XEROX

Xerox University Microfilms
Ann Arbor, Michigan 48106

# WESTERN AMERICANA

Reproduced from the original in the collection of
Philadelphia Bar Association
Law Library

*THE attention of the profession is invited to the following practical features of this work:—*

## *TABLE OF CASES.*

*In the citations of cases in notes to the text, the official report in which the case cited appears is alone given. The table of cases in the front of the first volume, gives, however, in addition to the year in which the decision is rendered, duplicate citations to most of the standard reports where the case has been reprinted. A few illustrations will serve to demonstrate the value of such a table over the ordinary one usually appearing in text-books:—*

**Harris v. Equator M. & S. Co. (1881), 3 McCrary 14; 8 Fed. 863; 12 Morr. 178, §§ 539, 688.**

**Iron S. M. Co. v. Elgin S. M. Co. (1886), 118 U. S. 196; L. ed. 30; 98; 15 Morr. 641, §§ 58, 318, 364, 365, 552, 567, 576, 582, 583, 593.**

**Williams v. Gibson (1887), 84 Ala. 228; 5 Am. St. Rep., 368; 4 So. Rep. 350; 16 Morr. 253, §§ 812, 813, 814, 821.**

## *THE APPENDIX.*

*The appendix contains the congressional, state and territorial legislation on mining subjects in force September, 1897; also the existing departmental regulations concerning the sale and disposal of mineral lands. These statutes and regulations have been annotated with reference to the text, the notes indicating the section of the work where the particular subject covered by the act is discussed. The few rulings of the courts and land department made while the work was passing through the press will also be found in these notes.*

## *THE INDEX.*

*In connection with indexing the text, the author has also indexed the appendix, so that the statutory declarations on a given subject will be found in connection with a reference to the section of the text where the decisions are cited and the Author's conclusions stated.*

# A TREATISE

ON THE

# AMERICAN LAW RELATING TO MINES AND MINERAL LANDS

WITHIN THE

## PUBLIC LAND STATES AND TERRITORIES

AND

## GOVERNING THE ACQUISITION AND ENJOYMENT OF MINING RIGHTS IN LANDS OF THE PUBLIC DOMAIN

BY

CURTIS H. LINDLEY

OF THE SAN FRANCISCO BAR

IN TWO VOLUMES

**VOLUME I**

*"I hold every man a debtor to his profession: from the which, as men of course do seek to receive countenance and profit, so ought they of duty to endeavor themselves, by way of amends, to be a help and ornament thereto."*

*"Et opus desperatum, quasi per medium profundum euntes, cælesti favore jam adimplevimus."*
*— From Dedication of Justinian's Institutes.*

SAN FRANCISCO
BANCROFT-WHITNEY COMPANY
LAW PUBLISHERS AND LAW BOOKSELLERS
1897

1897 Nov. 19
Thos Biel

THE LAW ASSOCIATION
OF
PHILADELPHIA

COPYRIGHT, 1897,
BY
CURTIS H. LINDLEY.

# PREFACE.

THE United States cannot be said to possess a National Mining Code, in the sense that the term is used and understood among the older nations of the earth.

The system of rules which sanctions and regulates the acquisition and enjoyment of mining rights, and defines the conditions under which title may be obtained to mineral lands within the public domain of the United States is composed of several elements, most of which find expression in positive legislative enactment. Others, while depending for their existence and application upon the sanction of the General Government, either express or implied, are in a measure controlled by local environment, and are evidenced by the expressed will of local assemblages embodied in written regulations, or rest in unwritten customs peculiar to the vicinage.

American mining law may therefore be said to be found expressed —

(1) *In the legislation of Congress;*

(2) *In the legislation of the various states and territories supplementing Congressional action, and in harmony therewith;*

(3) *In local rules and customs or regulations established in different localities not repugnant to Federal legislation, or that of the state or territory wherein they are operative.*

This system, as thus constituted, is deemed national only in a restricted sense. As a rule of property, it has no application or force in many of the states of the Union.

Generally speaking, its operation is limited geographically to the area acquired by the General Government by cession from the original states, or by treaty with or purchase from foreign powers subsequent to the organization of the General Government, or perhaps, more logically stated, its operation is co-extensive with the area of the public domain, the primary

ownership and right of disposal of which resides in the General Government.

It does not seek to regulate or control mines or mining within lands held in private ownership, except such only as are acquired directly from the Government under the mining laws, and then only forming a muniment of the locator's or purchaser's title, and measuring his rights.

It does not require the payment of either tribute or royalty, as a condition upon which the public mineral lands may be explored or worked.

It treats the Government simply as a private proprietor holding the paramount title to its public domain, with right of disposal, upon such terms and conditions, and subject to such limitations, as the law-making power may prescribe.

The National Government acquired no rights of property within the present boundaries of the thirteen original states. Nor in the states of Vermont, Kentucky, Maine, or West Virginia, which were severally carved out of territory originally forming a part of some one of the original States. Nor in Texas, as by the terms of its admission into the Union the state retained all the vacant and unappropriated public lands lying within its limits, for the purpose of liquidating its debt contracted while it was an independent republic.

The entire area of Tennessee was originally public domain; but the United States donated the same to the State, after deducting the lands necessary to fill the obligations in the deed of cession of North Carolina.

In Arkansas, Illinois, Missouri, Iowa, Michigan, Minnesota, and Wisconsin, lands of the Government containing the baser metals (lead and copper) were ordered sold under special laws, prior to the discovery of gold in California.

By acts of Congress, passed at different times, Alabama, Michigan, Wisconsin, Minnesota, Missouri, and Kansas were excepted from the operation of the general mining laws.

The system is inoperative in Oklahoma, as by congressional law all lands within that territory are declared to be agricultural.

With the exception, perhaps, of lands containing deposits of coal, and some of the baser metallic substances, the system

is practically confined in its operation to those states and territories lying wholly or in part west of the one hundredth meridian, embracing the states of California, Colorado, Oregon, Washington, Nevada, Idaho, Montana, North Dakota, South Dakota, Wyoming, and Utah, the territories of Arizona and New Mexico, and the district of Alaska. These comprise the precious-metal-bearing states and territories of the "Public "Domain."

As thus defined and limited, "American Mining Law" is the subject of this treatise.

While in the treatment of the subject, and in the discussion of the origin and growth of the system, as we understand it, we shall at times encounter the earmarks of an older civilization and find lodged in what we might term a primitive custom, the experience of ages; yet wherever its rules depart from the doctrine of the common law, the system, as such, is of recent birth and modern development. It is an evolution from primitive and peculiar conditions, a crystallization of usages which do not appeal to antiquity for either their force or wisdom.

It is the principal design of this work to treat of this system as it is at present constituted. But as it is in itself an evolution out of antecedent and somewhat complex conditions, some space will be devoted to a consideration of an historical nature concerning the policy of the Government in dealing with its mineral lands prior to the enactment of general laws affecting them, and to trace the growth of the system through its various stages of development.

As an appropriate introduction to a treatise of this nature, the Author has inserted a chapter epitomizing the different systems of mining jurisprudence in force at different periods in the countries from which the United States acquired its public domain. We may reasonably expect to find in the growth and development of our own system the influence of those laws. It has also been deemed advisable to insert a brief review of the systems adopted in the states of the Union wherein the Federal Government acquired no property, and where the regulation of the mining industry falls exclusively within the jurisdiction of state legislation.

This comparative review of the mining laws, foreign and state, will at least be of historical interest, if it should serve no other or higher purpose.

As state and territorial legislation supplementing the acts of Congress is permitted, if not in fact contemplated, by the Federal laws, careful consideration will be given to these local statutes and the decisions of courts in construing them. The value of a decision as a precedent often depends on local conditions. The legitimate scope of this permissive local legislation is a fruitful subject of controversy.

The existing legislation of each state and territory supplementing the Federal laws, together with references to legislation on cognate subjects, will be found in the appendix, with citations under each section indicating where the subject-matter has been discussed and generally treated in the text.

The appendix also contains the various acts of Congress upon the subject of mineral lands, and the regulations of the land department, with back references to the text; also such forms as in the Author's judgment might be serviceable to the profession.

In citing authorities the Author has adopted the rule of citing the case from the original report only; but in the table of cases will be found the date of the decision, and a citation to every standard report, including the "National Reporter" system, wherein the case appears.

Realizing the importance of a comprehensive and exhaustive index, the Author has himself undertaken the work of its preparation.

While the treatise is in the main devoted to a consideration of the federal mining system, to meet the general expectation of the profession, we deem it advisable to devote some space to cognate subjects, including rights and liabilities arising out of the conduct of mining ventures, mining partnerships, cotenancy, and obligations flowing from contractual relations.

The necessity for a comprehensive treatise on American mining law is conceded. The literature on this branch of jurisprudence is limited. Most of the works which have been

presented to the profession, while possessing great merit, have not attempted a systematic or philosophical treatment of the subject.

The preparation of a work which will fulfill the requirements of the profession and prove measurably satisfactory, is a matter of great moment, involving much time and patient labor.

While not anticipating that the result of his efforts will fully meet the wants of the profession, the Author expresses a hope that it will be found of value to those who are interested in the study of the many intricate questions arising out of the mining laws.

When in the preparation of the text he has been instructed or guided by the original work of others, it has been the aim of the Author to give due credit in the appropriate place. Yet he has derived so much benefit and assistance in so many ways from various authors and writers upon mining subjects, that he deems it a duty as well as a pleasure to here specifically express his acknowledgments.

Professor Rossiter W. Raymond, lawyer, scholar, and scientist of national renown, has contributed in a marked degree to the literature on mining subjects. His extended experience in the field of practical mining, his connection with much of the important mining litigation in the West, his thorough knowledge of the ever-varying geological conditions, to which are to be applied the unyielding terms of Congressional laws, have made him pre-eminent in the field of mining literature. His reports as Commissioner of Mining Statistics abound with fruitful suggestions, and contributed in no small degree to the adoption of the act of 1872. His monograph, "Relations of "Governments to Mining" (in "Mineral Resources West of the "Rocky Mountains," 1869); his article on "Mines," (appearing in Lalor's "Cyclopedia of Political Science"); his numerous papers read before the American Institute of Mining Engineers, notably, "Law of the Apex," "Lode Locations," "End Lines "and Side Lines," "The Eureka-Richmond Case"; and his occasional contributions to the "Engineering and Mining "Journal," have afforded the Author great and valuable aid.

Professor Raymond's immediate predecessor in the work of collecting Mining Statistics, Mr. J. Ross Browne, rendered

valuable service to the mining industry, and his reports to the Government contain much that is valuable and important, giving as they do the early history of mining in the West, and the customs, rules, and regulations of miners, which formed the basis of our first mining statutes.

The Author has also derived great assistance from previous works on the subject, notably "Mining Claims and Water "Rights," by Hon. Gregory Yale, the pioneer work on the subject of American mining law; "Mining Rights in the "Western States and Territories," by Hon. R. S. Morrison, of the Colorado Bar; Weeks on "Mineral Lands," Copp's "U. S. "Mineral Lands," and Wade's "American Mining Law."

As the closing chapters of the work were being printed, the "Mineral Law Digest" of Messrs. Clark, Heltman, and Consaul, a conscientious and valuable contribution to mining literature, made its appearance.

The Author is under special obligations to the Hon. Wm. H. De Witt, late judge of the supreme court of Montana, Edwin Van Cise, Esq., of Deadwood, South Dakota, Hon. Jacob Fillius, and Harvey Riddell, Esq., of the Colorado Bar, for many valuable and timely suggestions.

The numerous diagrams illustrating the important subjects of "Dip," "Strike," and the "Extralateral Right" are the handiwork of Mr. J. W. D. Jensen, of San Francisco, to whom all credit is due. These figures, except those used for hypothetical purposes, were all reduced by scale from officially authenticated maps and surveys.

With these grateful acknowledgments, the Author submits his work to a critical but ever-indulgent profession.

CURTIS H. LINDLEY.

*San Francisco, 1897.*

# TABLE OF CONTENTS.


TITLE I. COMPARATIVE MINING JURISPRUDENCE.

II. HISTORICAL REVIEW OF THE FEDERAL POLICY AND LEGISLATION CONCERNING MINERAL LANDS.

III. LANDS SUBJECT TO APPROPRIATION UNDER THE MINING LAWS, AND THE PERSONS WHO MAY ACQUIRE RIGHTS THEREIN.

IV. STATE LEGISLATION AND LOCAL DISTRICT REGULATIONS SUPPLEMENTING THE CONGRESSIONAL MINING LAWS.

V. OF THE ACQUISITION OF TITLE TO PUBLIC MINERAL LANDS BY LOCATION, AND PRIVILEGES INCIDENT THERETO.

VI. THE TITLE ACQUIRED AND RIGHTS CONFERRED BY LOCATION.

VII. OF THE PROCEEDINGS TO OBTAIN UNITED STATES PATENT AND THE TITLE CONVEYED BY THAT INSTRUMENT.

VIII. RIGHTS AND OBLIGATIONS ARISING OUT OF OWNERSHIP IN COMMON OF MINES AND JOINT PARTICIPATION IN MINING VENTURES.

IX. RIGHTS AND OBLIGATIONS OF PARTIES ENGAGED IN WORKING MINES AS BETWEEN THEIR NEIGHBORS AND THE GENERAL PUBLIC.

X. MINES AND MINING CLAIMS AS SUBJECTS OF CONTRACT BETWEEN INDIVIDUALS.

XI. ACTIONS CONCERNING MINING CLAIMS OTHER THAN SUITS UPON ADVERSE CLAIMS—AUXILIARY REMEDIES.

XII. MISCELLANEOUS.

## TITLE I.

### COMPARATIVE MINING JURISPRUDENCE.

CHAPTER I. MINING LAWS OF FOREIGN COUNTRIES.
II. LOCAL STATE SYSTEMS.

### CHAPTER I. MINING LAWS OF FOREIGN COUNTRIES.

§ 1. Introductory.
§ 2. Property in mines under the common law.
§ 3. Royal mines.
§ 4. Local customs.
§ 5. Tin mines of Cornwall.
§ 6. Tin mines of Devonshire.
§ 7. Coal, iron, and other mines in the Forest of Dean.
§ 8. Lead mines of Derbyshire.
§ 9. Severance of title.
§ 10. Existing English laws.
§ 11. Mines under the civil law.
§ 12. Mining laws of France:— *Mines* — *Minières* — *Carrières.*
§ 13. Mining laws of Mexico:— Nature and condition of mining concessions — Right of discoverer; *pertenencias* — Right to mine, how acquired — Denouncement of abandoned mines — Right to denounce mines in private property — Rights of one not a discoverer — Placers — Foreigners and religious orders — Extent of *pertenencias;* surface limits — Marking boundaries; rights in depth — Right to all veins found within boundaries of *pertenencias* — Forfeiture for failure to work — Royalties.

### CHAPTER II. LOCAL STATE SYSTEMS.

§ 18. Classification of states.
§ 19. First group.
§ 20. Second group.
§ 21. Third group.
§ 22. Limit of state control after patent.

## TITLE II.

### HISTORICAL REVIEW OF THE FEDERAL POLICY AND LEGISLATION CONCERNING MINERAL LANDS.

CHAPTER I. INTRODUCTORY — PERIODS OF NATIONAL HISTORY.
II. FIRST PERIOD: FROM THE FOUNDATION OF THE GOVERNMENT TO THE DISCOVERY OF GOLD IN CALIFORNIA.
III. SECOND PERIOD: FROM THE DISCOVERY OF GOLD IN CALIFORNIA UNTIL THE PASSAGE OF THE LODE LAW OF 1866.

CHAPTER IV. THIRD PERIOD: FROM THE PASSAGE OF THE LODE LAW OF 1866 TO THE ENACTMENT OF THE GENERAL LAW OF MAY 10, 1872.

V. FOURTH PERIOD: FROM THE ENACTMENT OF THE LAW OF 1872 TO THE PRESENT TIME.

VI. THE FEDERAL SYSTEM.

CHAPTER I. INTRODUCTORY — PERIODS OF NATIONAL HISTORY.

§ 25. Introductory.

CHAPTER II. FIRST PERIOD: FROM THE FOUNDATION OF THE GOVERNMENT TO THE DISCOVERY OF GOLD IN CALIFORNIA.

§ 28. Original nucleus of national domain.
§ 29. Mineral resources of the territory ceded by the states.
§ 30. First congressional action on the subject of mineral lands.
§ 31. Reservation in crown grants to the colonies.
§ 32. No development of copper mines until 1845.
§ 33. The Louisiana purchase, and legislation concerning lead mines.
§ 34. Message of President Polk.
§ 35. Sales of land containing lead and copper under special laws.
§ 36. Reservation in pre-emption laws.

CHAPTER III. SECOND PERIOD: FROM THE DISCOVERY OF GOLD IN CALIFORNIA UNTIL THE PASSAGE OF THE LODE LAW OF 1866.

§ 40. Discovery of gold in California, and the Mexican cession.
§ 41. Origin of local customs.
§ 42. Scope of local regulations.
§ 43. Dips, spurs, and angles of lode claims.
§ 44. Legislative and judicial recognition by the state.
§ 45. Federal recognition.
§ 46. Local rules as forming part of present system of mining law.
§ 47. Federal legislation during the second period.
§ 48. Executive recommendations to congress.
§ 49. Coal land laws — Mining claims in Nevada — Sutro tunnel act.

CHAPTER IV. THIRD PERIOD: FROM THE PASSAGE OF THE LODE LAW OF 1866 TO THE ENACTMENT OF THE GENERAL LAW OF MAY 10, 1872.

§ 53. The act of July 26, 1866.
§ 54. Essential features of the act.
§ 55. Declaration of governmental policy.

§ 56. Recognition of local customs and possessory rights acquired thereunder.
§ 57. Title to lode claims.
§ 58. Relationship of surface to the lode.
§ 59. Construction of the act by the land department.
§ 60. Construction by the courts.
§ 61. Local rules and customs after the passage of the act.
§ 62. The act of July 9, 1870.
§ 63. Local rules and customs after the passage of the act.
§ 64. Accession to the national domain during the third period.

CHAPTER V. FOURTH PERIOD: FROM THE ENACTMENT OF THE LAW OF MAY 10, 1872, TO THE PRESENT TIME.

§ 68. The act of May 10, 1872.
§ 69. Declaration of governmental policy.
§ 70. Changes made by the act — Division of the subject.
§ 71. Changes made with regard to lode claims.
§ 72. Changes made with regard to other claims.
§ 73. New provisions affecting both classes of claims.
§ 74. Tunnels and millsites.
§ 75. Legislation subsequent to the act of 1872.
§ 76. Local rules and customs since the passage of the act.

CHAPTER VI. THE FEDERAL SYSTEM.

§ 80. Conclusions deduced from preceding chapters.
§ 81. Outline of the federal system — Scope of the treatise.

## TITLE III.

### LANDS SUBJECT TO APPROPRIATION UNDER THE MINING LAWS, AND THE PERSONS WHO MAY ACQUIRE RIGHTS THEREIN.

CHAPTER I. "MINERAL LANDS" AND KINDRED TERMS DEFINED.
II. THE PUBLIC SURVEYS AND THE RETURN OF THE SURVEYOR-GENERAL.
III. STATUS OF LAND AS TO TITLE AND POSSESSION.
IV. OF THE PERSONS WHO MAY ACQUIRE RIGHTS IN PUBLIC MINERAL LANDS.

### CHAPTER I. "MINERAL LANDS" AND KINDRED TERMS DEFINED.

§ 85. Necessity for definition of terms.
§ 86. Terms of reservation employed in various acts.
§ 87. "Mine" and "mineral" indefinite terms.

§ 88. English denotation—"Mine" and "mineral" in their primary sense.
§ 89. Enlarged meaning of "mine."
§ 90. "Mineral" as defined by the English and Scotch authorities.
§ 91. English rules of interpretation.
§ 92. Substances classified as mineral under the English decisions.
§ 93. American cases defining "mine" and "mineral."
§ 94. "Mineral lands" as defined by the American tribunals.
§ 95. Interpretation of terms by the land department.
§ 96. American rules of statutory interpretation.
§ 97. Substances held to be mineral by the land department.
§ 98. Rules for determining mineral character of land.

CHAPTER II. THE PUBLIC SURVEYS AND THE RETURN OF THE SURVEYOR-GENERAL.

§ 102. No general classification of lands as to their character.
§ 103. Geological surveys.
§ 104. General system of land surveys.
§ 105. What constitutes the surveyor-general's return.
§ 106. *Prima facie* character of land established by the return.
§ 107. Character of land, when and how established.

CHAPTER III. STATUS OF LAND AS TO TITLE AND POSSESSION.

ARTICLE I. INTRODUCTORY.
II. MEXICAN GRANTS.
III. GRANTS TO STATES FOR EDUCATIONAL AND INTERNAL IMPROVEMENT PURPOSES.
IV. RAILROAD GRANTS.
V. TOWNSITES.
VI. INDIAN RESERVATIONS.
VII. MILITARY RESERVATIONS.
VIII. NATIONAL PARK AND FOREST RESERVATIONS.
IX. HOMESTEAD AND OTHER AGRICULTURAL CLAIMS.
X. OCCUPANCY WITHOUT COLOR OF TITLE.

ARTICLE I. INTRODUCTORY.

§ 112. Only public lands subject to appropriation under the mining laws.

ARTICLE II. MEXICAN GRANTS.

§ 114. Ownership of mines under Mexican law.
§ 115. Nature of title conveyed to the United States by the treaty.
§ 116. Obligation of the United States to protect rights accrued prior to the cession.
§ 117. Adjustment of claims to Mexican grants in California.

§ 118. Adjustment of claims to Mexican grants in other states and territories.
§ 119. Claims to mines asserted under the Mexican mining ordinances.
§ 120. Status of grants considered with reference to condition of title.
§ 121. Grants *sub judice*.
§ 122. Different classes of grants.
§ 123. Grants of the first and third classes.
§ 124. Grants of the second class — commonly called "floats."
§ 125. Grants confirmed under the California act.
§ 126. Grants confirmed by direct action of congress.
§ 127. Grants which have been, or may be, finally confirmed under the act of March 3, 1891, situated in Colorado, Wyoming, Utah, Nevada, New Mexico, or Arizona.
§ 128. Conclusions.

ARTICLE III. GRANTS TO THE STATES FOR EDUCATIONAL AND INTERNAL IMPROVEMENT PURPOSES.

§ 132. Grant of sixteenth and thirty-sixth sections.
§ 133. Indemnity grant in lieu of sixteenth and thirty-sixth sections lost to the states.
§ 134. Other grants for schools and internal improvements.
§ 135. Conflicts between mineral claimants and purchasers from the states.
§ 136. Mineral lands excepted from the operation of grants to the states.
§ 137. Restrictions upon the definition of "mineral lands," when considered with reference to school land grants.
§ 138. Petroleum lands.
§ 139. Lands chiefly valuable for building-stone.
§ 140. In construing the term "mineral lands," as applied to administration of school land grants, the time to which the inquiry is addressed is the date when the asserted right to a particular tract accrued, and not the date upon which the law was passed authorizing the grant.
§ 141. Test of mineral character applied to school land grants.
§ 142. When grants to the sixteenth and thirty-sixth sections take effect.
§ 143. Selections by the state in lieu of sixteenth and thirty-sixth sections, and under general grants.
§ 144. Effect of surveyor-general's return as to character of land within sixteenth and thirty-sixth sections, or lands sought to be selected in lieu thereof, or under floating grants.
§ 145. Conclusions.

ARTICLE IV. RAILROAD GRANTS.

§ 149. Area of grants in aid of railroads, and congressional legislation donating lands for such purposes.
§ 150. Types of land grants in aid of the construction of railroads, selected for the purpose of discussion.
§ 151. Character of the grants.
§ 152. Reservation of mineral lands from the operation of railroad grants.
§ 153. Grants of rights of way.

§ 154. Grants of particular sections as construed by the courts.
§ 155. Construction of railroad grants by the land department.
§ 156. Distinctions between grants of sixteenth and thirty-sixth sections to states, and grants of particular sections to railroads.
§ 157. Indemnity lands.
§ 158. Restrictions upon the definition of "mineral lands," when considered with reference to railroad grants.
§ 159. Test of mineral character of land applied to railroad grants.
§ 160. Classification of railroad lands under special laws in Idaho and Montana.
§ 161. Effect of patents issued to railroad companies.
§ 162. Conclusions.

ARTICLE V. TOWNSITES.

§ 166. Laws regulating the entry of townsites.
§ 167. Rules of interpretation applied to townsite laws.
§ 168. Occupancy of public mineral lands for purposes of trade or business.
§ 169. Rights of mining locator upon unoccupied lands within unpatented townsite limits.
§ 170. Prior occupancy of public mineral lands within unpatented townsites for purposes of trade, as affecting the appropriation of such lands under the mining laws—The rule prior to the passage of the act of March 3, 1891.
§ 171. Correlative rights of mining and townsite claimants recognized by the land department prior to the act of March 3, 1891.
§ 172. Section sixteen of the act of March 3, 1891, is limited in its application to incorporated towns and cities.
§ 173. The object and intent of section sixteen of the act of March 3, 1891.
§ 174. The act of March 3, 1891, not retroactive.
§ 175. Effect of patents issued for lands within townsites.
§ 176. What constitutes a mine or valid mining claim within the meaning of section twenty-three hundred and ninety-two of the Revised Statutes.
§ 177. In what manner may a townsite patent be assailed by the owner of a mine or mining claim.

ARTICLE VI. INDIAN RESERVATIONS.

§ 181. Nature of Indian title.
§ 182. Manner of creating and abolishing Indian reservations.
§ 183. Lands within Indian reservations are not open to settlement or purchase under the public land laws.
§ 184. Status of mining claims located within limits of an Indian reservation prior to the extinguishment of the Indian title.
§ 185. Effect of creating an Indian reservation embracing prior valid and subsisting mining claims.
§ 186. Conclusions.

ARTICLE VII. MILITARY RESERVATIONS.

§ 190. Manner of creating and abolishing military reservations.

§ 191. Status of mining claims located within the limits of a subsisting military reservation.
§ 192. Effect of creating a military reservation embracing prior valid and subsisting mining claims.

ARTICLE VIII. NATIONAL PARK AND FOREST RESERVATIONS.

§ 196. Manner of creating national park reservations, and purposes for which they are created.
§ 197. Manner of creating forest reservations, and purposes for which they are created.
§ 198. Status of mining claims within forest reservations.

ARTICLE IX. HOMESTEAD AND OTHER AGRICULTURAL CLAIMS.

§ 202. Introductory.
§ 203. Classification of laws providing for the disposal of the public lands.
§ 204. Manner of acquiring homestead claims.
§ 205. Nature of inceptive right acquired by homestead claimant.
§ 206. Location of mining claims within homestead entries.
§ 207. Proceedings for the determination of the character of the land.
§ 208. When decision of land department becomes final.
§ 209. The reservation of "known mines" in the pre-emption laws.
§ 210. Timber and stone lands.
§ 211. Scrip.
§ 212. Desert lands.

ARTICLE X. OCCUPANCY WITHOUT COLOR OF TITLE.

§ 216. Naked occupancy of the public mineral lands confers no title—Rights of such occupant.
§ 217. Rights upon the public domain cannot be initiated by forcible entry upon the actual possession of another.
§ 218. Appropriation of public mineral lands by peaceable entry in good faith upon the possession of a mere occupant without color of title.
§ 219. Conclusions.

CHAPTER IV. OF THE PERSONS WHO MAY ACQUIRE RIGHTS TO PUBLIC MINERAL LANDS.

ARTICLE I. CITIZENS.
II. ALIENS.
III. GENERAL PROPERTY RIGHTS OF ALIENS IN THE STATES.
IV. GENERAL PROPERTY RIGHTS OF ALIENS IN THE TERRITORIES.

ARTICLE I. CITIZENS.

§ 223. Only citizens, or those who have declared their intention to become such, may locate mining claims.

§ 224. Who are citizens.
§ 225. Minors.
§ 226. Domestic corporations.
§ 227. Citizenship, how proved.

ARTICLE II. ALIENS.

§ 231. Acquisition of title to unpatented mining claims by aliens.
§ 232. The effect of naturalization of an alien upon a location made by him at a time when he occupied the status of an alien.
§ 233. What is the legal status of a title to a mining claim located and held by an alien who has not declared his intention to become a citizen?
§ 234. Conclusions.

ARTICLE III. GENERAL PROPERTY RIGHTS OF ALIENS IN THE STATES.

§ 237. After patent, property becomes subject to rules prescribed by the state.
§ 238. Constitutional and statutory regulations of the precious-metal-bearing states on the subject of alien proprietorship.

ARTICLE IV. GENERAL PROPERTY RIGHTS OF ALIENS IN THE TERRITORIES.

§ 242. Power of congress over the territories.
§ 243. The alien act of March 3, 1887, and the territorial limit of its operation.
§ 244. General scope of the alien act — Opinion of Attorney-General Garland.

TITLE IV.

STATE LEGISLATION AND LOCAL DISTRICT REGULATIONS SUPPLEMENTING THE CONGRESSIONAL MINING LAWS.

CHAPTER I. STATE LEGISLATION SUPPLEMENTAL TO THE CONGRESSIONAL MINING LAWS.
II. LOCAL DISTRICT REGULATIONS.

CHAPTER I. STATE LEGISLATION SUPPLEMENTAL TO THE CONGRESSIONAL MINING LAWS.

§ 248. Introductory.
§ 249. Limits within which state may legislate.
§ 250. Scope of existing state and territorial legislation — Subjects concerning which states and territories may unquestionably legislate.

§ 251. Subjects upon which states have enacted laws, the validity of which is open to question.
§ 252. Drainage, easements, and rights of way for mining purposes.
§ 253. Provisions of state constitutions on the subject of eminent domain.
§ 254. Mining as a "public use."
§ 255. Rights of way for pipe-lines for the conveyance of oil and natural gas.
§ 256. Lateral and other railroads for transportation of mine products.
§ 257. Physical and industrial conditions as affecting the rule of "public "utility."
§ 258. The rule in Nevada.
§ 259. The rule in Arizona.
§ 260. The rule in Georgia.
§ 261. The rule in Pennsylvania.
§ 262. The rule in West Virginia.
§ 263. The rule in California.
§ 264. Conclusions.

CHAPTER II. LOCAL DISTRICT REGULATIONS.

§ 268. Introductory.
§ 269. Manner of organizing districts.
§ 270. Permissive scope of local regulations.
§ 271. Acquiescence and observance, not mere adoption, the test.
§ 272. Regulations, how proved — Their existence a question of fact for the jury; their construction a question of law for the court.
§ 273. Regulations concerning records of mining claims.
§ 274. Penalty for noncompliance with district rules.
§ 275. Local rules and regulations before the land department.

TITLE V.

OF THE ACQUISITION OF TITLE TO PUBLIC MINERAL LANDS BY LOCATION, AND PRIVILEGES INCIDENT THERETO.

CHAPTER I. INTRODUCTORY — DEFINITIONS.
II. LODE CLAIMS, OR DEPOSITS "IN PLACE."
III. PLACERS AND OTHER FORMS OF DEPOSIT NOT "IN "PLACE."
IV. TUNNEL CLAIMS.
V. COAL LANDS.
VI. SALINES.
VII. MILLSITES.
VIII. EASEMENTS.

## CHAPTER I. INTRODUCTORY—DEFINITIONS.

ARTICLE I. INTRODUCTORY.
II. "LODE," "VEIN," "LEDGE."
III. "ROCK IN PLACE."
IV. "TOP," OR "APEX."
V. "STRIKE,"—"DIP," OR "DOWNWARD COURSE."

### ARTICLE I. INTRODUCTORY.

§ 280. Introductory.
§ 281. Division of the subject.
§ 282. Difficulties of accurate definition.

### ARTICLE II. "LODE," "VEIN," "LEDGE."

§ 286. English and Scotch definitions.
§ 287. As defined by the lexicographers.
§ 288. As defined by the geologists.
§ 289. Elements to be considered in the judicial application of definitions.
§ 290. The terms "lode," "vein," "ledge," legal equivalents.
§ 291. Classification of cases, in which the terms "lode" and "vein" are to be construed.
§ 292. Judicial definitions, and their application—The Eureka case.
§ 293. The Leadville cases.
§ 294. Other definitions given by state and federal courts.

### ARTICLE III. "ROCK IN PLACE."

§ 298. Classification of lands containing valuable deposits.
§ 299. Use of term "in place" in the mining laws.
§ 300. The blanket deposits of Leadville.
§ 301. Judicial interpretation of the term "rock in place."

### ARTICLE IV. "TOP," OR "APEX."

§ 305. The "top," or "apex," of a vein, as a controlling factor in lode locations.
§ 306. The term "top," or "apex," not found in the miner's vocabulary—Definitions of the lexicographers.
§ 307. Definitions given in response to circulars issued by the public land commission.
§ 308. Definition of Dr. Raymond.
§ 309. The ideal lode and its apex.
§ 310. Illustrations of a departure from the ideal lode—The case of Duggan *v.* Davey.
§ 311. The Leadville cases.
§ 312. Hypothetical illustrations based upon the mode of occurrence of the Leadville and similar deposits.
§ 313. The existence and *situs* of the "top," or "apex," a question of fact.

ARTICLE V. "STRIKE," "DIP" OR "DOWNWARD COURSE."

§ 317. Terms "strike" and "dip" not found in the Revised Statutes—Popular use of the terms.
§ 318. "Strike" and "dip" as judicially defined.

CHAPTER II.—LODE CLAIMS, OR DEPOSITS "IN PLACE."

ARTICLE I. INTRODUCTORY.
II. THE LOCATION AND ITS REQUIREMENTS.
III. THE DISCOVERY.
IV. THE DISCOVERY SHAFT AND ITS EQUIVALENT.
V. THE PRELIMINARY NOTICE AND ITS POSTING.
VI. THE SURFACE COVERED BY THE LOCATION—ITS FORM AND RELATIONSHIP TO THE LOCATED LODE.
VII. THE MARKING OF THE LOCATION ON THE SURFACE.
VIII. THE LOCATION CERTIFICATE AND ITS CONTENTS.
IX. THE RECORD.
X. CHANGE OF BOUNDARIES AND AMENDED LOCATION CERTIFICATES.
XI. RELOCATION OF FORFEITED OR ABANDONED CLAIMS.
XII. LODES WITHIN PLACERS.

ARTICLE I. INTRODUCTORY.

§ 322. Introductory.
§ 323. The metallic or nonmetallic character of deposits occurring in veins as affecting the right of appropriation under the laws applicable to lodes.

ARTICLE II. THE LOCATION AND ITS REQUIREMENTS.

§ 327. "Location" and "mining claim" defined.
§ 328. Acts necessary to be performed to constitute a valid lode location under the Revised Statutes in the absence of supplemental state legislation and local district rules.
§ 329. The requisites of a valid lode location where supplemental state legislation exists.
§ 330. Order in which acts are performed immaterial.
§ 331. Locations made by agents.

ARTICLE III. THE DISCOVERY.

§ 335. Discovery the source of the miner's title.
§ 336. What constitutes a valid discovery.
§ 337. Where such discovery must be made.
§ 338. The effect of the loss of discovery upon the remainder of the location.
§ 339. Extent of locator's rights after discovery and prior to completion of location.

ARTICLE IV. THE DISCOVERY SHAFT AND ITS EQUIVALENT.

§ 343. State legislation requiring development work as prerequisite to completion of location.
§ 344. Object of requirement as to development work.
§ 345. Relationship of the discovery to the discovery shaft.
§ 346. Extent of development work.

ARTICLE V. THE PRELIMINARY NOTICE AND ITS POSTING.

§ 350. Local customs as to preliminary notice, and its posting prior to enactment of federal laws—Not required by congressional law.
§ 351. State legislation requiring the posting of notices—States grouped.
§ 352. First group.
§ 353. Second group.
§ 354. Third group.
§ 355. Liberal rules of construction applied to notices.
§ 356. Place and manner of posting.

ARTICLE VI. THE SURFACE COVERED BY THE LOCATION.—ITS FORM AND RELATIONSHIP TO THE LOCATED LODE.

§ 360. The ideal location.
§ 361. Surface area, length, and width of lode claims.
§ 362. Location covering excessive area.
§ 363. Surface conflicts with prior locations.
§ 364. Surface must include apex—Location on the dip.
§ 365. The end lines.
§ 366. The side lines.
§ 367. Side-end lines.

ARTICLE VII. THE MARKING OF THE LOCATION ON THE SURFACE.

§ 371. Necessity for, and object of, marking.
§ 372. Time allowed for marking.
§ 373. What is sufficient marking under the federal law.
§ 374. State statutes defining the character of marking.
§ 375. Perpetuation of monuments.

ARTICLE VIII. THE LOCATION CERTIFICATE AND ITS CONTENTS.

§ 379. The location certificate—Its purpose.
§ 380. State legislation as to contents of location certificate.
§ 381. Rules of construction applied.
§ 382. Variation between descriptive calls in certificate and monuments on the ground.
§ 383. "Natural objects" and "permanent monuments."
§ 384. Effect of failure to comply with the law as to contents of certificate
§ 385. Verification of certificates.

ARTICLE IX. THE RECORD.

§ 389. Time and place of record.
§ 390. Effect of failure to record within the time limited.
§ 391. Proof of record.
§ 392. The record as evidence.

ARTICLE X. CHANGE OF BOUNDARIES AND AMENDED LOCATION CERTIFICATES.

§ 396. Circumstances justifying change of boundaries.
§ 397. Privilege of changing boundaries exists in the absence of intervening rights, independent of state legislation.
§ 398. Objects and functions of amended certificates.

ARTICLE XI. RELOCATION OF FORFEITED OR ABANDONED CLAIMS.

§ 402. Circumstances under which relocation may be made.
§ 403. New discovery not essential as basis of relocation.
§ 404. Relocation admits the validity of the original.
§ 405. Relocation by original locator.
§ 406. Relocation by one of several original locators in hostility to the others.
§ 407. Relocation by agent or others occupying contractual or fiduciary relations with original locator.
§ 408. Manner of perfecting relocations—Statutory regulations.
§ 409. Right of second locator to improvements made by the first.

ARTICLE XII. LODES WITHIN PLACERS.

§ 413. Right to appropriate lodes within placers.
§ 414. Manner of locating lodes within placers.
§ 415. Width of lode locations within placers.

CHAPTER III. PLACER AND OTHER FORMS OF DEPOSITS NOT "IN PLACE."

ARTICLE I. CHARACTER OF DEPOSITS SUBJECT TO APPROPRIATION UNDER LAWS APPLICABLE TO PLACERS.
II. THE LOCATION AND ITS REQUIREMENTS.
III. THE DISCOVERY.
IV. STATE LEGISLATION AS TO POSTING NOTICES AND PRELIMINARY DEVELOPMENT WORK.
V. THE SURFACE COVERED BY THE LOCATION—ITS FORM AND EXTENT.
VI. THE MARKING OF THE LOCATION ON THE GROUND.
VII. THE LOCATION CERTIFICATE AND ITS RECORD.
VIII. CONCLUSION.

ARTICLE I. CHARACTER OF DEPOSITS SUBJECT TO APPROPRIATION UNDER LAWS APPLICABLE TO PLACERS.

§ 419. The general rule.
§ 420. Specific substances classified as subject to entry under the placer laws.
§ 421. Building stone and stone of special commercial value.
§ 422. Petroleum.
§ 423. Natural gas.
§ 424. Brick clay.
§ 425. Phosphatic deposits.
§ 426. Tailings.
§ 427. Subterranean gravel deposits in ancient river beds.
§ 428. Beds of streams.

ARTICLE II. THE LOCATION AND ITS REQUIREMENTS.

§ 432. Acts necessary to be performed to constitute a valid placer location under the Revised Statutes, in the absence of supplemental state legislation and local district rules.
§ 433. Requisites of a valid placer location where supplemental state legislation exists.

ARTICLE III. THE DISCOVERY.

§ 437. Rules governing discovery the same as in lode locations.
§ 438. Unit of placer locations—Discovery in each twenty-acre tract.

ARTICLE IV. STATE LEGISLATION AS TO POSTING NOTICES AND PRELIMINARY DEVELOPMENT WORK.

§ 442. State statutes requiring posting of notices on placers.
§ 443. Preliminary development work required by state laws upon placer locations.

ARTICLE V. THE SURFACE COVERED BY THE LOCATION—ITS FORM AND EXTENT.

§ 447. Form and extent of placer locations prior to Revised Statutes.
§ 448. Form and extent under Revised Statutes.
§ 449. Placer locations by corporations.
§ 450. Locations by several persons in the interest of one—Number of locations by an individual.

ARTICLE VI. THE MARKING OF THE LOCATION ON THE GROUND.

§ 454. Rule as to marking boundaries of placer claims in absence of state legislation.
§ 455. State legislation as to marking boundaries of placer claims.

ARTICLE VII. THE LOCATION CERTIFICATE AND ITS RECORD.

§ 459. State legislation concerning location certificates and their record.

ARTICLE VIII. CONCLUSION.

§ 463. General principles announced in previous chapter on lode locations apply with equal force to placers.

CHAPTER IV. TUNNEL CLAIMS.

ARTICLE I. INTRODUCTORY.
II. MANNER OF PERFECTING TUNNEL LOCATIONS.
III. RIGHTS ACCRUING TO THE TUNNEL PROPRIETOR BY VIRTUE OF HIS TUNNEL LOCATION.

ARTICLE I. INTRODUCTORY.

§ 467. Tunnel locations prior to the enactment of federal laws.
§ 468. The provisions of the federal law.

ARTICLE II. MANNER OF PERFECTING TUNNEL LOCATION.

§ 472. Acts to be performed in acquiring tunnel rights.
§ 473. "Line" of tunnel defined.
§ 474. "Face" of tunnel defined.
§ 475. The marking of the tunnel location on the ground.

ARTICLE III. RIGHTS ACCRUING TO THE TUNNEL PROPRIETOR BY VIRTUE OF HIS TUNNEL LOCATION.

§ 479. Important questions suggested by the tunnel law.
§ 480. Rule of interpretation applied.
§ 481. Length upon the discovered lode awarded to the tunnel discoverer.
§ 482. Necessity for appropriation of discovered lode by surface location.
§ 483. To what extent does the inception of a tunnel right and its perpetuation by prosecuting work with reasonable diligence operate as a withdrawal of the surface from exploration by others?
§ 484. The Colorado rule.
§ 485. The Montana rule.
§ 486. The Idaho rule.
§ 487. Judge Hallett's views.
§ 488. The doctrine announced by the circuit court of appeals, eighth circuit.
§ 489. Tunnel locations before the supreme court of the United States.
§ 490. Opinions of the land department.
§ 491. Conclusions.

CHAPTER V. COAL LANDS.

ARTICLE I. INTRODUCTORY.
II. MANNER OF ACQUIRING TITLE TO COAL LANDS.

ARTICLE I. INTRODUCTORY.

§ 495. Classification of coal as a mineral—History of legislation—Characteristics of the system.

§ 496. Rules for determining character of land.
§ 497. Geographical scope of the coal land laws.

ARTICLE II. MANNER OF ACQUIRING TITLE TO COAL LANDS.

§ 501. Who may enter coal lands.
§ 502. Different classes of entries.
§ 503. Private entry under Revised Statutes, section twenty-three hundred and forty-seven.
§ 504. Preferential right of purchase under Revised Statutes, section twenty-three hundred and forty-eight.
§ 505. The declaratory statement.
§ 506. Assignability of inchoate rights.
§ 507. The purchase price.
§ 508. The final entry.
§ 509. Conclusions.

CHAPTER VI. SALINES.

§ 513. Governmental policy with reference to salines—Grants to states.
§ 514. The act of January 12, 1877—Territorial limit of its operation.
§ 515. What embraced within the term "salines."

CHAPTER VII. MILLSITES.

§ 519. The law relating to millsites.
§ 520. Different classes of millsites.
§ 521. Right to millsite—How initiated.
§ 522. Location of millsite with reference to lode.
§ 523. Nature of use required in case of location by lode proprietor.
§ 524. Millsites used for quartz mill or reduction works disconnected with lode ownership.

CHAPTER VIII. EASEMENTS.

§ 529. Scope of the chapter.
§ 530. Rights of way for ditches and canals—Highways.
§ 531. Location subject only to pre-existing easements.

TITLE VI.

THE TITLE ACQUIRED AND RIGHTS CONFERRED BY LOCATION.

CHAPTER I. THE CHARACTER OF THE TENURE.
II. THE NATURE AND EXTENT OF PROPERTY RIGHTS CONFERRED BY LODE LOCATIONS.
III. THE EXTRALATERAL RIGHT.
IV. THE NATURE AND EXTENT OF PROPERTY RIGHTS CONFERRED BY PLACER LOCATIONS.

CHAPTER V. PERPETUATION OF THE ESTATE BY ANNUAL DEVELOPMENT AND IMPROVEMENT.

VI. FORFEITURE OF THE ESTATE, AND ITS RESTORATION BY RESUMPTION OF WORK.

## CHAPTER I. THE CHARACTER OF THE TENURE.

§ 535. Nature of the estate as defined by the early decisions.
§ 536. Origin of the doctrine.
§ 537. Actual and constructive possession under miners' rules.
§ 538. Federal recognition of the doctrine.
§ 539. Nature of the estate as defined by the courts since the enactment of general mining laws.
§ 540. Nature of the estate compared with copyholds at common law.
§ 541. Nature of the estate compared with the *dominium utile* of the civil law.
§ 542. Nature of the estate compared with inchoate pre-emption and homestead claims.
§ 543. Dower within the states.
§ 544. Dower within the territories.

## CHAPTER II. THE NATURE AND EXTENT OF PROPERTY RIGHTS CONFERRED BY LODE LOCATIONS.

ARTICLE I. INTRODUCTORY—INTRALIMITAL RIGHTS.

II. CROSS LODES.

### ARTICLE I. INTRODUCTORY—INTRALIMITAL RIGHTS.

§ 548. General observations.
§ 549. Classification of rights with reference to boundaries.
§ 550. Extent of the grant as defined by the statute.
§ 551. The right to the surface, and presumptions flowing therefrom.
§ 552. Intralimital rights not affected by the form of surface location.
§ 553. Pursuit of the vein on its course beyond bounding planes of the location not permitted.

### ARTICLE II. CROSS LODES.

§ 557. Section twenty-three hundred and thirty-six of the Revised Statutes and its interpretation.
§ 558. The Colorado rule.
§ 559. Cross lodes before the supreme court of Montana.
§ 560. The Arizona-California rule.

## CHAPTER III. THE EXTRALATERAL RIGHT.

ARTICLE I. INTRODUCTORY.

II. EXTRALATERAL RIGHTS ON THE ORIGINAL LODE UNDER PATENTS ISSUED PRIOR TO MAY 10, 1872.

CHAPTER III. EXTRALATERAL RIGHTS FLOWING FROM LOCATIONS MADE UNDER THE ACT OF MAY 10, 1872, AND THE REVISED STATUTES.

IV. EXTRALATERAL RIGHTS ON OTHER LODES, CONFERRED BY THE ACT OF 1872 ON OWNERS OF CLAIMS PREVIOUSLY LOCATED.

V. CONSTRUCTION OF PATENTS APPLIED FOR PRIOR, BUT ISSUED SUBSEQUENT, TO THE ACT OF 1872.

VI. LEGAL OBSTACLES INTERRUPTING THE EXTRALATERAL RIGHT.

ARTICLE I. INTRODUCTORY.

§ 564. Introductory.
§ 565. Origin and use of the term extralateral.
§ 566. The "dip right" under local rules.
§ 567. The right to pursue the vein in depth, prior to patent, under the act of July 26, 1866.
§ 568. Nature of estate in the vein, created by grant of the dip or extralateral right.

ARTICLE II. EXTRALATERAL RIGHTS ON THE ORIGINAL LODE UNDER PATENTS ISSUED PRIOR TO MAY 10, 1872.

§ 572. The right to patent under the act of 1866, and its restriction to one lode.
§ 573. The functions of the diagram and the surface lines described in the patent as controlling rights on the patented lode.
§ 574. Rights of patentee under the act of 1866, where the end lines converge in the direction of the dip.
§ 575. Rights where the end lines diverge in the direction of the dip.
§ 576. Under the act of 1866, parallelism of end lines not required—Doctrine of the Eureka case.
§ 577. Conclusions.

ARTICLE III. EXTRALATERAL RIGHTS FLOWING FROM LOCATIONS MADE UNDER THE ACT OF MAY 10, 1872, AND THE REVISED STATUTES.

§ 581. Introductory.
§ 582. Parallelism of end lines a condition precedent to the exercise of the extralateral right.
§ 583. Entire width of apex to be included in the location—"Broad lodes."
§ 584. Vein entering and departing through the same side line.
§ 585. The extralateral right applied to the ideal lode.
§ 586. Vein crossing two parallel side lines—The Flagstaff case.
§ 587. Same—The Argentine-Terrible case.
§ 588. Same—The King-Amy case.
§ 589. Deductions from side-end line cases—Extralateral right in such cases defined by vertical planes drawn through the side-end lines produced.
§ 590. Vein crossing two opposite non-parallel side lines.

§ 591. Vein crossing one end line and a side line.
§ 592. Vein with apex wholly within the location, but crossing none of its boundaries, or entering at one end line and not reaching any any other boundary.
§ 593. Extralateral right as to veins other than the one upon which the location is based.
§ 594. Conclusions.

ARTICLE IV. EXTRALATERAL RIGHTS ON OTHER LODES CONFERRED BY THE ACT OF 1872 ON OWNERS OF CLAIMS PREVIOUSLY LOCATED.

§ 598. Introductory.
§ 599. Extralateral right on other lodes where the end lines of the original location cross the original lode and are parallel.
§ 600. Same — Where the end lines are not parallel.

ARTICLE V. CONSTRUCTION OF PATENTS APPLIED FOR PRIOR, BUT ISSUED SUBSEQUENT, TO THE ACT OF 1872.

§ 604. Patents applied for under the act of 1866, but issued after May 10, 1872, to be construed as if issued under the prior law.

ARTICLE VI. LEGAL OBSTACLES INTERRUPTING THE EXTRALATERAL RIGHT.

§ 608. Classes of impediments interrupting the right of lateral pursuit.
§ 609. Prior appropriation by a regular valid location of a segment of the same vein without conflict as to surface area.
§ 610. Qualification of the doctrine that the extent of the extralateral right of different locators on the same vein is to be determined by priority of location.
§ 611. The encountering of a vertical plane drawn through a surface boundary of a prior grant, which grant did not in terms or inferentially reserve the right of underground invasion — Senior mining locations not of this class.
§ 612. Same — Prior agricultural grants.
§ 613. Same — Other classes of grants.
§ 614. Union of veins on the dip.
§ 615. Identity and continuity of veins involved in the exercise of the extralateral right.

CHAPTER IV. THE NATURE AND EXTENT OF PROPERTY RIGHTS CONFERRED BY PLACER LOCATIONS.

§ 619. Rights conferred by placer locations as compared with lode locations.

CHAPTER V. PERPETUATION OF THE ESTATE BY ANNUAL DEVELOPMENT AND IMPROVEMENT.

§ 623. Annual labor under local rules—Provisions of the federal law.
§ 624. Requirement as to annual labor imperative.

§ 625. Annual labor upon placer claims.
§ 626. Supplemental state legislation.
§ 627. Division of the subject.
§ 628. "Claim" defined.
§ 629. Work done within the limits of a single location.
§ 630. Work done within the limits of a group of claims in furtherance of a common system of development.
§ 631. Work done outside of the boundaries of a claim or group of claims.
§ 632. Period within which work must be done—Can preliminary work required by state laws as an act of location be credited on the first year's work?
§ 633. By whom labor must be performed.
§ 634. Circumstances under which performance of annual labor is excused.
§ 635. Value of labor and improvements—How estimated.
§ 636. Proof of annual labor under state laws.
§ 637. Obligation to perform labor annually ceases with the final entry at the land office.
§ 638. Millsites.

CHAPTER VI. FORFEITURE OF THE ESTATE, AND ITS RESTORATION BY RESUMPTION OF WORK.

ARTICLE I. ABANDONMENT AND FORFEITURE.
II. RESUMPTION OF WORK.

ARTICLE I. ABANDONMENT AND FORFEITURE.

§ 642. Circumstances under which the locator's estate is terminated.
§ 643. Distinction between abandonment and forfeiture.
§ 644. Acts constituting abandonment—Evidence establishing or negativing it.
§ 645. Forfeiture.
§ 646. Forfeiture to co-owners.

ARTICLE II. RESUMPTION OF WORK.

§ 651. Resumption of work prevents forfeiture.
§ 652. What constitutes a valid resumption of work.
§ 653. When right to resume work must be exercised.
§ 654. Conclusions.

TITLE VII.

OF THE PROCEEDINGS TO OBTAIN UNITED STATES PATENT AND THE TITLE CONVEYED BY THAT INSTRUMENT.

CHAPTER I. THE LAND DEPARTMENT AND ITS FUNCTIONS.
II. THE SURVEY FOR PATENT.
III. THE APPLICATION FOR PATENT AND PROCEEDINGS THEREON.

CHAPTER IV. THE ADVERSE CLAIM.

V. ACTIONS TO DETERMINE ADVERSE CLAIMS, AND THE EFFECT OF JUDGMENT THEREON.

VI. THE CERTIFICATE OF PURCHASE AND TITLE CONVEYED THEREBY.

VII. THE PATENT.

CHAPTER I. THE LAND DEPARTMENT AND ITS FUNCTIONS.

§ 658. Introductory.
§ 659. The land department — How constituted.
§ 660. Registers and receivers — Their appointment, powers, and duties.
§ 661. The surveyors-general and their deputies.
§ 662. Commissioner of the general land office — Appointment, powers, and duties.
§ 663. Secretary of the interior.
§ 664. Jurisdiction of the land department.
§ 665. The effect of the decisions of the land department upon questions of fact.
§ 666. Decisions of the land department upon questions of law and mixed questions of law and fact.

CHAPTER II. THE SURVEY FOR PATENT.

§ 670. Application for survey.
§ 671. The survey of lode claims.
§ 672. The survey of placer claims — Descriptive report.
§ 673. The surveyor-general's certificate as to expenditures.

CHAPTER III. THE APPLICATION FOR PATENT, AND PROCEEDINGS THEREON.

ARTICLE I. LODE CLAIMS.

II. PLACER CLAIMS — LODES WITHIN PLACERS.

III. MILLSITES.

ARTICLE I. LODE CLAIMS.

§ 677. Posting of the notice and copy of the plat on the claim.
§ 678. The initiatory proceedings in the land office.
§ 679. Land embraced within the claim must be clear on the tract books.
§ 680. The application for patent — Its contents.
§ 681. Application by one of several co-owners — Corporations.
§ 682. Verification of application and other proofs.
§ 683. Proof of posting of notice and plat on the claim.
§ 684. Proof of citizenship.
§ 685. Designation of newspaper — Agreement of publisher.
§ 686. Proof of annual labor.
§ 687. The abstract of title — Certified copies of location notices.
§ 688. Proof of title by possession, without location under section twenty-three hundred and thirty-two of the Revised Statutes.

§ 689. Proof of mineral character of the land.
§ 690. Publication of the notice, and proof thereof.
§ 691. The posting of the notice in the register's office, and proof thereof.
§ 692. Proof that the plat and notice of application for patent remained posted on the claim during the period of publication.
§ 693. Statement of fees and charges.
§ 694. Application to purchase.
§ 695. Résumé.

ARTICLE II. PLACER CLAIMS — LODES WITHIN PLACERS.

§ 699. Proceedings to obtain patent to lode claims generally applicable to placers.
§ 700. Description of placer claims upon surveyed lands.
§ 701. Proof of the five hundred dollars' expenditure.
§ 702. Proof of mineral character of the land.
§ 703. Proof that no known lodes exist within limits of placer claim.
§ 704. Lodes within placers — How applied for.

ARTICLE III. MILLSITES.

§ 708. Manner of acquiring patents to millsites.

CHAPTER IV. THE ADVERSE CLAIM.

ARTICLE I. INTRODUCTORY.
II. WHAT IS AND WHAT IS NOT THE SUBJECT OF AN ADVERSE CLAIM.
III. HOW, WHEN, AND WHERE ADVERSE CLAIM MUST BE ASSERTED.

ARTICLE I. INTRODUCTORY.

§ 712. Distinction between adverse claim and protest.
§ 713. Patent proceedings are essentially *in rem*.

ARTICLE II. WHAT IS AND WHAT IS NOT THE SUBJECT OF AN ADVERSE CLAIM.

§ 717. Character of land — Agricultural claimants.
§ 718. Prior patentees and prior patent applicants.
§ 719. Mortgages — Lienholders — Owners of equitable interests.
§ 720. Lode claimant *v.* placer applicant.
§ 721. Placer claimant *v.* lode applicant.
§ 722. Mineral claimant *v.* townsite applicant.
§ 723. Townsite claimant *v.* mineral applicant.
§ 724. Millsite claimant *v.* mineral applicant.
§ 725. Tunnel proprietor *v.* lode applicant.
§ 726. Owners of lodes located prior to May 10, 1872.
§ 727. Cross lodes.
§ 728. Co-owners.
§ 729. Easements.
§ 730. Underground conflicts.

ARTICLE III. HOW, WHEN, AND WHERE ADVERSE CLAIM MUST BE ASSERTED.

§ 734. Adverse claim — How asserted — Contents of the claim — Amendments.
§ 735. Survey of the adverse claim.
§ 736. Verification of the claim.
§ 737. Sufficiency of adverse claims to be determined by land department.
§ 738. When adverse claim must be filed — Time how computed.
§ 739. Where adverse claim must be filed.
§ 740. But one adverse claim need be filed.
§ 741. Filing of adverse claim suspends the powers of the land department.
§ 742. Effect of failure to file an adverse claim.

CHAPTER V. ACTIONS TO DETERMINE ADVERSE CLAIMS, AND THE EFFECT OF JUDGMENT THEREON.

ARTICLE I. INTRODUCTORY — TRIBUNALS HAVING JURISDICTION.
II. CHARACTER OF THE ACTION — PLEADINGS AND PRACTICE — FUNCTIONS OF THE LAND DEPARTMENT PENDING THE ACTION.
III. THE JUDGMENT AND ITS EFFECT.

ARTICLE I. INTRODUCTORY — TRIBUNALS HAVING JURISDICTION.

§ 746. Introductory — What courts are courts of competent jurisdiction.
§ 747. The federal courts.
§ 748. The questions involved in the adverse suit necessarily arise under the laws of the United States, and are essentially federal in their nature.
§ 749. The federal courts are the only ones upon which congress can confer jurisdiction, or over whose procedure it may exercise legislative control.
§ 750. The state courts.

ARTICLE II. CHARACTER OF THE ACTION — PLEADINGS AND PRACTICE — FUNCTIONS OF THE LAND DEPARTMENT PENDING THE ACTION.

§ 754. Character of the action — At law or in equity — Pleadings.
§ 755. General rules of pleading.
§ 756. Time within which action must be commenced.
§ 757. Action when deemed commenced.
§ 758. Parties to the action.
§ 759. Functions of the land department, pending the action.

ARTICLE III. THE JUDGMENT AND ITS EFFECT.

§ 763. Form of judgment.
§ 764. When judgment becomes available in the land office.
§ 765. Effect of the judgment.
§ 766. Adverse claim — How waived.

## Chapter VI. The Certificate of Purchase and Title Conveyed Thereby.

§ 770. Issuance of the certificate.
§ 771. The title conveyed by the certificate of purchase.
§ 772. Power of the land department to suspend or cancel the certificate.
§ 773. The certificate of purchase as evidence — Collateral attack.

## Chapter VII. The Patent.

§ 777. General rules as to conclusiveness of patents.
§ 778. Conclusiveness of patent as to form and extent of surface boundaries.
§ 779. Character of the land established by the patent.
§ 780. What is conveyed by a lode patent.
§ 781. What is conveyed by a placer patent — Reservation of lodes "known to exist."
§ 782. Exceptions in junior patents of conflicting area held under senior title.
§ 783. Title conveyed by patent relates to inception of right — When evidence admissible to prove date of location.
§ 784. Patent — how vacated — Within what time suit must be brought.

---

# TITLE VIII.

## RIGHTS AND OBLIGATIONS ARISING OUT OF OWNERSHIP IN COMMON OF MINES AND JOINT PARTICIPATION IN MINING VENTURES.

Chapter I. Tenants in Common.
II. Mining Partnerships.

## Chapter I. Tenants in Common.

§ 788. Cotenancy — how created — General rules governing tenants in common applicable to ownership in common of mines.
§ 789. Right of each cotenant to occupy and use the common property.
§ 790. Remedy of excluded cotenant — Accounting between tenants in common.
§ 791. Leases, licenses, and conveyances executed by one of several cotenants.
§ 792. Partition of mining property.

## Chapter II. Mining Partnerships.

§ 796. Nature of relationship.
§ 797. Mining partnership — how created.
§ 798. Special instances wherein mining partnership held to be created.
§ 799. Special instances where mining partnership held not to be created.

§ 800. Rights and obligations of mining partners *inter sese.*
§ 801. Authority of the members — Liability of copartnership to third parties.
§ 802. Partnership property.
§ 803. Dissolution.

## TITLE IX.

### RIGHTS AND OBLIGATIONS OF PARTIES ENGAGED IN WORKING MINES, AS BETWEEN THEIR NEIGHBORS AND THE GENERAL PUBLIC.

CHAPTER I. DRAINAGE OF MINES — RELATIVE RIGHTS AND DUTIES OF MINERS OPERATING AT DIFFERENT LEVELS, WITH RESPECT TO WATER.

II. MUTUAL RIGHTS AND DUTIES WHERE TITLE TO MINERALS IS SEVERED FROM THAT OF THE SURFACE.

III. LATERAL OR ADJACENT SUPPORT.

IV. DEPOSIT OF MINING DEBRIS IN RUNNING STREAMS AND ON LANDS OF OTHERS — PRIVATE NUISANCES.

V. GOVERNMENTAL SUPERVISION OF HYDRAULIC MINING IN CALIFORNIA — THE CALIFORNIA DEBRIS COMMISSION — ITS JURISDICTION AND POWERS.

### CHAPTER I. DRAINAGE OF MINES — RELATIVE RIGHTS AND DUTIES OF MINERS OPERATING AT DIFFERENT LEVELS, WITH RESPECT TO WATER.

§ 806. Introductory — Statutory regulations on the subject of mine drainage.
§ 807. The law of natural flow.
§ 808. Foreign water — Flooding.

### CHAPTER II. MUTUAL RIGHTS AND DUTIES WHERE TITLE TO MINERALS IS SEVERED FROM THAT OF THE SURFACE.

ARTICLE I. GENERAL PRINCIPLES — RIGHTS AND DUTIES OF MINE OWNERS — USE OF SURFACE.

II. VERTICAL OR SUBJACENT SUPPORT.

III. RIGHTS AND DUTIES OF SURFACE PROPRIETOR — OWNERSHIP OF SEPARATE STRATA.

#### ARTICLE I. GENERAL PRINCIPLES — RIGHTS AND DUTIES OF MINE OWNERS — USE OF SURFACE.

§ 812. Application of the doctrine of the common law on the subject of severance — Severance under the federal law — General principles.

§ 813. To what extent owner of minerals may use surface — Ways of necessity.
§ 814. Manner of conducting mining operations.

ARTICLE II. VERTICAL OR SUBJACENT SUPPORT.

§ 818. Right of surface support reserved by implication in grant of minerals — Nature of the right.
§ 819. Right an absolute one — Negligence not involved.
§ 820. Right limited to support of soil in its natural state — Buildings.
§ 821. Waiver or release of the right.
§ 822. Statutory regulations on subject of subjacent support.

ARTICLE III. RIGHTS AND DUTIES OF SURFACE PROPRIETOR — OWNERSHIP OF SEPARATE STRATA.

§ 826. Responsibility of surface owner for injuries to miners' rights.
§ 827. Rights of access to lower strata — Reciprocal servitudes between owners of different strata.

CHAPTER III. LATERAL OR ADJACENT SUPPORT.

§ 831. Introductory.
§ 832. General principles — Negligence as an element.
§ 833. Right limited to support of soil in its natural state.
§ 834. The right of lateral support as applied to mines worked by hydraulic process.

CHAPTER IV. DEPOSIT OF MINING DEBRIS IN RUNNING STREAMS AND ON LAND OF OTHERS — PRIVATE NUISANCES.

§ 838. The use of water in the conduct of mining operations.
§ 839. Pollution of streams — The English rule — Tin streaming in Cornwall.
§ 840. The American rule as declared in states not accepting the Pacific Coast doctrine as to right of appropriation and user of water.
§ 841. The rule in the mining states and territories where the right of appropriation is recognized.
§ 842. The remedy by injunction to prevent pollution of water.
§ 843. The deposit of tailings and refuse on the lands of others.
§ 844. Measure of damages for unlawfully depositing debris on another's land.

CHAPTER V. GOVERNMENTAL SUPERVISION OF HYDRAULIC MINING IN CALIFORNIA — THE CALIFORNIA DEBRIS COMMISSION — ITS JURISDICTION AND POWERS.

§ 848. Causes leading up to the passage by congress of the act creating the California debris commission.

§ 849. Hydraulic mining not a nuisance *per se*—Principles established by the debris cases.
§ 850. Essential features of the congressional act creating the California debris commission and regulating hydraulic mining in the state of California.
§ 851. Necessity for definition of term "hydraulic mining."
§ 852. What constitutes "hydraulic mining," or "mining by the hydraulic process," within the meaning of the act.
§ 853. Judicial interpretation of the act—Its constitutionality.

## TITLE X.

### MINES AND MINING CLAIMS AS SUBJECTS OF CONTRACT BETWEEN INDIVIDUALS.

### CHAPTER I. MISCELLANEOUS CONTRACTS RELATING TO MINING VENTURES AND THEIR DISTINGUISHING FEATURES.

§ 857. Introductory.
§ 858. "Grub stake" and prospecting contracts.
§ 859. Options, working bonds, or executory contracts of sale.
§ 860. Licenses and their distinguishing attributes.
§ 861. What constitutes a lease.

## TITLE XI.

### ACTIONS CONCERNING MINING CLAIMS OTHER THAN SUITS UPON ADVERSE CLAIMS—AUXILIARY REMEDIES.

CHAPTER I. TRESPASS—MEASURE OF DAMAGES.
II. AUXILIARY REMEDIES.

### CHAPTER I. TRESPASS—MEASURE OF DAMAGES.

§ 865. Introductory.
§ 866. Burden of proof in cases of underground trespasses.
§ 867. When the statute of limitations commences to run against underground trespasses.
§ 868. Measure of damages.

### CHAPTER II. AUXILIARY REMEDIES.

§ 872. Injunction.
§ 873. Inspection and survey.

# APPENDIX—MISCELLANEOUS.

## TITLE XII.

### FEDERAL STATUTES RELATING TO MINES, TOGETHER WITH THE LAND DEPARTMENT REGULATIONS.

I. Lode and Water Law of July 26, 1866.
II. Placer Law of July 9, 1870.
III. General Mining Act of May 10, 1872.
IV. Title XXXII, Chapter 6, of United States Revised Statutes Embodying Existing Laws Relating to Mineral Lands.
V. Land Department Regulations upon the Subject of Mineral Lands Other than Coal.
VI. Coal Land Law with Regulations Thereunder.
VII. Instructions Relating to Selection of Lands by Railroads and States.
VIII. Petroleum Law of February 11, 1897, and Circular of Instructions Relating Thereto.
IX. Alien Act of March 2, 1897.
X. Recent Legislation and Regulations on the Subject of Mining Claims within Forest Reservations.

---

## TITLE XIII.

### STATE AND TERRITORIAL LEGISLATION UPON THE SUBJECT OF MINES.

#### Arizona.

I. Act of 1895, relating to the location and development of mining claims.
II. Act of 1891, relating to forfeiture of mining claims.
III. Reference to miscellaneous legislation on mining subjects.

#### California.

I. Act of 1897, relating to the location and development of mining claims.
II. Act of 1891 relating to performance and proof of annual labor.
III. Regulating the sale of mineral lands belonging to the state.
IV. Congressional act regulating hydraulic mining in California.
V. Reference to miscellaneous legislation on mining subjects.

COLORADO.

I. Provisions relating to lode claims.
II. Provisions relating to placer claims
III. Provisions relating to tunnels and tunnel claims.
IV. Reference to miscellaneous legislation on mining subjects.

IDAHO.

I. Act of 1895, relating to the location and development of lodes and placers.
II. Act of 1897, relating to location and development of placers.
III. Reference to miscellaneous legislation on mining subjects.

MONTANA.

I. Laws relating to the location and development of mining claims.
II. Reference to miscellaneous legislation on mining subjects.

NEVADA.

I. Act of 1897, regulating the location and development of lode, placer, tunnel, and millsite claims.
II. Act regulating the disposition of certain state mineral lands.
III. Reference to miscellaneous legislation on mining subjects.

NEW MEXICO.

I. Laws relating to the location, relocation and development of mines.
II. Reference to miscellaneous legislation on mining subjects.

NORTH DAKOTA.

I. Legislation relating to the acquisition of title to lode claims.
II. Reference to miscellaneous legislation on mining subjects.

OREGON.

I. Laws relating to the location and recording of mining claims.
II. Reference to miscellaneous legislation on mining subjects.

SOUTH DAKOTA.

A. Mining laws enacted by the legislature of South Dakota.
B. Mining laws of Dakota Territory adopted by South Dakota.
I. Relating to the size, location, and development of mining claims.
II. Reference to miscellaneous legislation on mining subjects.

UTAH.

I. Act of 1897, providing the manner in which lode and placer claims may be located and recorded.
II. Reference to miscellaneous legislation on mining subjects.

WASHINGTON.

I. Laws defining the rights and duties of the locator of mining claims.
II. Reference to miscellaneous legislation on mining subjects.

WYOMING.

I. Laws relating to the location of lode claims and the extent of locator's rights therein.
II. Laws relating to the location and annual development of placer claims.
III. Reference to miscellaneous legislation on mining subjects.

DISTRICT OF ALASKA.

FEDERAL LAWS AND REGULATIONS CONCERNING MINING CLAIMS IN ALASKA.

I. Statutes.
II. Land department regulations.

TITLE XIV.

FORMS AND PRECEDENTS.

# TABLE OF CASES.


Abbey v. Wheeler (1895), 85 Hun 226; 32 N. Y. Supp. 1069, § 790.
Abbott v. Smith (1893), 3 Colo. App. 264; 32 Pac. 843, §§ 801, 858.
Abercombie, In re (1887), 6 L. D. 393, §§ 94, 209, 784.
Adam v. Norris (1881), 103 U. S. 591; L. ed. 26; 583, § 125.
Adams v. Briggs Iron Co. (1851), 7 Cush. 361; 13 Morr. 235, § 791.
Adams v. Simmons (1892), 16 L. D. 181, § 521.
Adjutant-General v. Welsh Granite Co. (1887B), 35 W. R. 617, § 92.
Ah Hee v. Crippen (1861), 19 Cal. 491; 10 Morr. 367, § 125.
Ah Yew v. Choate (1864), 24 Cal. 562; 1 Morr. 492, §§ 94, 161, 207.
Aiken v. Ferry (1879), 6 Saw. 79; Fed. Cases No. 112, § 542.
Alexander v. Kimbro (1873), 49 Miss. 529, § 802.
Alexander v. Sherman (1887, Ariz.), 16 Pac. 45; 15 Morr. 638, §§ 407, 719.
Alford v. Barnum (1873), 45 Cal. 482; 10 Morr. 422, § 94.
Alice Edith Lode (1888), 6 L. D. 711; 15 C. L. O. 51, § 631.
Alice Placer (1886), 4 L. D. 314; 12 C. L. O. 274, §§ 717, 765.
Alleman v. Hawley (1888), 117 Ind. 532; 20 N. E. Rep. 441, § 790.
Allen v. Dunlap (1893), 24 Ore. 229; 33 Pac. 675, §§ 273, 350, 872.
Allen, In re (1889), 8 L. D. 140, § 501.
Alta Millsite (1889), 8 L. D. 195, §§ 521, 681, 708.
Alta Millsite (1889), 9 L. D. 48, § 638.
Alta Min. & Smelting Co. v. Benson Min. & Sm. Co. (1888, Ariz.), 16 Pac. 565, §§ 637, 808.
Altoona Q. M. Co. v. Integral Q. M. Co. (1896), 114 Cal. 100; 45 Pac. 1047, §§ 233, 629, 643, 688, 750, 754, 755.
Amador Medean G. M. Co. v. South Spring Hill (1888), 13 Sawyer, 523; 36 Fed. 668, §§ 125, 208, 531, 612, 771.
Amador Queen Min. Co. v. Dewitt (1887), 73 Cal. 482; 15 Pac. Rep. 74, §§ 263, 531.
American Flag Lode, In re (1887), 6 L. D. 320; §§ 690, 738.
American Hill Quartz Mine (1879), Sickle's Min. Dec. 377; 6 C. L. O. 1, §§ 542, 637, 771.
American Ins. Co. v. Canter (1828), 1 Peters, 511; L. ed. 7; 242, § 242.
American Mortg. Co. v. Hopper (1891), 48 Fed. 47, § 772.
Anaconda C. M. Co. v. Butte & B. M. Co. (1896), 17 Mont. 519; 43 Pac. 924, §§ 788, 790, 797.
Anchor v. Howe (1892), 50 Fed. 306, § 735.
Anderson v. Amador & Sac. C. Co. (1890), 10 L. D. 572, § 717.

Anderson v. Black (1886), 70 Cal. 226; 11 Pac. 700, § 373.
Anderson v. Byam (1889), 8 L. D. 388, § 651.
Anderson v. N. P. R. R. (1888), 7 L. D. 163, § 772.
Anderson v. Simpson (1866), 21 Ia. 399; 9 Morr. 262, § 860.
Andromeda Lode (1891), 13 L. D. 146, §§ 338, 671, 673.
Angier v. Agnew (1881), 98 Pa. St. 587; 42 Am. Rep. 624, § 789.
Antediluvian Lode & Millsite (1889), 8 L. D. 602, §§ 171, 338.
Antelope Lode (1875), 2 C. L. O. 2, §§ 758, 766.
Anthony v. Jillson (1890), 83 Cal. 296; 23 Pac. 419; 16 Morr. 26, §§ 233, 273, 432, 624, 754, 755.
Antoine Co. v. Ridge Co. (1863), 23 Cal. 219; 10 Morr. 97, §§ 270, 868.
Apple Blossom Placer v. Cora Lee Lode (1892), 14 L. D. 641, § 765.
Apple Blossom Placer v. Cora Lee Lode (1895), 21 L. D. 438, § 670.
Archuleta, In re (1889), 15 C. L. O. 256, § 496.
Argentine Min. Co. v. Terrible M. Co. (1887), 122 U. S. 478; L. ed. 30; 1140, §§ 345, 364, 367, 553, 587, 609.
Argonaut Cons. Min. & M. Co. v. Turner (1897, Colo.), 48 Pac. 685, § 615.
Arimond v. Green Bay Co. (1872), 31 Wis. 316, § 843.
Armory v. Delamirie (1722), 1 Strange, 504; 10 Morr. 66, § 868.
Armstrong v. Lake Champlain Granite Co. (1895), 147 N. Y. 495; 42 N. E. Rep. 186, § 93.
Armstrong v. Larimer County Ditch Co. (1891), 1 Colo. App. 49; 27 Pac. 235, § 838.
Armstrong v. Lower (1882), 6 Colo. 393; 15 Morr. 631, §§ 294, 322, 337, 345, 363, 403, 615, 688, 755.
Armstrong v. Lower (1882), 6 Colo. 581; 15 Morr. 458, §§ 218, 615.
Arnold, In re (1884), 2 L. D. 758, § 685.
Arnold v. Stevens (1839), 24 Pick. 106; 35 Am. Dec. 305; 1 Morr. 176, §§ 175, 812.
Arthur v. Earle (1895), 21 L. D. 92, §§ 208, 496.
Ashenfelter v. Williams (1896), 7 Colo. App. 332; 43 Pac. 664, § 798.
Ashley v. Port Huron (1877), 35 Mich. 296; 24 Am. Rep. 552, § 843.
Aspden v. Seddon (1875), 10 L. R. Ch. App. Cas. 394, § 821.
Aspen Min etc. Co. v. Rucker (1886), 28 Fed. 220, §§ 535, 792.
Aspen Cons. Min. Co. v. Williams (1896), 23 L. D. 34, § 208.
Astiazaran v. Santa Rita L. & M. Co. (1893), 148 U. S. 80; L. ed. 37; 376; § 116.
Atchison v. Peterson (1872), 1 Mont. 561, §§ 842, 841.
Atchison v. Peterson (1874), 20 Wall. 507; L. ed. 22; 414; 1 Morr. 583, §§ 838, 841.
Atherton v. Fowler (1878), 96 U. S. 513; L. ed. 24, 732, §§ 217, 218.
Atkins v. Hendree (1867), 1 Idaho, 95; 2 Morr. 328, §§ 58, 362, 557, 632.
Attorney-General v. Council of Birmingham (1858), 4 K. & J. 528, § 807.
Attorney-General v. Mylchreest (1879), 4 App. C. 294, §§ 90, 92.

Attorney-General v. Tomline (1877), L. R. 5 Ch. D. 750, §§ 90, 92.
Attorney-General v. Welsh Granite Co. (1887), 35 W. R. 617, § 90.
Attwood v. Fricot (1860), 17 Cal. 38; 76 Am. Dec. 567; 2 Morr. 328, §§ 216, 391, 868.
Aurora Hill Con. v. 85 Min. Co. (1887), 34 Fed. 515; 12 Saw. 355; 15 Morr. 581, §§ 208, 363, 637, 771, 773, 868.
Aurora Lode v. Bulger Hill Placer (1896), 23 L. D. 95, §§ 413, 415, 619, 708, 720, 721, 765.
Austin v. Barrett (1876), 44 Iowa, 488, § 790.
Austin v. Huntsville C. & M. Co. (1880), 72 Mo. 535; 37 Am. Rep. 446; 9 Morr. 115, §§ 861, 868.
Ayers v. Daly (1877), 3 Copp. L. O. 196, § 681.

Baca Float No. 3 (1891), 13 L. D. 624, § 126.
Back v. Sierra Nevada Cons. Min. Co. (1888), 2 Idaho, 396; 17 Pac. 83, §§ 473, 486, 725.
Backhouse v. Bonomi (1861), 9 H. L. Cases, 503; 13 Morr. 677, § 820.
Bagnall v. L. & N. Ry. Co. (1862), 1 Hurlstone & C. 544, 5 Morr. 366, § 826.
Bagnall v. L. & N. W. Ry. Co. (on appeal), (1861), 7 Hurlstone & N. 423; 5 Morr. 362, § 826.
Bailey, In re (1885), 3 L. D. 386, § 677.
Baird v. Williamson (1863), 15 Com. B., N. S., 376; 4 Morr. 368, §§ 807, 868.
Baker v. Wheeler (1832), 8 Wend. 505; 24 Am. Dec. 66, § 868.
Baldwin v. Starks (1883), 107 U. S. 463; L. ed. 27, 526, §§ 175, 207, 666.
Bankier Distilling Co. v. Young, 19 R. 1083; 20 R. H. L. 76, affirmed, § 841.
Bannon v. Mitchell (1880), 6 Ill. App. 17; 2 Morr. 108, § 807.
Barclay v. Commonwealth (1855), 1 Casey, 503; 25 Pa. St. 503; 64 Am. Dec. 715, § 840.
Barclay v. State of California (1888), 6 L. D. 699, § 772.
Barden v. Northern Pac. R. R. (1894), 154 U. S. 288; L. ed. 38, 992, §§ 80, 96, 106, 107, 154, 156, 161, 175, 207, 482, 665.
Bardon v. N. P. R. R. (1892), 145 U. S. 535; L. ed. 36, 806, §§ 80, 322.
Barnard v. Ashley (1856), 18 How. 45; 15 L. ed. 285, §§ 660, 662.
Barnes v. Sabron (1875), 10 Nev. 217; 4 Morr. 673, §§ 530, 838.
Barney v. Winona R. R. Co. (1886), 117 U. S. 228; 29 L. ed. 858, § 157.
Barnstetter v. C. P. R. R. (1895), 21 L. D. 464, § 208.
Barnum v. Landon (1856), 25 Conn. 137; 14 Morr. 250, § 791.
Bartlett v. Prescott (1860), 41 N. H. 493, § 860.
Barton Coal Co. v. Cox (1873), 39 Md. 1; 17 Am. Rep. 525; 10 Morr. 157, § 868.
Basey v. Gallagher (1874), 20 Wall. 670; L. ed. 22, 452; 1 Morr. 683, §§ 838, 841.
Batavia Mfg. Co. v. Newton Wagon Co. (1878), 91 Ill. 230, § 840.
Bates v. Chambers (1874), Sickles Min. Dec. 265; 1 C. L. O. 97, § 735.

Battlement Mesa Forest Reserve (1893), 16 L. D. 190, § 197.
Baxter Mt. G. M. Co. v. Patterson (1884), 3 New Mex. 179; 3 Pac. 741, § 383.
Bay State S. M. Co. v. Brown (1884), 10 Saw. 243; 21 Fed. 167, §§ 227, 755.
Bazemore v. Davis (1875), 55 Ga. 504, § 790.
Bear River etc. Co. v. New York M. Co. (1857), 8 Cal. 327; 68 Am. Dec. 325; 4 Morr. 526, § 841.
Beard v. Federy (1866), 3 Wall. 478; L. ed. 18, 88, § 125.
Beatty and Clements (1875), 2 C. L. O. 82, § 759.
Beatty v. Gregory (1864), 17 Ia. 109; 85 Am. Dec. 546; 9 Morr. 234, § 860.
Becker, In re (1878), 5 Copp. L. O. 51, § 708.
Becker v. Central City Townsite (1875), 2 Copp's L. O. 98, §§ 171, 723, 724.
Becker v. Pugh (1886), 9 Colo. 589; 13 Pac. Rep. 906; 15 Morr. 304, §§ 398, 755, 763.
Becker v. Pugh (1892), 18 Colo. 243; 29 Pac. Rep. 173, §§ 271, 755.
Becker v. Sears (1883), 1 L. D. 575, § 680.
Beecher v. Wetherby (1877), 95 U. S. 517; L. ed. 24, 440, §§ 181, 183.
Belcher Cons. G. M. Co. v. Deferrari (1882), 62 Cal. 160; §§ 275, 408, 645, 651, 652.
Belford, In re James B. (1876), 2 C. L. O. 178, § 782.
Belk v. Meagher (1878), 3 Mont. 65; 1 Morr. 522, §§ 218, 219, 322, 363, 409, 632, 651, 652.
Belk v. Meagher (1881), 104 U. S. 279; L. ed. 26, 739; 1 Morr. 510, §§ 169, 184, 192, 218, 322, 324, 329, 363, 371, 404, 409, 413, 539, 632, 642, 651, 652, 688.
Bell v. Bedrock T. & M. Co. (1868), 36 Cal. 214; 1 Morr. 45, §§ 274, 643.
Bell v. Brown (1863), 22 Cal. 671; 5 Morr. 540, § 643.
Bell v. Hearne (1857), 19 How. 252; L. ed. 15; 614, § 662.
Bell v. Love (1883), 10 Q. B. D. 547, § 820.
Bell v. Skillicorn (1891), 6 New Mex. 309; 28 Pac. Rep. 768, §§ 551, 615, 866.
Bell v. Wilson (1865), 2 Drew. & S. 395; S. C. on Appeal L. R. 1 Ch. App. 303, § 92.
Bellows v. Champion Mine (1877), 4 C. L. O. 17, § 209.
Benavides v. Hunt (1891), 79 Tex. 383; 15 S. W. Rep. 396, § 812.
Bennet's Placer (1884), 3 L. D. 116; 11 C. L. O. 213, §§ 97, 139, 210, 421.
Bennett v. Griffiths (1861), 30 L. J. Q. B. 98; 8 Morr. 21, § 873.
Bennett v. Harkrader (1895), 158 U. S. 441; L. ed. 39; 1046, §§ 381, 415, 718, 721, 754.
Bennitt v. Whitehouse (1860), 28 Beav. 119; 8 Morr. 17, § 873.
Benson M. & S. Co. v. Alta M. & S. Co. (1892), 145 U. S. 428; L. ed. 36; 702; §§ 208, 542, 637, 771, 773, 868.
Bernal v. Hovious (1861), 17 Cal. 542; 79 Am. Dec. 147, § 861.

Berry v. Woodburn (1895), 107 Cal. 504; 40 Pac. 802, §§ 799, 858.
Bigelow v. Finch (1851), 11 Barb. 498, § 540.
Bigelow v. Finch (1853), 17 Barb. 394, § 540.
Billings, Estate of (1884), 65 Cal. 593; 1 Pac. 701, § 238.
Billings v. Aspen Min. & S. Co. (1892), 51 Fed. 338, §§ 233, 646.
Billings v. Aspen Min. Co. (1892), 52 Fed. 250, § 233.
Bishop v. Baisley (1895), 28 Ore. 119; 41 Pac. 936, §§ 629, 643, 652.
Bishop v. Baisley (1895) 28 Ore. 119; 41 Pac. 936, §§ 629, 643, 652, 872.
Black v. Elkhorn Min. Co. (1891), 47 Fed. 600, § 543.
Black v. Elkhorn Min. Co. (1892), 52 Fed. 859, § 543.
Black v. Elkhorn Min. Co. (1892), 49 Fed. 549, §§ 205, 535, 539, 540, 542.
Black v. Elkhorn M. Co. (1896), 163 U. S. 445; L. ed. 41; 21, §§ 80, 539, 642, 646.
Blackmore v. Reilly (1888, Ariz.), 17 Pac. 72, §§ 170, 177.
Black Queen Lode v. Excelsior No. 1 Lode (1896), 22 L. D. 343, § 739.
Blake v. Butte S. M. Co. (1877), 2 Utah, 54; 9 Morr. 503, §§ 54, 560, 567, 726.
Blake v. Thorne (1888, Ariz.), 16 Pac. 270, § 407.
Blakesley v. Wheeldon (1841), 1 Hare, 176; 8 Morr. 8, § 873.
Bluebird Min. Co. v. Largey (1892), 49 Fed. 289, §§ 294, 313.
Bluebird Min. Co. v. Murray (1890), 9 Mont. 468; 23 Pac. 1022, §§ 866, 873.
Blythe, Estate of (1893), 99 Cal. 472; 34 Pac. 108, § 764.
Bodie Tunnel & Min. Co. v. Bechtel Cons. Mg. Co. (1881), 1 L. D. 584, §§ 725, 738, 742.
Boggs v. Merced M. Co. (1859), 14 Cal. 279; 10 Morr. 517, §§ 112, 125.
Bohanon v. Howe (1888), 2 Idaho, 417; 17 Pac. 583, §§ 233, 754.
Bonesell v. McNider (1891), 13 L. D. 286, §§ 690, 738.
Book v. Justice Min. Co. (1893), 58 Fed. 106, §§ 274, 282, 289, 294, 331, 336, 350, 355, 373, 375, 381, 382, 383, 629, 631, 633, 636, 645.
Boston Franklinite Co. v. Condit (1869), 19 N. J. Eq. 394; 14 Morr. 301, §§ 791, 792.
Botiller v. Dominguez (1889), 130 U. S. 238; L. ed. 32; 926, § 123.
Boucher v. Mulverhill (1871), 1 Mont. 306; 12 Morr. 350, §§ 796, 858.
Boulder & Buffalo M. Co. (1888), 7 L. D. 54; 15 C. L. O. 147, §§ 142, 144.
Bowers v. Keesecker (1862), 14 Iowa, 301, §§ 541, 542.
Bracken v. Rushville (1866), 27 Ind. 346; 3 Morr. 273, § 860.
Brady v. Husby (1893), 21 Nev. 453; 33 Pac. 801, §§ 227, 355, 381, 383.
Brannagan v. Dulaney (1884), 2 L. D. 744; 11 C. L. O. 67, §§ 336, 742.
Branagan v. Dulaney (1885), 8 Colo. 408; 8 Pac. 669, §§ 558, 727, 705.
Brandt v. Wheaton (1877), 52 Cal. 430; 1 Morr. 45, § 261.
Bray v. Ragstale (1873), 53 Mo. 170, § 542.
Brennan v. Hume (1889), 10 L. D. 160, § 505.
Bretell v. Swift (1893), 16 L. D. 178, § 685.
Brettell v. Swift (on review), (1893), 17 L. D. 558, § 685.

Bright v. Elkhorn M. Co. (1889), 9 L. D. 503, § 692.
Broder v. Natoma Water & Min. Co. (1879), 101 U. S. 274; L. ed. 25; 790; 5 Morr. 33, §§ 45, 56, 306, 530, 567, 838.
Brooks v. Bruyn (1864), 35 Ill. 392, § 536.
Brown v. Bond (1890), 11 L. D. 150, § 737.
Brown v. Campbell (1893), 100 Cal. 635; 35 Pac. Rep. 433; 38 Am. St. Rep. 314, § 764.
Brown v. Corey (1862), 43 Pa. St. 495; 5 Morr. 368, § 256.
Brown v. County Commissioners (1853), 21 Pa. 37, § 558.
Brown v. Covillaud (1856), 6 Cal. 566, § 859.
Brown v. Levan (1896, Idaho), 46 Pac. 661, § 379.
Brown v. Massey (1842), 3 Humph. 470, § 542.
Brown v. Robins (1859), 4 H. & N. 186, § 820.
Brown v. United States (1885), 113 U. S. 568; L. ed. 28; 1079, §§ 96, 419, 482, 666.
Brown v. Vandergrift (1875), 80 Pa. 147, § 423.
Brownfield v. Bier (1895), 15 Mont. 403; 39 Pac. 461, §§ 336, 781.
Brown's Trust (1862), 11 W. R. 19, § 92.
Brundy v. Mayfield (1895), 15 Mont. 201; 38 Pac. 1067, §§ 251, 406, 646, 728.
Brunswick v. Walters' Heirs (1885), 3 New Mex. 241; 5 Pac. 707, § 790.
Bryan v. McCaig (1887), 10 Colo. 309; 15 Pac. 413, § 629.
Buchanan v. Cole (1894), 57 Mo. Ap. 11, § 861.
Buena Vista County v. Iowa Falls & S. C. R. R. (1884), 112 U. S. 165; L. ed. 28; 680, § 663.
Buffalo Nat. Gas Fuel Co. (1896), 73 Fed. 191, § 423.
Buhne v. Chism (1874), 48 Cal. 467, § 143.
Bullard v. Flanagan (1890), 11 L. D. 515, § 504.
Bullion, Beck and Champion M. Co. v. Eureka Hill M. Co. (1886), 5 Utah, 3; 11 Pac. 515; 15 Morr. 449, §§ 294, 583.
Bullion Min. Co. v. Croesus G. & S. M. Co. (1866), 2 Nev. 168; 90 Am. Dec. 526; 5 Morr. 254, § 612.
Bullock v. Rouse (1889), 81 Cal. 590; 22 Pac. Rep. 919, § 448.
Burgan v. Lyell (1851), 2 Mich. 102; 55 Am. Dec. 53; 11 Morr. 287, § 801.
Burgess, In re (1897), 24 L. D. 11, § 507.
Burgess v. Gray (1853), 16 How. 48; L. ed. 14; 839, § 216.
Burke v. Bunker Hill & Sullivan Min. Co. (1891), 46 Fed. 644, §§ 748, 749.
Burke v. McDonald (1887), 2 Idaho, 310; 13 Pac. 351, § 294.
Burke v. McDonald (1890), 2 Idaho, 646; 33 Pac. 49, §§ 335, 336, 339, 362, 372, 754, 755, 763.
Burke v. McDonald (1892), 2 Idaho, 1022; 29 Pac. 98, § 336.
Busby v. Holthaus (1870), 46 Mo. 161, § 833.
Busch v. Donohue (1875), 31 Mich. 482, § 542.
Bush v Sullivan, 3 G. Greene 344 (1851), § 860.

Bushnell v. Crooke M. & S. Co. (1893), 148 U. S. 682; L. ed. 37; 610, § 748.
Butler v. Hinckley (1892), 17 Colo. 523; 30 Pac. 250, § 799.
Butte & Boston Min. Co. (1895), 21 L. D. 125, §§ 180, 413, 721, 784.
Butte & Boston M. Co. v. Sloane (1895), 16 Mont. 97; 40 Pac. 217, §§ 126, 161.
Butte City Smoke House Lode Cases (1887), 6 Mont. 397; 12 Pac. 858, §§ 125, 169, 170, 171, 177, 604, 609, 722, 783.
Butte City Townsite (1876), 3 Copp's L. O. 114, §§ 171, 173.
Buttz v. N. P. R. R. (1886), 119 U. S. 55; L. ed. 30; 330, § 183.
Bybee v. Hawkett (1882), 12 Fed. 649; 11 Morr. 594, § 798.
Byrne v. Slauson (1895), 20 L. D. 43, § 677.

Caha v. United States (1894), 152 U. S. 211; L. ed. 38; 415, §§ 472, 662.
Cahill v. Eastman (1872), 18 Minn. 324; 10 Am. Rep. 184, § 808.
Cahn v. Barnes (1881), 5 Fed. 326, § 662.
Cain v. Addenda Min. Co. (1897), 24 L. D. 18, § 755.
Caldwell v. Bush (1896, Wyo.), 45 Pac. 488, §§ 207, 208, 772.
Caldwell v. Copeland (1860), 37 Pa. St. 427; 78 Am. Dec. 436; 1 Morr. 189, § 812.
Caldwell v. Fulton (1858), 31 Pa. St. 475; 72 Am. Dec. 760; 3 Morr. 238, §§ 175, 812, 860.
Caledonia G. M. Co. v. Noonan (1882), 3 Dak. 189, § 184.
Caledonia M. Co. v. Rowen, (1883), 2 L. D. 714, § 106.
Caledonian Ry. Co. v. Sprot (1856), 2 Macq. H. L. Cases, 449; 2 Jurist, N. S., 623, § 833.
California v. Ore. R. R. Co. (1893), 16 L. D. 262, § 156.
Calvert v. Aldrich (1868), 99 Mass. 74; 96 Am. Dec. 693, § 790.
Calvin v. McCune (1874), 39 Iowa, 502; 1 Morr. 223, § 688.
Cameron, In re (1890), 10 L. D. 195, § 502.
Cameron, Daniel, In re (1886), 4 L. D. 515; 13 C. L. O. 64, § 687.
Cameron Lode (1891), 13 L. D. 369, §§ 173, 180.
Cameron v. United States (1892), 148 U. S. 301; L. ed. 37; 459, §§ 123, § 322.
Campbell v. Bear River and Auburn W. & M. Co. (1868), 35 Cal. 679; 10 Morr. 656, § 808.
Campbell v. Rankin (1879), 99 U. S. 261; L. ed. 25, 435; 12 Morr. 257, § 272.
Campbell v. Wade (1889), 132 U. S. 34; L. ed. 33; 240, §§ 205, 216, 542.
Camp Bowie Reservation (1879), 7 C. L. O. 4, § 192.
Capner v. Flemington M. Co. (1836), 3 N. J. Eq. 467, § 789.
Capricorn Placer, In re (1890), 10 L. D. 641, § 684.
Carli v. Union Depot R. R. Co. (1884), 32 Minn. 101; 20 N. Rep. 89, § 844.
Carlin v. Chappel (1882), 101 Pa. St. 348; 47 Am. Rep. 722, § 819.
Carlyon v. Lovering (1857), 1 Hurl. & N. 784; 26 L. J. Exch. 251; 14 Morr. 397, §§ 839, 843.

Carney v. Arizona G. M. Co. (1884), 65 Cal. 40; 2 Pac. Rep. 734, §§ 624, 625.
Carothers' Appeal (1888), 118 Pa. 468; 12 Atl. Rep. 314, § 256.
Carr v. Fife (1895), 156 U. S. 494; L. ed. 39; 508, § 665.
Carr v. Quigley (1893), 149 U. S. 652; L. ed. 37; 885, §§ 124, 183.
Carrasco v. State (1885), 67 Cal. 385; 7 Pac. 766, § 238.
Carroll v. Safford (1845), 3 How. 441; L. ed. 11; 440, §§ 208, 542.
Carson City Gold & S. M. Co. v. North Star M. Co. (1896), 73 Fed. 597, §§ 318, 574, 576, 615, 671, 778.
Carter v. Bacigalupi (1890), 83 Cal. 187; 23 Pac. 361, §§ 273, 350, 355, 381, 383.
Carter v. Page (1844), 4 Ired. L. (N. C.) 424, § 860.
Carter v. Thompson (1894), 65 Fed. 329, §§ 107, 127, 161, 175.
Casey v. Northern Pac. R. R. Co. (1892), 15 L. D. 439, § 95.
Casey v. Thievege (1897, Mont.), 48 Pac. 394, § 781.
Cash Lode (1874), 1 C. L. O. 97, §§ 227, 232.
Caste, Nancy Ann (1884), 1 C. L. O. 97, §§ 227, 232.
Castillero v. United States (1863), 69 U. S. 1; 17; 360, §§ 13, 114, 119, 125.
Castle v. Womble (1894), 19 L. D. 455, §§ 95, 336.
Castro v. Barry (1889), 79 Cal. 443; 21 Pac. Rep. 946, § 754.
Castro v. Hendricks (1859), 23 How. 438; L. ed. 16; 576, § 123.
Catholic Bishop of Nesqually v. Gibbon (1895), 158 U. S. 155; L. ed. 39; 931, § 665.
Catron v. Lewishon (1896), 23 L. D. 20, § 759.
Catron v. Old (1897, Colo.), 48 Pac. 687, §§ 584, 593, 615.
Cavanah, In re (1880), 8 C. L. O. 5, § 671.
Cayuga Lode (1887), 5 L. D. 703; 14 C. L. O. 162, § 338.
Central Pac. R. R. Co. v. Mammoth B. G. (1874), 1 C. L. O. 134, § 155.
Central Pac. R. R. Co. v. Valentine (1890), 11 L. D. 238, § 155.
Chadwick v. Tatem (1890), 9 Mont. 354; 23 Pac. 729, § 543.
Chamberlain v. Bell (1857), 7 Cal. 292; 68 Am. Dec. 260, § 392.
Chambers v. Harrington (1884), 111 U. S. 350; L. ed. 28; 452, §§ 45, 56, 192, 306, 415, 539, 542, 624, 630, 631, 673, 748, 754.
Chambers v. Jones (1895), 17 Mont. 156; 42 Pac. 738, §§ 170, 175.
Chambers v. Jones (1895), 17 Mont. 156; 42 Pac. 758, § 777.
Chambers v. Pitts (1876), 3 C. L. O. 162, § 737.
Champion Min. Co. (1886), 4 L. D. 362, § 670.
Champion Min. Co. v. Consolidated Wyoming Co. (1888), 75 Cal. 78; 16 Pac. 513; 16 Morr. 145, §§ 583, 614, 730, 742, 777, 783.
Chandler v. State of California (1896), L. Dept. Oct. 27, 1896, §§ 138, 422.
Chapman v. Quinn (1880), 56 Cal. 266, §§ 472, 662.
Chapman v. Toy Long (1876), 4 Saw. 23; 5 Fed. Cases 497; 1 Morr. 497, §§ 218, 329, 542, 872.
Chappell v. Waterworth (1894), 155 U. S. 102; L. ed. 39; 85, § 750.
Charles v. Eshleman (1879), 5 Colo. 107; 2 Morr. 65, §§ 790, 791, 796, 801.

Charless v. Rankin (1856), 22 Mo. 566; 66 Am. Dec. 642, § 833.
Chartiers Black Coal Co. v. Mellon (1893), 152 Pa. St. 286; 34 Am. St. Rep. 645; 25 Atl. Rep. 597, §§ 812, 827.
Chase v. Savage (1866), 2 Nev. 9; 9 Morr. 476, § 790.
Cheeney v. Nebraska & C. Stone Co. (1890), 41 Fed. 740, § 868.
Cherokee Nation v. Georgia (1831), 5 Pet. 1; L. ed. 8; 25, § 181.
Cheseman v. Hart (1890), 42 Fed.98; 12 Morr. 263, §§ 381, 551, 615. 866.
Cheseman v. Shreeve (1889), 37 Fed. 36; 16 Morr. 79, §§ 615, 866, 872.
Cheseman v. Shreeve (1889), 40 Fed. 787, §§ 282, 290, 293, 337, 392. 398, 615, 868.
Chessman's Placer (1883), 2 L. D. 774, §§ 629, 631.
Chicago v. Hunerbein (1877), 85 Ill. 594; 28 Am. Rep. 626, § 844.
Chicago v. North Western R. R. Co. v. Whitton (1872), 13 Wall. 270; L. ed. 20; 571, § 226.
Chicago Q. M. Co. v. Oliver (1888), 75 Cal. 194; 16 Pac. 780, § 161.
Chief Moses Indian Reservation (1882), 9 C. L. O. 189, § 185.
Childs v. Kansas City Ry. Co. (1891, Mo.), 17 S. W. Rep. 954, § 790.
Chollar, Potosi and Bullion M. Co. v. Julia G. & S. M. Co. (1873), Copp's Min. Lands, 93; Copp's Min. Dec. 101, § 730.
Chouteau v. Eckhart (1844), 2 How. 344; L. ed. 11; 343, § 116.
Chung Kee v. Davidson (1894), 102 Cal. 188; 36 Pac. 519, § 799.
Churchill v. Anderson (1878), 53 Cal. 212, § 143.
City of South Bend v. Paxon (1879), 67 Ind. 228, § 844.
City Rock and Utah v. Pitts (1874), 1 C. L. O. 146, §§ 227, 684, 734. 737.
Clark v. American Flag (1879), 7 C. L. O. 5, § 632.
Clark v. Ervin (1893), 16 L. D. 122, §§ 210, 421.
Clark v. Ervin, (on review), (1893), 17 L. D. 550, § 210.
Clark v. Vermont & C. R. R. Co. (1855), 28 Vt. 103, § 813.
Clary v. Hazlitt (1885), 67 Cal. 286; 7 Pac. 701, §§ 125, 413.
Clegg v. Bearden (1848), 12 Q. B. 576; 5 Morr. Min. Rep. 88, § 807.
Cleghorn v. Bird (1886), 4 L. D. 478, § 207.
Clifton Iron Co. v. Dye (1888), 87 Ala. 468; So. Rep. 192, § 842.
Clipper Min. Co., In re (1896), 22 L. D. 527, §§ 721, 759.
Clute v. Carr (1866), 20 Wis. 531; 91 Am. Dec. 442, § 860.
Coal Creek M. & M. Co. v. Moses (1885), 15 Lea, 300; 54 Am. Rep. 415; 15 Morr. 544, § 868.
Cobb v. Fisher (1876), 121 Mass. 169, § 860.
Coffee v. Emigh (1890), 15 Colo. 184; 25 Pac. 83, § 558.
Coffin v. Left Hand Ditch Co. (1882), 6 Colo. 443, § 838.
Cole v. Markley (1883), 2 L. D. 847, §§ 106, 513, 515.
Coleman, In re (1874), 1 C. L. O. 34, § 631.
Coleman v. Chadwick (1875), 80 Pa. St. 81, §§ 814, 818.
Coleman v. Coleman (1852), 19 Pa. St. 100; 11 Morr. 183; 57 Am. Dec. 641, § 792.
Coleman v. Coleman (1858), 19 Pa. St. 100; 57 Am. Dec. 641; 11 Morr. 183, § 535.

Coleman v. Curtis (1892), 12 Mont. 301; 30 Pac. 266, §§ 635, 636.
Coleman's Appeal (1869), 62 Pa. 252; 14 Morr. 221, § 792.
Collins v. Bartlett (1872), 44 Cal. 371, § 409.
Collins v. Bubb (1896), 73 Fed. 735, § 184.
Colman v. Clements (1863), 23 Cal. 245; 5 Morr. 247, §§ 271, 643, 645.
Colorado Cent. C. M. Co. v. Turck (1892), 50 Fed. 888, §§ 364, 367, 610, 611.
Colorado Cent. Con. M. Co. v. Turck (1893), 54 Fed. 262, § 364.
Colorado Cent. Cons. M. Co. v. Turck (1895), 70 Fed. 294, §§ 364, 367, 611, 868.
Colorado Coal and Iron Co. v. United States (1887), 123 U. S. 307; L. ed. 31; 182, §§ 94, 127, 142, 176, 209, 496, 784.
Colorado E. Railway Co. v. Union Pac. R. R. Co. (1890), 41 Fed. 293, § 256.
Colton, In re Jos. L. (1890), 10 L. D. 422, § 507.
Columbus Hocking Coal & Iron Co. v. Tucker (1891), 48 Oh. St. 41; 29 Am. St. Rep. 528; 26 N. E. Rep. 630, §§ 843, 840.
Colvin v. Baker & Johnson (1848), 2 Barb. 206, § 540.
Commrs. of Kings County v. Alexander (1886), 5 L. D. 126, § 496.
Conant v. Smith (1826), 1 Aikens (Vt.), 67; 11 Morr. 199; 15 Am. Dec. 669, § 792.
Condon v. Mammoth M. Co. (on review), (1892), 15 L. D. 330, § 685.
Congdon v. Olds (1896), 18 Mont. 487; 46 Pac. 261, §§ 796, 801.
Conlin v. Kelly (1891), 12 L. D. 1, §§ 97, 158, 210, 421.
Conner v. Terry (1892), 15 L. D. 310, § 501.
Consolidated Channel Co. v. C. P. R. R. (1876), 51 Cal. 269; 5 Morr. 438, § 263.
Consolidated Coal Co. of St. Louis v. Peers (1894), 150 Ill. 344; 37 N. E. 937, § 861.
Consolidated Rep. Min. Co. v. Lebanon (1886), 9 Colo. 345; 12 Pac. 212; 15 Morr. 490, § 623.
Consolidated Wyoming M. Co. v. Champion M. Co. (1894), 63 Fed. 540, §§ 294, 318, 551, 574, 576, 591, 614, 615, 773, 780, 866.
Continental Divide Min. Co. v. Bliley (1896, Colo.), 46 Pac. 633, § 800.
Continental G. & S. M. Co. v. Gage (1890), 10 L. D. 534, §§ 632, 679.
Contra Costa R. R. v. Moss (1863), 23 Cal. 323, § 256.
Cook v. Stearns (1814), 11 Mass. 534, § 869.
Cornelius v. Kessel (1888), 128 U. S. 456; L. ed. 32; 482, §§ 208, 662, 771, 772.
Corning Tunnel v. Pell (1878), 4 Colo. 507; 14 Morr. 612, §§ 473, 475, 484, 725.
Corning Tunnel M. & R. Co. v. Pell (1876), 3 C. L. O. 130, §§ 475, 490.
Cornwall v. Culver (1860), 16 Cal. 423, § 123.
Coster v. Tide Water Co. (1896), 18 N. J. Eq. 54, § 254.
County of Yuba v. Cloke (1889), 79 Cal. 239, § 889.
Courtnay v. Turner (1877), 12 Nev. 345, § 233.
Cowan v. Duke of Buccleuch (1876), 2 App. Cas. 344, § 839.

Cowell v. Lammers (1884), 10 Saw. 246; 21 Fed. 200, §§ 106, 107, 126, 127, 142, 156, 161, 207, 217.
Cox v. McGarrahan (1870), 9 Wall. 298; L. ed. 19; 579, §§ 208, 438.
Cox v. Mathews (1872), 1 Vent. 237, § 833.
Craig v. Leitensdorfer (1887), 123 U. S. 189; L. ed. 31; 114, § 660.
Craig v. Radford (1818), 3 Wheat. 594; L. ed. 4; 467, § 232.
Craig v. Thompson (1887), 10 Colo. 517; 16 Pac. 25, §§ 330, 346, 390, 398.
Crane v. Winsor (1877), 2 Utah, 248; 11 Morr. 69, § 841.
Craw v. Wilson (1895, Nev.), 40 Pac. 1076, § 797.
Crest v. Jack (1834), 3 Watts (Penn., 238; 27 Am. Dec. 353, § 790.
Creswell M. Co. v. Johnson (1889), 8 L. D. 440; 15 C. L. O. 24, § 94.
Croesus Mining M. & S. Co. v. Colo. Land & M. Co. (1884), 19 Fed. 78, §§ 232, 233, 373.
Cronin v. Bear Creek G. M. Co. (1893, Idaho), 32 Pac. 204, § 754.
Crossman v. Pendery (1881), 8 Fed. 693; 2 McCrary, 139; 4 Morr. 431, §§ 335, 339.
Crow Indian Reservation (1879), Copp's Min. Lands, 236, § 184.
Crutsinger v. Catron (1848), 10 Humph. 24, § 542.
Cullacott v. Cash G. &. S. M. Co. (1884), 8 Colo. 179; 6 Pac. 211; 15 Morr. 392, § 382.
Cullen v. Rich (14 Geo. II) Bull, N. P. 102; 2 Str. 1142, sub nom. Rich v. Johnson, § 9.
Cunningham, In re P. G. (1883), 10 C. L. O. 206, § 728.
Currie v. State of California (1895), 21 L. D. 134, § 197.
Curtis v. La Grande Water Co. (1890), 20 Ore. 34; 23 Pac. 808, § 838.
Cutting v. Reininghaus (1888), 7 L. D. 265, § 94.
Cypress Millsite (1888), 6 L. D. 706, §§ 524, 708.

Dahl v. Raunheim (1889), 132 U. S. 260; L. ed. 33; 324; 16 Morr. 214, §§ 107, 126, 161, 177, 413, 720, 742.
Dahl v. Montana C. Co. (1889), 132 U. S. 264; L. ed. 33; 325, §§ 107, 226.
Dall v. Confidence S. M. Co. (1868), 3 Nev. 531; 93 Am. Dec. 419; 11 Morr. 214, §§ 535, 792.
Dand v. Kingscote (1840), 6 M. & W. 174, § 813.
Daney G. & S. M. Co. v. Sapphire (1874), 2 C. L. O. 66, § 679.
Darger v. Le Sieuer (1892), 8 Utah, 160; 30 Pac. 363, § 379.
Darger v. Le Sieuer (1893), 9 Utah, 192; 93 Pac. 701, § 379.
Dargin v. Koch (1895), 20 L. D. 384, § 208.
Dark v. Johnson (1867), 55 Pa. St. 164; 93 Am. Dec. 732; 9 Morr. 283, § 860.
Dartt, In re (1879), 5 C. L. O. 178, § 142.
Darvill v. Roper (1855), 3 Drewry, 294; 10 Morr. 406, § 88.
Daugherty v. Marcum (1859), 3 Head, 323, § 542.
Davidson v. Bordeaux (1895), 15 Mont. 245; 38 Pac. 1075, §§ 336, 636.
Davis v. Getchell (1862), 50 Me. 602; 79 Am. Dec. 641, § 840.

Davis' Administrator v. Weibbold (1891), 139 U. S. 507; L. ed. 35; 238, §§ 80, 94, 127, 142, 170, 171, 175, 176, 177, 207, 336, 438, 609, 777.
Davis v. Butler (1856), 6 Cal. 510; 1 Morr. 7, § 643.
Dayton Min. Co. v. Seawell (1876), 11 Nev. 394; 5 Morr. 424, §§ 258, 264.
Dean v. Thwaite (1855), 21 Beav. 621; 1 Morr. 77, § 867.
Dearden, In re (1890), 11 L. D. 351, § 501.
Dech's Appeal (1868), 57 Pa. St. 467, § 790.
Decker v. Howell (1872), 42 Cal. 636; 11 Morr. 492, §§ 799, 801.
Deffeback v. Hawke (1885), 115 U. S. 392; L. ed. 29; 423, §§ 47, 62, 86, 94, 125, 142, 167, 169, 170, 171, 176, 208, 209, 216, 336, 409, 637, 771, 783.
De Garcia v. Eaton (1896), 22 L. D. 16, § 757.
De Haro v. United States (1867), 5 Wall. 599; L. ed. 18; 681, § 860.
De la Croix v. Chamberlain (1827), 12 Wheat. 599; L. ed. 6; 741, § 116.
Delaney, In re (1893), 17 L. D. 120, §§ 97, 210, 421.
Delaware etc. R. R. Co. v. Sanderson (1885), 109 Pa. St. 583; 58 Am. Rep. 1 Atl. Rep. 394; 743, §§ 812, 861.
Deliapiazza v. Foley (1896), 112 Cal. 380; 44 Pac. 727, § 891.
Del Monte Min. & M. Co. v. New York L. C. M. Co. (1895), 66 Fed. 212, §§ 591, 592.
De Long v. Hill (1882), 9 C. L. O. 114, § 677.
De Merle v. Mathews (1864), 26 Cal. 455, § 233.
Denison and Willits (1884), 11 C. L. O. 261, § 661.
De Noon v. Morrison (1890), 83 Cal. 163; 23 Pac. 374; 16 Morr. 33, §§ 630, 631.
Deno v. Griffin (1889), 20 Nev. 249; 20 Pac. 308, §§ 208, 604, 609, 637, 737, 759, 771, 772, 783.
Denys v. Shuckburgh (1840), 4 Y. & C. Eq. Ex. 42, §§ 790, 867.
Depuy v. Williams (1864), 26 Cal. 310; 5 Morr. 251, §§ 274, 623.
Derry v. Ross (1881), 5 Colo. 295; 1 Morr. 1, §§ 643, 872.
Desloge v. Pearce (1866), 38 Mo. 588; 9 Morr. 247, § 869.
Devereux v. Hunter (1890), 11 L. D. 214, § 679.
Dewey, In re (1882), 9 C. L. O. 51, §§ 97, 138, 422.
Dickinson v. Capen (1892), 14 L. D. 426, § 496.
Dieckman v. Good Return M. Co. (1887), 14 C. L. O. 237, § 735.
Dilling v. Murray (1855), 6 Ind. 324; 63 Am. Dec. 385, §§ 840.
Dillingham v. Fisher (1856), 5 Wis. 475, § 542.
Dillon v. Bayliss (1891), 11 Mont. 171; 27 Pac. 725, §§ 379, 383.
Dixon v. Caledonian & Glasgow Ry. Co. (1880), L. R. 5 App. C. 820, § 92.
Dixon v. White (1883), 8 L. R. App. Cases, 833, § 827.
Dobbs Placer (1883), 1 L. D. 567, § 106.
Dodge, In re (1879), 6 C. L. O. 122, § 671.
Dodge v. Davis (1892), 85 Iowa, 77; 52 N. W. Rep. 2, § 790.
Dodge v. Marden (1879), 7 Ore. 456; 1 Morr. 63, §§ 643, 644.
Doe ex dem. Governeurs Heirs v. Robertson (1826), 11 Wheat. 332; L. ed. 488, §§ 232, 233.

Doe v. Sanger (1890), 83 Cal. 203; 23 Pac. 365, §§ 364, 365, 396, 582, 671.
Doe v. Tyler Min. Co. (1887), 73 Cal. 21; 14 Pac. 371, §§ 365, 373.
Doe v. Waterloo Min. Co. (1890), 43 Fed. 219, § 754.
Doe v. Waterloo Min. Co. (1893), 54 Fed. 935, §§ 290, 365, 372, 396, 551, 552, 582, 612, 671, 866.
Doe v. Waterloo Min. Co. (1893), 55 Fed. 11, §§ 339, 379.
Doe v. Waterloo Min. Co. (C. C. A. 1895), 70 Fed. 455, §§ 226, 272, 339, 355, 372, 373, 419, 643, 749.
Doherty v. Morris (1888), 11 Colo. 12; 16 Pac. 911, §§ 406, 728.
Doherty v. Morris (1891), 18 Colo. 105; 28 Pac. 85, § 629.
Dolles v. Hamberg Cons. Min. Co. (1896), 23 L. D. 267, §§ 630, 633.
Doloret v. Rothschild (1824), 1 Sim. & Stu. 590, § 859.
Donahue v. Meister (1891), 88 Cal. 121; 25 Pac. 1096, §§ 271, 356, 371.
Doolan v. Carr (1887), 125 U. S. 618; L. ed. 31; 844, § 123.
Doran v. C. P. R. R. (1864), 24 Cal. 245, §§ 22, 153.
Dougherty v. Chesnutt (1887), 2 Pickle 1; 5, S. W. Rep. 444, § 868.
Dougherty v. Creary (1866), 30 Cal. 291; 1 Morr. 35, §§ 426, 790, 797, 809.
Dower v. Richards (1887), 73 Cal. 477; 15 Pac. 105, §§ 415, 531.
Dower v. Richards (1894), 151 U. S. 658; L. ed. 38; 305, §§ 176, 336.
Downey v. Rogers (1883), 2 L. D. 707, §§ 138, 422, 756.
Downs, In re (1888), 7 L. D. 71; 15 C. L. O. 147, §§ 94, 631.
Drake v. Earhart (1890), 2 Idaho, 716; 23 Pac. 541, §§ 838, 841.
Drake v. Lady Ensly Coal I. & K. Co. (1893), 102 Ala. 501; 14 So. Rep. 749, § 840.
Dreyfus v. Badger (1895), 108 Cal. 58, § 161.
Driscoll v. Dunwoody (1888), 7 Mont. 394; 16 Pac. 726, § 866.
Drummond v. Long (1887), 9 Colo. 538; 13 Pac. 543, §§ 371, 379.
Duchess of Cleveland v. Meyrick (1867), 16 W. R. 104; 37 L. J. Ch. 125, § 92.
Ducie v. Ford (1888), 8 Mont. 233; 19 Pac. 414, §§ 233, 754.
Dugdale v. Robertson (1857), 3 Kay & Johnson, 795; 13 Morr. 662, § 818.
Duggan v. Davey (1886), 4 Dak. 110; 26 N. W. Rep. 887, §§ 282, 306, 309, 310, 317, 318, 551, 866.
Dughi v. Harkins (1883), 2 L. D. 721, §§ 94, 106, 207, 438, 496.
Dunham v. Kirkpatrick (1882), 101 Pa. St. 36; 47 Am. Rep. 696, §§ 93, 138, 422.
Dunlap v. Pattison (1895, Idaho), 42 Pac. 504, § 331.
Dunluce Placer Mine (1888), 6 L. D. 761, § 424.
Du Prat v. James (1884), 65 Cal. 555; 4 Pac. 563; 15 Morr. 341, §§ 218, 373, 405, 624, 629, 645.
Durango L. & C. Co., In re (1894), 18 L. D. 382, § 501.
Durant v. Comegys (1891), 2 Idaho, 936; 28 Pac. 425, § 859.
Duryea v. Boucher (1885), 67 Cal. 141; 7 Pac. 421, § 381.
Duryea v. Burt (1865), 28 Cal. 569; 11 Morr. 395, §§ 797, 800, 801, 802.

Dutch Flat W. Co. v. Mooney (1859), 12 Cal. 534; 6 Morr. 303, §§ 268, § 790.

Eagle Salt Works (1877), 5 C. L. O. 4, §§ 97, 513.
Earl of Rosse v. Wainman (1845), 14 M. & W. 859; 10 Morr. 398, § 92.
Early v. Friend (1860), 16 Gratt, 21; 14 Morr. 271; 78 Am. Dec. 649, .. 790.
East Jersey Iron Co. v. Wright (1880), 32 N. J. Eq. 248; 9 Morr. 332, § 860.
East Lake Land Co. v. Brown (1894), 155 U. S. 488; L. ed. 39; 233, § 750.
Eberle v. Carmichael (1895, New Mex.), 42 Pac. 95, §§ 249, 630, 631.
Eccl. Commrs. v. N. E. R. Co. (1877), L. R. 4 Ch. D. 845; 12 Morr. 609, §§ 867, 868.
Eclipse G. & S. M. Co. v. Spring (1881), 59 Cal. 304; §§ 58, 350, 560, 567, 604, 726.
Eclipse Mill Site (1896), 22 L. D. 496, §§ 523, 708.
Edgewood R. R's Appeal (1875), 79 Pa. St. 257; 5 Morr. 406, §§ 256, 261.
Edwards v. Allouez M. Co. (1878), 38 Mich. 46; 31 Am. Rep. 301; 7 Morr. 577, § 842.
Ege v. Kille (1877), 84 Pa. St. 333; 10 Morr. 212, § 868.
Eilers v. Boatman (1884), 3 Utah, 159; 2 Pac. 71; 15 Morr. 462, §§ 218, 367, 373.
Eilers v. Boatman (1884), 111 U. S. 356; L. ed. 28; 454; 15 Morr. 471, §§ 373, 383.
Eiseman, In re (1890), 10 L. D. 539, § 501.
Elder v. Lykens Valley Coal Co. (1893), 157 Pa. St. 490, § 840.
Elder's Administrator v. Horseshoe Min. & M. Co. (1897, S. Dak.), 70 N. W. Rep. 1060.
Electro-Magnetic M. & D. Co. v. Van Auken (1887), 9 Colo. 204; 11 Pac. Rep. 80, § 646.
Elk v. Wilkins (1884), 112 U. S. 94; L. ed. 28; 643, § 224.
Ellet v. Campbell (1893), 18 Colo. 510; 33 Pac. 521, §§ 481, 482, 484, 723.
Elliott v. Fitchburg R. R. (1852), 10 Cush. 191, § 840.
Elliott v. Whitmore (1890), 8 Utah, 253; 24 Pac. 673, § 838.
Emily Lode (1887), 6 L. D. 220; 14 C. L. O. 200, §§ 629, 631.
Emperor Wilhelm Lode (1887), 5 L. D. 685, § 677.
Empey, In re (1883), 10 C. L. O. 102, §§ 362, 671.
Empire G. M. Co. v. Bonanza G. M. Co. (1885), 67 Cal. 406; 7 Pac. 810, § 868.
English v. Johnson (1860), 17 Cal. 108; 12 Morr. 202, §§ 216, 272, 274, 537, 631.
Enterprise Min. Co. v. Rico Aspen Cons. Min. Co. (1895), 66 Fed. 200, §§ 473, 481, 488, 558, 725.
Enterprise Min. Co. v. Rico Aspen Cons. Co. M. Co. (1897), 167 U. S. 108, § 725.

Equator Min. & Sm. Co. (1875), 2 C. L. O. 114, §§ 718, 738.
Erhardt v. Boaro (1881), 8 Fed. 692; 4 Morr. 432, §§ 339, 634.
Erhardt v. Boaro (1885), 113 U. S. 537; L. ed. 28, 1116, § 872.
§§ 268, 335, 336, 339, 355, 356, 362, 372, 373, 379, 405, 542, 634.
Erhardt v. Boaro (1885), 113 U. S. 527; L. ed. 28; 1113; 15 Morr. 472,
Erie Lode v. Cameron Lode (1890), 10 L. D. 655, § 685.
Errington v. Met. Ry. Co. (1882), L. R. 19 Ch. D. 559, § 92.
Esler v. Townsite of Cooke (1885), 4 L. D. 212, §§ 171, 723.
Esmond v. Chew (1860), 15 Cal. 137; 5 Morr. 175, §§ 843, 841.
Esperance Min. Co. (1884), 10 C. L. O. 338, § 448.
Etling v. Potter (1893), 17 L. D. 424, §§ 106, 335.
Eureka M. Co. v. Jenny Lind M. C. (1873), C. M. Dec. 169, § 690.
Eureka Min. Co. v. Pioneer Cons. Min. Co. (1881), 8 C. L. O. 106, § 730.
Eureka Cons. M. Co. v. Richmond M. Co. (1877), 4 Sawyer, 302; Fed. Cases, No. 4548; 9 Morr. 578, §§ 43, 58, 282, 289, 292, 350, 364, 365, 567, 576, 577, 604, 609, 742, 783.
Eureka Springs v. Conant (1881), 8 C. L. O. 3, § 171.
Evans v. Consumers' Gas Trust Co. (1891, Ind.), 29 N. E. 398, § 861.
Evans v. Rendall (1876), 3 C. L. O. 2, § 765.

Fall v. Goodtitle (1826), Breese (Ill.), 201, § 773.
Fairbanks v. Woodhouse (1856), 6 Cal. 434; 12 Morr. 86, § 272.
Fairchild v. Fairchild (1887, Penn.), 9 Atl. Rep. 255, § 861.
Fairfax v. Hunter (1813), 7 Cranch, 603; L. ed. 3; 453, §§ 232, 233.
Farnum v. Platt (1829), 8 Pick. (Mass.) 339; 19 Am. Dec. 330; 8 Morr. 330, § 813.
Farrand v. Gleason (1884), 56 Vt. 633, § 790.
Faulds v. Yates (1870), 57 Ill. 416; 11 Am. Rep. 24; 3 Morr. 551, § 802.
Faxon v. Barnard (1880), 4 Fed. 702; 9 Morr. 515, §§ 218, 322, 330, 379, 390.
Felger v. Coward (1868), 35 Cal. 650; 5 Morr. 273, §§ 270, 642.
Fenn v. Holme (1858), 21 Howard, 481; L. ed. 16, 198, § 773.
Ferguson v. Hanson (1895), 21 L. D. 336, §§ 438, 632, 673, 677.
Ferguson v. Neville (1882), 61 Cal. 356, § 233.
Ferrand v. Marshall (1855), 21 Barb. 400, § 832.
Ferrell v. Hoge (on review), (1894), 19 L. D. 568, §§ 432, 438.
Ferrell v. Hoge (on review), (1894), 19 L. D. 568, §§ 432, 438.
Ferris v. Coover (1858), 10 Cal. 589, §§ 123, 642.
Field v. Beaumont (1818), 1 Swanst. 204; 7 Morr. 257, § 790.
Field v. Gray (1881, Ariz.), 25 Pac. 93, § 339.
Figg v. Handley (1877), 52 Cal. 244, § 208.
Figg v. Hensley (1877), 52 Cal. 209, § 637.
Filmore v. Reithman (1881), 6 Colo. 120, § 792.
Findlay v. Smith (1818), 6 Munf. (Va.), 134, 8 Am. Dec. 733; 13 Morr. 182, § 789.
Finney v. Berger (1875), 50 Cal. 248, § 142.

Firmstone v. Wheeley (1844), 2 Dowling & L. (Q. B.) 203, 12 Morr. 76, § 807.
First Nat'l Bank v. Bissell (1880), 4 Fed. 694; 2 McCrary, 73, §§ 791, 800.
First National Bank v. County of Yankton (1880), 101 U. S. 129; L. ed. 25; 1046, § 242.
Fishbourne v. Hamilton (1890), L. R. 25 Ir. 483, § 92.
Fitzgerald v. Clark (1895), 17 Mont. 100; 42 Pac. 273, §§ 591, 868.
Flagstaff Case (1871), Copp's Min. Dec. p. 61, §§ 59, 60.
Flagstaff S. M. Co. v. Tarbet (1879), 98 U. S. 463; L. ed. 25; 253; 9 Morr. 607, §§ 60, 318, 364, 365, 367, 586, 591, 610.
Flaherty v. Gwinn (1877), 1 Dak. 509; 12 Morr. 605, §§ 268, 270, 272, 274.
Flavin v. Mattingly (1888), 8 Mont. 242; 19 Pac. 384, §§ 381, 383.
Fleetwood Lode (1891), 12 L. D. 604, §§ 142, 144.
Fletcher v. Peck (1810), 6 Cranch. 87; L. ed. 3; 87, § 181.
Fletcher v. Rylands (1866), 1 L. R. Ex. 265, § 808.
Fletcher v. Smith (1877), 2 L. R. App. Cas. 781; 5 Morr. 78, § 808.
Flick v. Gold Hill Mining Co. (1889), 8 Mont. 208; 20 Pac. 807, §§ 227, 392.
Foley v. Wyeth (1861), 2 Allen, 131; 79 Am. Dec. 771, § 832.
Folsom, In re (1890), 16 C. L. O. 270, § 630.
Foote, In re (1883), 2 L. D. 773, § 670.
Foote v. National Min. Co. (1876), 2 Mont. 403; 9 Morr. 605, §§ 294, 309, 346.
Forbes v. Gracey (1877), 94 U. S. 762; L. ed. 24; 313; 14 Morr. 183, §§ 535, 538, 642.
Ford v. Knapp (1884), 31 Hun, 522, § 790.
Forsyth v. Wells (1861), 41 Pa. St. 291; 80 Am. Dec. 617; 14 Morr. 493, § 868.
Fort Maginnis (1881), 1 L. D. 552; 8 C. L. O. 137, § 191.
Foster, In re (1883), 2 L. D. 739; 10 C. L. O. 341, § 507.
Four Twenty Min. Co. v. Bullion Min. Co. (1876), 3 Saw. 634; 11 Morr. 698, §§ 688, 754, 792.
Four Twenty M. Co. v. Bullion Min. Co. (1893), 2 C. L. O. 5, § 755.
Four Twenty Min. Co. v. Bullion M. Co. (1874), 9 Nev. 240; 1 Morr. 114, § 750.
Fox, In re (1884), 2 L. D. 696, § 679.
France v. Connor (1891), 3 Wyo. 445; 27 Pac. 569, § 544.
France v. Connor (1896), 161 U. S. 65; L. ed. 40; 619, § 544.
Francoeur v. Newhouse (1889), 40 Fed. 618, § 160.
Francoeur v. Newhouse (1890), 43 Fed. 293, § 154.
Frank G. & S. M. Co. v. Larimer M. & S. Co. (1881), 8 Fed. 724; 1 Morr. 150, § 748.
Franklin Coal Co. v. McMillan (1878), 49 Md. 549; 33 Am. Rep. 280; 10 Morr. 224, § 868.
Freeman, In re (1879), 7 C. L. O. 4, § 522.

Frees v. State of Colorado (1896), 22 L. D. 510, § 496.
Freezer v. Sweeney (1889), 8 Mont. 508; 21 Pac. 20, §§ 96, 97, 210, 273, 421, 454.
Fremont v. Flower (1861), 17 Cal. 199; 12 Morr. 418, §§ 80, 114, 115, 125, 126, 609.
Fremont v. United States (1855), 58 U. S. 442; L. ed. 15; 248, § 125.
French v. Brewer (1861), 3 Wall. Jr. 346; 9 Fed. Cas. 774; 11 Morr. 108, § 175.
French v. Fyan (1876), 93 U. S. 169; L. ed. 23; 812; § 169.
French v. Lancaster (1880), 2 Dak. 346; 47 N. W. Rep. 395, § 184.
Frisbie v. Whitney (1870), 9 Wall. 187; L. ed. 19; 668, §§ 192, 205, 216, 542.
Fuhr v. Dean (1857), 26 Mo. 116; 69 Am. Dec. 484; 6 Morr. 216, § 860.
Fuller v. Harris (1887), 29 Fed. 814, § 273.
Fuller v. Swan River (1888), 12 Colo. 12; 19 Pac. 836; 16 Morr. 252, § 843.
Funk v. Haldeman (1866), 53 Pa. St. 229; 7 Morr. 203, §§ 93, 860.
Funk v. Sterrett (1881), 59 Cal. 613, §§ 373, 754, 755.

Gaines v. Thompson (1869), 7 Wall. 347; L. ed. 19; 62, §§ 208, 438.
Gale v. Best (1889), 78 Cal. 235; 20 Pac. 550, §§ 107, 126, 161.
Galt v. Galloway (1830), 4 Pet. 332; L. ed. 7; 876, § 783.
Gamer v. Glenn (1889), 8 Mont. 371; 20 Pac. 654, §§ 381, 383.
Ganssen v. Morton (1830), 10 B. & C. 731, § 809.
Garfield Mining & M. Co. v. Hammer (1889), 6 Mont. 53; 8 Pac. 153, §§ 227, 329, 371, 379, 643.
Garland v. Towne (1874), 55 N. H. 55; 20 Am. Rep. 164, § 908.
Garthe v. Hart (1887), 73 Cal. 541; 15 Pac. 93; 15 Morr. 492, §§ 218, 270, 322, 363, 642.
Gary v. Todd (1894), 18 L. L. 58, §§ 97, 425.
Gatewood v. McLaughlin (1853), 23 Cal. 178; 13 Morr. 387, § 270.
Gaved v. Martyn (1865), 19 C. B., N. S., 732, § 839.
Gary v. Todd (1894), 19 L. D. 475, §§ 97, 425.
Gelcich v. Moriarity (1878), 53 Cal. 217; 9 Morr. 498, § 373.
Gentry, In re (1882), 9 C. L. O. 5, § 158.
George, In re (1875), 2 C. L. O. 114, § 521.
Gerhauser, In re (1888), 7 L. D. 390, § 672.
German Ins. Co. v. Hayden (1895), 21 Colo. 127; 40 Pac. 453, § 208.
Gesner v. Cairns (1853), 2 Allen N. B. 595, §§ 97, 860.
Gesner v. Gas Co. (1853), 1 James, N. S., 72, § 97.
Gibbs v. Guild (1882), 9 Q. B. D. 59, § 867.
Gibson, In re (1895), 21 L. D. 219, § 679.
Gibson v. Chouteau (1872), 13 Wall. 92; L. ed. 20; 534, §§ 175, 216.
Gibson v. Puchta (1867), 33 Cal. 310; 12 Morr. 227, § 537.
Gibson v. Tyson (1836), 5 Watts, 35; 13 Morr. 72, § 93.
Gill v. Weston (1885), 110 Pa. St. 313, §§ 93, 97, 138, 422.
Gillan v. Hutchinson (1860), 16 Cal. 154; 2 Morr. 317, §§ 218, 537.
Gillett v. Gaffney (1877), 3 Colo. 351, § 702.

Gillett v. Treganza (1858), 6 Wis. 343, § 800.
Gilmore v. Driscoll (1877), 122 Mass. 199; 23 Am. Rep. 312; 14 Morr. 37, §§ 832, 833.
Gilpin County M. Co. v. Drake (1886), 8 Colo. 586; 9 Pac. 787, §§ 371, 379.
Gilpin v. Sierra Nevada Cons. M. Co. (1890), 2 Idaho, 662; 23 Pac. 547, §§ 310, 872.
Girard v. Carson (1896), 22 Colo. 345; 44 Pac. 508, §§ 337, 338, 742, 755.
Gird v. Cal. Oil Co. (1894), 60 Fed. 531, §§ 97, 138, 271, 273, 350, 355, 356, 371, 373, 422, 450, 630, 631, 754, 755.
Glacier Mt. S. M. Co. v. Willis (1888), 127 U. S. 471; L. ed. 32; 173, §§ 45, 362, 481, 489.
Glasgow & S. W. Ry. Co. v. Bain (1893), 21 R. 134, § 92.
Gleason v. Martin White M. Co. See Gleeson v. Martin White Co.
Gleeson v. Martin White M. Co. (1878), 13 Nev. 442; 9 Morr. 529, §§ 71, 81, 271, 272, 273, 312, 329, 339, 350, 355, 371, 372, 373, 379, 383, 396.
Godfrey v. Beardsley (1841), 2 McLean, 412; Fed. Cases, No. 5497, § 181.
Gold Blossom Quartz Mine (1882), 2 L. D. 767; 11 C. L. O. 99, §§ 637, 742.
Golden Canal Co. v. Bright (1884), 8 Colo. 144; 6 Pac. 142, § 838.
Golden Fleece G. & S. M. Co. v. Cable Cons. G. & S. M. Co. (1877), 12 Nev. 312; 1 Morr. 120, §§ 45, 227, 233, 271, 272, 273, 339, 372, 373, 379, 392, 646, 750, 754, 755.
Golden Sun Min. Co. (1888), 6 L. D. 808; 15 C. L. O. 85, § 671.
Golden Terra M. Co. v. Mahler (1879 Dak.), 4 Morr. 390, §§ 184, 294, 330, 335, 336, 337.
Golden Terra M. Co. v. Smith (1881), 2 Dak. 377; 11 N. W. Rep. 98, § 184.
Gold Hill Quartz M. Co. v. Ish (1873), 5 Ore. 104; 11 Morr. 635, §§ 106, 192, 200, 539, 542.
Gold Hill v. Lee Mt. M. Co. (1889), 16 C. L. O. 110, §§ 681, 684.
Goldsmid v. Tunbridge Wells Imp. Co. (1866), L. R. 1 Ch. App. 349, § 842.
Gold Springs v. Denver City Millsite (1891), 13 L. D. 175, § 523.
Goldstein v. Juneau Townsite (1896), 23 L. D. 417, §§ 95, 170, 172.
Goller v. Fett (1866), 30 Cal. 481; 11 Morr. 171, §§ 270, 642, 868.
Gonu v. Russell (1879), 3 Mont. 358, §§ 371, 373, 408, 651.
Gonzales v. French (1896), 164 U. S. 338; L. ed., 41; 458, § 192.
Good Return P. M. Co. (1885), 4 L. D. 221, §§ 438, 630, 673, 686.
Goold v. Great West Coal Co. (1865), 2 De G. J. & S. 600, § 813.
Gore v. McBrayer (1861), 18 Cal. 582; 1 Morr. 645, §§ 270, 271, 331, 398, 858.
Gorlinski, In re (1895), 20 L. D. 283, § 661.
Gorman v. Alexander (1892), 2 S. Dak. 557; 51 N. W. Rep. 346, § 233.
Goveneurs Heirs v. Robertson (1826), 11 Wheat. 322; L. ed. 6; 488, §§ 232, 233.

Gowan v. Christie (1873), 5 Moak 114; 8 Morr. 688, § 861.
Gowdy v. Kismet M. Co. (1896), 22 L. D. 624, §§ 677, 742.
Graham v. Pierce (1869), 19 Gratt. 28; 100 Am. Dec. 658; 14 Morr. 308, § 790.
Grampian Lode (1882), 1 L. D. 544, §§ 646, 728.
Grand Dipper Lode (1883), 10 C. L. O. 240, § 671.
Grand View M. & S. Co. (1885), 3 L. D. 386, § 677.
Grant v. Oliver (1891), 91 Cal. 158; 27 Pac. 596, §§ 124, 207.
Gray v. Truby (1882), 6 Colo. 278, § 346.
Great Eastern M. Co. v. Esmeralda M. Co. (1883), 2 L. D. 704; 10 C. L. O. 192, § 679.
Great Falls Mfg. Co. v. Fernald (1867), 47 N. H. 444, § 257.
Great Western Lode (1887), 5 L. D. 510; 14 C. L. O. 27, §§ 690, 738.
Green v. Covillaud (1858), 10 Cal. 317; 70 Am. Dec. 725, § 859.
Green v. Gilbert (1880), 60 N. H. 144, § 840.
Gregory v. Pershbaker (1887), 73 Cal. 109; 14 Pac. 401; 15 Morr. 602, §§ 273, 290, 301, 330, 372, 373, 427, 438.
Griffin v. Fellows (1873), 32 P. F. Smith (Penn.), 114; 8 Morr. 657, § 93.
Grisar v. McDowell (1868), 6 Wall. 381; L. ed. 18; 863, § 190.
Gropper v. King (1882), 4 Mont. 367, § 271.
Ground Hog Lode v. Parole & Morning Star Lode (1889), 8 L. D. 430, § 738.
Grubb v. Bayard (1851), 2 Wall. Jr. 81; Fed. Cases No. 5849; 9 Morr. 199, § 869.
Grunsfeld, In re (1890), 10 L. D. 508, § 505.
Guest v. East Dean (1872), L. R. 7 Q. B. 334, § 9.
Gumbert v. Kilgore (1886), 6 Cent. Rep. (Pa.) 406, § 820.
Gunnison Crystal M. Co., In re (1884), 2 L. D. 722; 11 C. L. O. 70, § 679.
Gurnee, In re (1891), 13 L. D. 608, § 661.
Gwillim v. Donnellan (1885), 115 U. S. 45; L. ed. 29; 348; 15 Morr. 482, §§ 169, 192, 322, 337, 338, 364, 413, 539, 642, 741, 742, 755, 763, 765.

Hadden v. Collector (Barney), (1867), 5 Wall. 107; L. ed. 18; 518, § 491.
Haggin, In re (1884), 2 L. D. 755; 11 C. L. O. 102, § 520.
Hagland, In re (1882), 1 L. D. 591, §§ 338, 738.
Hahn v. United States (1883), 107 U. S. 402; L. ed. 27; 527, § 482.
Haldeman v. Bruckhart (1863), 45 Pa. St. 514; 84 Am. Dec. 511; 5 Morr. 108, § 814.
Hale, In re Alfred H. (1880), 7 C. L. O. 115, §§ 250, 632.
Hale & Norcross v. Storey County (1865), 1 Nev. 82; 14 Morr. 155, § 535.
Hale's Placer, In re (1885), 3 L. D. 536; 11 C. L. O. 67, §§ 629, 631.
Hallack v. Traiser (1890, Colo.), 46 Pac. 110, § 398.
Hall v. Arnott (1889), 80 Cal. 348; 22 Pac. 200, §§ 397, 398.

Hall v. Equator Min. & S. Co. (1879), Fed. Cas. No. 5931, §§ 553, 558, 583.
Hall v. Hale (1885), 8 Colo. 35; 8 Pac. 580, §§ 623, 632.
Hall v. Kearney (1893), 18 Colo. 505; 33 Pac. 373, § 631. 513, 514.
Hall v. Street (1884), 3 L. D. 40; 11 C. L. O. 146, §§ 679, 718.
Hall v. Litchfield (1876), Copp's Min. Lands, 333; 2 C. L. O. 179, §§
Hallowell, In re (1884), 2 L. D. 735, § 505.
Halsey v. Hewitt (1878), 5 C. L. O. 162, § 759.
Hamburg Min. Co. v. Stephenson (1883), 17 Nev. 449; 30 Pac. 1088, § 529.
Hamer v. Knowles (1861), 6 H. & N. 454, § 829.
Hamilton v. Anderson (1894), 19 L. D. 168, §§ 207, 496.
Hamilton v. Graham, L. R. (1871), 2 Sc. & D. 166, § 9.
Hamilton v. Southern Nev. G. & S. M. Co. (1887), 13 Saw. 113; 33 Fed. 562; 15 Morr. 314, §§ 208, 688, 713, 719, 742, 771, 773.
Hammer v. Garfield M. & M. Co. (1889), 130 U. S. 291; L. ed. 32; 964; 16 Morr. 125, §§ 227, 273, 274, 373, 379, 383, 636, 645, 754.
Hammond v. Foster (1882), 4 Mont. 421; 1 Pac. 757, § 218.
Hand G. M. Co. v. Parker (1877), 59 Ga. 419, § 250.
Hanley v. Wood (1819), 2 B. & A. 724; 9 Morr. 182, § 869.
Hanson v. Fletcher (1894), 10 Utah, 206; 37 Pac. 480, §§ 362, 383.
Hanson v. Gardner (1802), 7 Vesey Jr. 305, § 790.
Hanswirth v. Butcher (1882), 4 Mont. 260; 1 Pac. 714, §§ 330, 335, 362, 373.
Hardenbergh v. Bacon (1867), 33 Cal. 356; 1 Morr. 352, §§ 270, 642.
Hardin v. Jordan (1891), 140 U. S. 371; L. ed. 35; 428, § 175.
Hardt v. Liberty Hill Cons. M. & W. Co. (1886), 11 Saw. 611; 27 Fed. 788, §§ 843, 888.
Hargrave v. Cook (1895), 108 Cal. 72; 41 Pac. 18, § 828.
Hargrove v. Robertson (1892), 15 L. D. 499, § 521.
Harkness v. Burton (1874), 39 Iowa, 101; 9 Morr. 318, §§ 644, 860.
Harkness v. Underhill (1861), 1 Black. 316; L. ed. 17; 208, §§ 208, 662.
Harkrader v. Carroll (1896), 76 Fed. 474, §§ 643, 777.
Harlan v. Lehigh Coal Co. (1860), 35 Pa. 287; 8 Morr. 496, § 861.
Harley v. State (1867), 40 Ala. 689, § 232.
Harnish v. Wallace (1891), 13 L. D. 108, §§ 209, 496.
Harper, In re (1883), 16 L. D. 110, § 139.
Harriet Min. Co. v. Phoenix Min. Co. (1882), 9 C. L. O. 165, §§ 719, 757.
Harrington v. Chambers (1881), 3 Utah, 94; 1 Pac. 368, §§ 294, 336, 345, 631.
Harris v. Barnhart (1893), 97 Cal. 546; 32 Pac. 589, § 764.
Harris v. Equator M. & S. Co. (1881), 3 McCrary, 14; 8 Fed. 863; 12 Morr. 178, §§ 539, 688.
Harris v. Gillingham (1832), 6 N. H. 9, § 869.
Harris v. Hillegass (1880), 54 Cal. 463, § 858.

Harris v. Kellogg (1897, Cal.), 49 Pac. 708, §§ 754, 755.
Harris v. Lloyd (1891), 11 Mont. 390; 28 Am. St. Rep. 475; 28 Pac. 736, §§ 791, 796, 800.
Harris v. Ryding (1839), 5 Mees. & W. 60, §§ 818, 819.
Harsh, In re Albert F. (1883), 2 L. D. 706; 10 C. L. O. 207, § 735.
Hart v. Mayor (1832), 3 Paige, 214, § 790.
Hartford & Salisbury Ore Co. v. Miller (1874), 41 Conn. 112; 3 Morr. 353, § 791.
Hartman v. Smith (1887), 7 Mont. 19; 14 Pac. 648, §§ 520, 521, 523.
Hartwell v. Camman (1854), 10 N. J. Eq. 128; 64 Am. Dec. 448; 3 Morr. 229, §§ 93, 175, 812.
Harvey v. Ryan (1872), 42 Cal. 626; 4 Morr. 490, §§ 250, 271, 272, 301.
Hastings etc. R. R. v. Whitney (1889), 132 U. S. 357; L. ed. 33; 363, §§ 205, 208, 419, 666.
Hatfield v. Wallace (1841), 7 Mo. 112, § 542.
Hauck v. Tide Water Pipe Line Co. (1893), 153 Pa. St. 366; 34 Am. St. Rep. 710; 26 Atl. Rep. 644, § 840.
Hawes, In re (1886), 5 L. D. 224, § 501.
Hawke v. Deffeback (1885), 4 Dak. 20, § 170.
Hawkeye Placer v. Gray Eagle Placer (1892), 15 L. D. 45, § 737.
Hawkins v. Spokane Hydraulic Min. Co. (1893), 2 Idaho, 970; 33 Pac. 40, §§ 790, 800.
Hawley v. Clowes (1816), 2 Johns. Ch. 122, § 790.
Hawley Cons. Min. Co. v. Mennon M. Co. (1876), Sickles Min. Dec. 235; 2 C. L. O. 178, § 736.
Haws v. Victoria Copper Co. (1895), 160 U. S. 303; L. ed. 40; 436, §§ 273, 350.
Haydel v. Dufresne (1855), 17 How. 23; L. ed. 15; 115, § 660.
Hayes v. Waldron (1863), 44 N. H. 580, §§ 840, 842.
Haymes, In re (1880), 7 C. L. O. 130, § 632.
Hays v. Richardson (1829, Md.), 1 Gill. & J. 366, § 800.
Hays v. Steiger (1888), 76 Cal. 555; 18 Pac. 670, §§ 207, 208, 663, 666.
Hazen v. Essex Co. (1853), 12 Cush. 475, § 257.
Heard v. James (1873), 49 Miss. 236, § 868.
Heela Cons. Min. Co. (1892), 14 L. D. 11, §§ 520, 708.
Helm v. Chapman (1885), 66 Cal. 291; 5 Pac. 352, § 327.
Helmick, In re (1895), 20 L. D. 163, § 661.
Henderson v. Eason (1851), 17 Q. B. 701; § 790.
Hendricks v. Spring Valley M. & I. Co. (1881), 58 Cal. 190; 41 Am. Rep. 247, § 834.
Henshaw v. Bissel (1874), 18 Wall. 255; L. ed. 21; 835, § 125.
Henshaw v. Clark (1859), 14 Cal. 461; 14 Morr. 434, §§ 842, 872.
Hermocilla v. Hubbell (1891), 89 Cal. 8; 26 Pac. 611, §§ 136, 142, 144.
Herrington v. Wood (1892), 6 Oh. Cir. Ct. R. 326, § 861.
Hess v. Bolinger (1874), 48 Cal. 349, § 207.
Hess v. Winder (1866), 30 Cal. 349; 12 Morr. 217, §§ 216, 537, 872.
Hestres v. Brennan (1875), 50 Cal. 211, §§ 208, 663.

Hext v. Gill (1872), L. R. 7 Ch. App. 699, §§ 90, 92.
Heydenfelt v. Daney G. & S. M. Co. (1875), 10 Nev. 290; 13 Morr. 204, §§ 136, 142, 480, 783.
Hibernia R. R. Co. v. De Camp (1885), 47 N. J. L. 518; 18 Vroom, 518; 54 Am. Rep. 197; 4 Atl. Rep. 318, § 256.
Hickey's Appeal (1884), 3 L. D. 83; 10 C. L. O. 164, § 171.
Hicks v. Bell (1853), 3 Cal. 219, § 21.
Hicks v. Michael (1860), 15 Cal. 107, § 872.
Hidden Treasure G. & S. M. Co. (1889), 16 C. L. O. 110, § 681.
Higgins v. Armstrong (1886), 9 Colo. 38; 10 Pac. 232, §§ 797, 801.
Higgins v. Houghton (1864), 25 Cal. 252; 13 Morr. 195, §§ 136, 142.
Higgins v. John Gold Min. Co. (1897), 14 C. L. O. 238, §§ 632, 679, 758.
Higueras v. United States (1866), 5 Wall. 827; L. ed. 18; 469, § 122.
Hinn v. Peck (1861), 18 Cal. 640, § 789.
Hill v. Cutting (1874), 113 Mass. 107, § 860.
Hill v. King (1857), 8 Cal. 337; 4 Morr. 533, § 841.
Hill v. Smith (1865), 27 Cal. 476; 4 Morr. 597, §§ 841, 843.
Hilton v. Lord Granville (1844), 5 Q. B. 701, §§ 819, 820.
Hilton v. Whitehead, 12 Q. B. 734, § 820.
Hirbour v. Reeding (1877), 3 Mont. 13; 11 Morr. 514, §§ 331, 858.
Hirschler v. McKendricks (1895), 16 Mont. 211; 40 Pac. 290, § 652.
Hobart v. Ford (1870), 6 Nev. 77; 15 Morr. 236, §§ 530, 550.
Hobart v. Murray (1893), 54 Mo. App. 249, § 861.
Hobbs v. Amador & Sacramento Canal Co. (1884), 66 Cal. 161; 4 Pac. 1147, § 843.
Hoffman v. Beecher (1892), 12 Mont. 489; 31 Pac. 92, §§ 382, 735, 737.
Hoffman v. Tuolumne Co. (1858), 10 Cal. 413, § 808.
Hogden, In re (1874), 1 C. L. O. 135, § 136.
Holbrooke v. Harrington (1894, Cal.), 36 Pac. 365, §§ 406, 646.
Holden & Warner v. Joy (1872), 17 Wall. 211; L. ed., 21; 523, § 181.
Hole v. Thomas (1802), 7 Vesey Jr. 589, § 790.
Holland v. Mt. Auburn G. Q. M. Co. (1878), 53 Cal. 149; 9 Morr. 497, §§ 373, 408.
Holmes v. Self (1881), 79 Ky. 297, § 802.
Homaker v. Martin (1891), 11 Mont. 91; 27 Pac. 397, §§ 629, 651, 652.
Hoofnagle v. Anderson (1822), 7 Wheat, 212; L. ed. 5; 437, § 175.
Hooper, In re (1881), 1 L. D. 561; 8 C. L. O. 120, §§ 95, 158.
Hooper v. Ferguson (1883), 2 L. D. 712, §§ 106, 205, 679.
Hooper v. Scheimer (1860), 23 How. 235; L. ed. 16; 452, §§ 175, 773.
Hope's Appeal (1886, Penn.), 3 Atl. Rep. 23, § 861.
Hope Min. Co., In re (1878), 5 C. L. O. 116, § 306.
Hope Min. Co. v. Brown (1888), 7 Mont. 550; 19 Pac. 218, §§ 473, 481, 485, 725.
Hope Min. Co. v. Brown (1891), 11 Mont. 370, §§ 473, 485, 725.
Hopkins v. Noyes (1883), 4 Mont. 550; 2 Pac. 280; 15 Morr. 287, §§ 218, 270, 642.
Horner v. Watson (1875), 79 Pa. St. 242; 21 Am. Rep. 55; 14 Morr. 1, §§ 808, 818.

Hornsby v. United States (1869), 10 Wall. 224; L. ed. 19; 900, § 122.
Horswell v. Ruiz (1885), 67 Cal. 111; 7 Pac. 197; 15 Morr. 488, §§ 218, 219, 329, 365, 582.
Horton v. New Pass G. &'S. M. Co. (1891), 21 Nev. 184; 27 Pac. 376, 1018, § 799.
Hosmer v. Wallace (1874), 47 Cal. 461. §§ 208, 217, 637, 660, 662, 772.
Houston v. Moore (1820), 5 Wheat. 1; L. ed., 5; 19, § 749.
Houtz v. Gisborn (1874), 1 Utah, 173; 2 Morr. 340, § 539.
Howell v. McCoy (1832), 3 Rawle, 256, § 840.
Howell v. Slauson (1890), 83 Cal. 539; 23 Pac. 692, § 143.
Howeth v. Sullinger (1896), 113 Cal. 541; 45 Pac. 841, §§ 362, 373, 671.
Howk v. Minnick (1869), 19 Oh. St. 462; 2 Am. Rep. 413, § 867.
Hoyt v. Smith (1854), 23 Conn. 177; 60 Am. Dec. 632; 12 Morr. 306, § 858.
Hoyt v. Smith (1858), 27 Conn. 63; 12 Morr. 315, § 858.
Hudepohl v. Liberty Hill Cons. M. Co. (1889), 80 Cal. 553; 22 Pac. Rep. 339, §§ 244, 861.
Huff v. McCauley (1866), 53 Pa. St. 206; 91 Am. Dec. 203; 9 Morr. 268, § 860.
Huff v. McDonald (1857), 22 Ga. 131; 68 Am. Dec. 487; 14 Morr. 202, 6 790.
Hughes v. Devlin (1863), 23 Cal. 501; 12 Morr. 241, §§ 535, 536, 792.
Hughes v. Dunlap (1891), 91 Cal. 385; 27 Pac. 642, § 872.
Humpries v. Brogdon (1850), 12 Q. B. 739, §§ 812, 818, 819, 820.
Hunt v. Eureka Gulch Min. Co. (1890), 14 Colo. 451; 24 Pac. 550, §§ 713, 738, 742.
Hunt v. Patchin (1888), 13 Saw. 304; 35 Fed. 816, §§ 405, 728.
Hunt v. Peake (1860), 1 Johnson (Eng.), 705, § 820.
Hunt v. Steese (1888), 75 Cal. 620; 17 Pac. 921, §§ 142, 161.
Hunter, In re David (1878), 5 C. L. O. 130; Copp's Min. Lands, 231, §§ 473, 490.
Hunter v. Gibbons (1856), 1 Hurl. & N. 459, § 867.
Huntley v. Russell (1849), 13 Q. B. 572, § 789.
Hurd v. Tomkins (1892), 17 Colo. 394; 30 Pac. 274, § 797.
Hurt v. Hollingsworth (1879), 100 U. S. 100; L. ed., 25; 569, § 872.
Hussey Lode (1886), 5 L. D. 93, §§ 646, 728.
Hutchings, In re (1877), 4 C. L. O. 142, § 501.
Hutchins v. Low (1873), 15 Wall. 77; L. ed. 21; 82, §§ 192, 205, 216, 542.
Hyman v. Wheeler (1886), 29 Fed. 347; 15 Morr. 519. §§ 293, 294, 615, 155, 16.

Iba v. Central Association (1895, Wyo.), 42 Pac. 20, §§ 750, 754.
Ill. & St. L. R. & Coal Co. v. Ogle (1879), 92 Ill. 353; 25 Am. Rep. 342, § 868.
Illinois S. M. Co v. Raff (1893), 7 N. Mex. 336; 34 Pac. 544. §§ 293, 294, 313.

Independence Lode (1889), 9 L. D. 571, §§ 338, 738.
Inhabitants of Shrewsbury v. Smith (1853), 12 Cush. 177, § 808.
Interstate L. Co. v. Maxwell L. G. Co. (1891), 139 U. S. 569; L. ed. 35; 278, § 116.
Iola Lode (1882), 1 L. D. 539; 9 C. L. O. 164, § 759.
Iowa Min. Co. v. Bonanza (1875), 6 C. L. O. 75, § 759.
Iron King Mine and Millsite (1889), 9 L. D. 201, § 523.
Iron Silver Mining Co. v. Campbell (1892), 17 Colo. 267; 29 Pac. 513, §§ 175, 305, 323, 551, 615, 665, 777, 780, 866.
Iron Silver Mining Co. v. Campbell (1890), 135 U. S. 286, L. ed. 34; Morr. 218, §§ 175, 177, 336, 364, 717, 718, 723, 781.
Iron Silver Min. Co. v. Cheesman (1886), 116 U. S. 529; L. ed. 29; 712, §§ 292, 293, 301, 311, 336, 615, 866.
Iron Silver Min. Co. v. Cheesman (1881), 8 Fed. 297; 9 Morr. 552, §§ 290, 293, 311.
Iron S. M. Co. v. Elgin S. M. Co. (1886), 118 U. S. 196; L. ed. 30; 98; 15 Morr. 641, §§ 58, 318, 364, 365, 552, 567, 576, 582, 583, 593, 866.
Iron Silver Min. Co. v. Mike & Starr G. & S. M. Co. (1892), 143 U. S. 394; L. ed. 36; 201, §§ 176, 292, 336, 413, 720, 781, 866.
Iron Silver Min. Co. v. Mike & Starr (1888), 6 L. D. 533; 15 C. L. O. 14, § 721.
Iron Silver Min. Co.v. Murphy (1880), 2 McCrary, 121; 3 Fed. 368; 1 Morr. 548, §§ 311, 364.
Iron S. M. Co. v. Reynolds (1888), 124 U. S. 374; L. ed. 31; 466, §§ 413, 415, 720, 781.
Iron Silver Min. Co. v. Sullivan (1883), 16 Fed. 829, § 415.
Irvine v. Tarbat (1894), 105 Cal. 237, § 161.
Irwin v. Covode (1854), 24 Pa. St. 162; 15 Morr. 120, § 789.
Irwin v. Phillips (1855), 5 Cal. 140; 63 Am. Dec. 113; 15 Morr. 178, §§ 530, 841.
Ivanhoe M. Co. v. Keystone Con. M. Co. (1890), 102 U. S. 167; L. ed. 26; 126; 13 Morr. 214, §§ 47, 55, 136, 142, 152.

Jackson v. Babcock (1809), 4 Johns. 418, § 809.
Jackson v. Dines (1889), 13 Colo. 90; 21 Pac. 918, §§ 223, 754.
Jackson v. Feather River Water Co. (1859), 14 Cal. 18; 5 Morr. 594, § 270.
Jackson v. McMurray (1878), 4 Colo. 76; 12 Morr. 164, § 773.
Jackson v. Roby (1883), 109 U. S. 440; L. ed. 27; 990, §§ 45, 268, 438, 624, 625, 629, 630, 631, 748, 754, 755.
Jackson ex dem. Doran v. Green (1831), 7 Wend. 333, §§ 224, 232.
Jackson, Ex Dem Webber v. Harsen (1827), 7 Cowen, 323, § 861.
Jacob, In re (1880), 7 C. L. O. 83, § 158.
Jacob v. Day (1896), 111 Cal. 571; 44 Pac. 243, §§ 530, 841, 842.
Jacob v. Lorenz (1893), 98 Cal. 332; 33 Pac. 119, §§ 530, 609, 783.
Jacobs, In re (1895), 21 L. D. 379, § 661.
Jacobs v. Allard (1869), 42 Vt. 303; 1 Am. Rep. 331, § 840.

Jacobs v. Seward (1872), 5 L. R. H. L. 464, § 790.
Jamie Lee Lode v. Little Forepaugh (1890), 11 L. D. 391, § 759.
Jamieson v. North British Ry. Co. (1868), 6 Scott L. Rep. 188, § 92.
Jantzen v. Arizona Copper Co. (1889, Ariz.), 20 Pac. 93, §§ 227, 392, 763.
Jefferson M. C. v. Penn M. Co. (1874), 1 C. L. O. 66, § 690.
Jeffords v. Hine (1886, Ariz.), 14 Pac. 352; 15 Morr. 575, § 738.
Jeffries v. Williams, 5 Exch. 792, § 820.
Jegon v. Vivian (1871), L. R. 6 Ch. App. 742; 8 Morr. 628, § 807.
Jennings v. Rickard (1887), 10 Colo. 395; 15 Pac. 677; 15 Morr. 624, §§ 800, 858.
Jennison, Executor, v. Kirk (1879), 98 U. S. 453; L. ed. 25; 240; 4 Morr. 504, §§ 44, 47, 54, 56, 96, 306, 530, 567, 623, 838, 843.
Jenny Lind Min. Co., In re (1873), Sickles Min. Dec. 223, §§ 735, 736, 739.
Jeremy & Co. v. Thompson (1895), 20 L. D. 299, § 515.
Job v. Potton (1875), L. R. 20 Eq. 84; 14 Morr. Rep. 329, §§ 789, 790.
Johns v. Marsh (1892), 15 L. D. 196, § 95.
Johnson, In re (1880), 7 C. L. O. 35, § 306.
Johnson v. Buell (1879), 4 Colo. 557; 9 Morr. 502, § 60.
Johnson & Graham's Lessees v. McIntosh (1823), 8 Wheat. 543; 5; 681, § 181.
Johnson v. Johnson (1835), 2 Hill Eq. (S. C.) 277; 29 Am. Dec. 72, § 790.
Johnson v. Leonhard (1889), 1 Wash. St. 564; 20 Pac. 591, § 501.
Johnson v. McLaughlin (1884), 1 Ariz. 493; 4 Pac. 130, § 69
Johnson v. Parks (1858), 10 Cal. 447; 4 Morr. 316, §§ 43, 58, 339, 350.
Johnson v. Towsley (1871), 13 Wall. 72; L. ed. 20; 485, §§ 161, 175, 207, 660, 665, 772.
Johnson v. Young (1893), 18 Colo. 625; 34 Pac. 173, §§ 274, 363, 398, 636, 643, 645.
Johnston v. Gas. Co. (1886, Penn.), 5 Cent. Rep. 564, § 255.
Johnston v. Harrington (1892), 5 Wash. 93; 31 Pac. 316, §§ 210, 421.
Johnston v. Morris (1896), 72 Fed. 890, §§ 106, 144, 612.
Johnstown I. Co. v. Cambria I. Co. (1858), 32 Pa. St. 241; 72 Am. Dec. 783; 9 Morr. 226, §§ 175, 861.
Jones v. Adams (1885), 19 Nev. 78; 6 Pac. Rep. 442, § 838.
Jones v. Clark (1871), 42 Cal. 180; 11 Morr. 473, §§ 796, 800, 801, 803.
Jones v. Driver (1892), 15 L. D. 514, §§ 208, 496.
Jones v. Jackson (1858), 9 Cal. 238; 14 Morr. 72, §§ 426, 843.
Jones v. Meyers (1891), 2 Idaho, 794; 35 Am. St. Rep. 259; 26 Pac. 215, § 772.
Jones v. Prospect Mt. T. Co. (1892), 21 Nev. 339; 31 Pac. 642, §§ 301, 551, 615, 688, 866.
Jones v. Robertson (1886), 116 Ill. 543; 56 Am. Rep. 786; 6 N. E. Rep. 890; 15 Morr. 703, § 808.
Jones v. Wagner (1870), 66 Pa. St. 429; 5 Am. Rep. 385; 13 Morr. 690, § 818.

Jordan v. Duke (1894, Ariz.), 36 Pac. 896, § 329.
Jordan v. Idaho Aluminum Min. Co. (1895), 20 L. D. 500, § 424.
Jourdan v. Barrett (1846), 4 How. 169; L. ed. 11; 924, § 216.
Judge v. Braswell (1877), 13 Bush (Ky.), 67; 26 Am. Rep. 185; 11 Morr. 508, § 801.
Julia G. v. S. M. Co. (1872), Copp's Min. Dec. 96, § 730.
Junkans v. Bergin (1885), 67 Cal. 267; 7 Pac. 684, § 841.
Jupiter Min. Co. v. Bodie Cons. M. Co. (1881), 11 Fed. 666; 7 Saw. 96; 4 Morr. 411, §§ 250, 271, 272, 273, 274, 294, 330, 335, 336, 361, 362, 373, 375, 379, 383, 403, 631, 633, 651.
Justice Min. Co. v. Lee (1895), 21 Colo. 260; 40 Pac. 444, §§ 175, 227, 777.

Kahn v. Central Smelting Co. (1881), 102 U. S. 641; L. ed. 26; 266; 11 Morr. 540, §§ 796, 800, 803.
Kahn v. Old Telegraph Co. (1877), 2 Utah, 174; 11 Morr. 645, §§ 175, 604, 608, 609, 777, 783, 796.
Kaler v. Campbell (1886), 13 Ore. 596; 11 Pac. 301, § 838.
Kane v. Vanderburgh (1814), 1 Johns. Ch. 11, § 790.
Kannanaugh v. Quartette Min. Co. (1891), 16 Colo. 341; 27 Pac. 245, §§ 604, 713, 742.
Kansas Pac. R. R. Co. v. Atchison, T. & S. Fe R. R. Co. (1884), 112 U. S. 414; L. ed. 28; 794, § 157.
Kansas Pacific Ry. Co. v. Dunmeyer (1885), 113 U. S. 629; L. ed. 28; 1123, §§ 154, 205.
Kaweah Colony (1891), 12 L. D. 326, § 210.
Keeler v. Green (1870), 21 N. J. Eq. 27; 12 Morr. 465, § 860.
Keeler v. Trueman (1890), 15 Colo. 143; 25 Pac. 311, §§ 233, 539, 754.
Kelly v. Taylor (1863), 23 Cal. 14; 5 Morr. 598, § 383.
Kemp v. Starr (1878), 5 C. L. O. 130, § 171.
Kempton Mine (1875), 1 C. L. O. 178, § 232.
Kendall v. Hall (1891), 12 L. D. 419, § 502.
Kendall v. San Juan S. M. Co. (1886), 9 Colo. 349; 12 Pac. 198, §§ 184, 753.
Kendall v. San Juan S. M. Co. (1892), 144 U. S. 658; L. ed. 36; 330, § 184.
Kenna v. Dillon (1872), Copp's Min. Dec. 93, § 207.
Kennedy, In re (1883), 10 C. L. O. 150, § 338.
Kerr v. Carlton (1883), 10 C. L. O. 255, §§ 501, 506.
Kerr v. Utah and Wyoming Imp. Co. (1883), 2 L. D. 727; 10 C. L. O. 255, § 501.
Keystone Case (1872), Copp's Min. Dec. 105, §§ 136, 142.
Keystone Lode v. State of Nevada (1892), 15 L. D. 250, § (?)
Kibling, In re (1888), 7. L. D. 327, § 773.
Kidder v. Rixford (1844), 16 Vt. 169; 42 Am. Dec. 504, § 790.
Kimball, In re (1876), 3 C. L. O. 50, § 501.
Kimberly v. Arms (1889), 129 U. S. 512; L. ed. 32; 764, § 800.

King v. Amy & Silversmith Min. Co. (1890), 9 Mont. 543; 24 Pac. 200; 16 Morr. 38, § 591.
King v. Amy & Silversmith Min. Co. (1894), 152 U. S. 222, §§ 335, 336, 364, 365, 366, 367, 576, 588, 591.
King v. Edwards (1870), 1 Mont. 235; 4 Morr. 480, §§ 44, 45, 270, 271, 272, 274, 566, 623.
King v. Randlett (1867), 33 Cal. 318; 5 Morr. 605, § 270.
King v. Thomas (1887), 6 Mont. 409; 12 Pac. 865, §§ 161, 177.
Kinkaid, In re (1886), 5 L. D. 25, §§ 630, 686.
Kinney v. Consolidated Virginia M. Co. (1877), 4 Saw. 382; Fed. Cases, No. 7827, §§ 270, 688.
Kirby v. Lewis (1889), 39 Fed. 66, § 106.
Kirk v. Bartholomew (1892), 2 Idaho, 1087; 29 Pac. 40, § 838.
Kirk v. Clark (1893), 17 L. D. 190, § 631.
Klauber v. Higgins (1897, Cal.), 49 Pac. 466, § 779.
Knight v. Indiana Co. (1874), 47 Ind. 105; 17 Am. Rep. 692, §§ 175, 812.
Knight v. U. S. Land Assn. (1891), 142 U. S. 161; L. ed. 35; 974, §§ 116, 208, 662, 663.
Knowles, Ex parte (1855), 5 Cal. 301, § 750.
Kohlsaat v. Murphy (1878), 96 U. S. 153; L. ed. 24; 844, § 480.
Kramer v. Settle (1873), 1 Idaho, 485; 9 Morr. 561, §§ 331, 623, 631.
Krogstad, In re (1886), 4 L. D. 564, § 232.

Lacey v. Woodward (1891), 5 New Mex. 583; 25 Pac. 785, § 651.
Lakin v. Dolly (1891), 53 Fed. 333, §§ 362, 366, 589, 778.
Lakin v. Roberts (1891), 54 Fed. 461, §§ 362, 778.
Lakin v. Sierra Buttes G. M. Co. (1885), 25 Fed. 337; 11 Saw. 232, §§ 405, 643, 651.
Lalande v. McDonald (1887), 2 Idaho, 283; 13 Pac. 347, § 329.
Lalley, In re Robert (1883), 10 C. L. O. 55, § 500.
Lamar v. Hale (1884), 79 Va. 147, § 796.
Lamb v. Davenport (1873), 18 Wall. 307; L. ed. 21; 759, § 542.
Lane, In re (1890), 135 U. S. 443; L. ed. 34; 219, § 243.
La Neve Millsite (1889), 6 L. D. 706, § 708.
Laney, In re (1889), 9 L. D. 83, §§ 94, 338.
Langdon v. Sherwood (1887), 124 U. S. 74; L. Ed. 31; 344, § 773.
Largent, In re (1891), 13 L. D. 397 § 507.
Largey v. Bartlett (1896), 18 Mont. 265; 44 Pac. 962, § 407.
Larkin v. Upton (1892), 144 U. S. 19; L. ed. 36; 533, §§ 309, 337, 364.
Last Chance v. Tyler (1894), 61 Fed. 557, §§ 364, 365, 396, 582, 591, 608, 609, 772, 783.
Last Chance Min. Co. v. Tyler M. Co. (1894), 157 U. S. 683; L. ed. 39; 859, §§ 591, 609, 749, 759, 783.
Lawrence v. Robinson (1879), 4 Colo. 567; 12 Morr. 387, §§ 797, 803, 858.
Lazarus' Estate, In re (1892), 145 Pa. St. 1; 23 Atl. Rep. 372, § 861.

Leach v. Day (1865), 27 Cal. 643, § 872.
Lead City Townsite v. Little Nell Lode (1893), 17 L. D. 291, § 784.
Leadville Min. Co. v. Fitzgerald (1879), Fed. Cases No. 8,158; 4 Morr. 381, §§ 293, 300, 301, 364, 551, 615, 806.
Leavenworth, Lawrence & Galveston R. Co. v. United States (1875), 92 U. S. 733; L. ed. 23; 634, §§ 96, 183, 191.
Lebanon Min. Co. v. Consolidated Rep. Co. (1882), 6 Colo. 371, §§ 218, 322, 688.
Ledger Lode (1893), 16 L. D. 101, § 738.
Ledoux v. Black (1856), 18 How. 473; L. ed. 15; 457, §
Lee v. Johnson (1885), 116 U. S. 48; L. ed. 29; 570, §§ 175, 207, 663, 665.
Lee v. Justice Min. Co. (1892), 2 Colo. Ct. App. 112; 29 Pac. 1020, § 227.
Lee v. Stahl (1886), 9 Colo. 208; 11 Pac. 77, §§ 558, 726, 727, 742.
Lee v. Stahl (1889), 13 Colo. 174; 22 Pac. 346; 16 Morr. 152, §§ 558, 560, 614, 726, 727, 742.
Lee Doon v. Tesh (1885, Cal.), 6 Pac. 97, § 233.
Lee Doon v. Tesh (1885), 68 Cal. 43; 8 Pac. 621, §§ 233, 754.
Leet v. John Dare S. M. Co. (1870), 6 Nev. 218; 4 Morr. 487, § 272.
Le Franchi, In re (1884), 3 L. D. 229, § 136.
Leggatt v. Stewart (1883), 5 Mont. 107; 2 Pac. 320; 15 Morr. 358, §§ 362, 373.
Leigh v. Dickenson (1883), 12 Q. B. D. 194, § 790.
Le Neve Millsite (1889), 9 L. D. 469, § 524.
Lenfers v. Henke (1874), 73 Ill. 405; 24 Am. Rep. 263; 5 Morr. 67, §§ 535, 792.
Lennig, In re (1886), 5 L. D. 190; 13 C. L. O. 197, §§ 521, 523, 524, 708.
Le Roy v. Wright (1864), 4 Saw. 530; Fed. Cases No. 8273, § 872.
Lentz v. Carnegie (1891), 145 Pa. St. 612; 27 Am. St. Rep. 717; 23 Atl. Rep. 219, § 840.
Levaroni v. Miller (1867), 34 Cal. 231; 91 Am. Dec. 692; 12 Morr. 232, § 843.
Lewey v. H. C. Frick C. Co. (1895), 166 Pa. St. 536; 45 Am. St. Rep. 684; 31 Atl. Rep. 261, § 867.
Lezeart v. Dunker (1885), 4 L. D. 96, § 503.
Lillibridge v. Lackawana Coal Co. (1891), 143 Pa. St. 283; 24 Am. St. Rep. 544; 22 Atl. Rep. 1035, §§ 812, 827.
Lincoln Placer (1888), 7 L. D. 81; 15 C. L. O. 81, §§ 396, 432, 438, 671, 672.
Lincoln v. Rodgers (1870), 1 Mont. 217; 14 Morr. 79, § 843.
Lipscomb v. Nichols (1882), 6 Colo. 280, § 501.
Litchfield v. Register & Receiver (1868), 1 Woolw. 269; Fed. Cases, No. 8388, § 660.
Litchfield v. The Register (Richards) (1870); 9 Wall. 575; L. Ed. 19; 681, §§ 208, 438.
Little Emily Mining & Milling Co. v. Couch (U. S. C. C. 1896), § 233.

Little Giant Lode (1869), 22 L. D. 629, § 739.
Little Gunnel Min. Co. v. Kimber (1878), 15 Fed. Cas. 629; 1 Morr. 536, §§ 405, 408, 633, 643, 645, 651.
Little Josephine M. Co. v. Fullerton (1893), 58 Fed. 521, § 614.
Little Pittsburgh Cons. Co. v. Amie M. Co. (1883), 17 Fed. 57, §§ 337, 338.
Little Pittsburg Co. v. Little Chief Co. (1888), 11 Colo. 223; 7 Am. St. Rep. 226; 17 Pac. 760; 15 Morr. 655, § 868.
Live Yankee Co. v. Oregon Co. (1857), 7 Cal. 41; 12 Morr. 94, § 383.
Livingston v. Livingston (1822), 6 Johns. Chanc. 497; 10 Am. Dec. 353, 10 Morr. 696, § 819.
Livingston v. Moingona Coal Co. (1878), 49 Ia. 369; 31 Am. Rep. 150; 10 Morr. 696, § 819.
Livingstone v. Rawyards Coal Co. (1880), L. R. 5 App. Cas. 25; 10 Morr. 291, § 868.
Lock Lode (1887), 6 L. D. 105; 14 C. L. O. 151, § 661.
Lockhardt v. Rollins (1889), 2 Idaho, 503; 21 Pac. 413; 16 Morr. 16, §§ 270, 407, 629, 635.
Lockwood Co. v. Lawrence (1855), 77 Me. 297, § 840.
Lockwood v. Lunsford (1874), 56 Mo. 68; 7 Morr. 532, § 860.
Logan v. Driscoll (1861), 19 Cal. 623; 81 Am. Dec. 90; 6 Morr. 172, §§ 530, 843.
Lone Dane Lode (1890), 10 L. D. 53, § 338.
Long, In re (1881), 9 C. L. O. 188, § 522.
Lonsdale v. Curioen (1799), 3 Bligh. 168; 7 Morr. 693, § 873.
Look Tin Sing, In re (1884), 21 Fed. 905, § 224.
Loosemore v. Tiverton & North Devon Ry. Co. (1882), L. R. 22 Ch. D. 25, §§ 90, 92.
Lord v. Carbon Iron Mftg. Co. (1884), 38 N. J. Eq. 452; 15 Morr. 695, § 807.
Lorenz v. Jacob (1883), 63 Cal. 73; 3 Pac. 654, § 263.
Lorenz v. Waldron (1892), 96 Cal. 243; 31 Pac. 54, § 530.
Los Angeles Farming & Milling Co. v. Thompson (1897, Cal.), 49 Pac. 714, § 778.
Losee v. Buchanan (1873), 51 N. Y. 476; 10 Am. Rep. 623, § 808.
Louise Min. Co. (1896), 22 L. D. 693, §§ 432, 438, 631.
Louisville Lode (1882), 1 L. D. 548, § 677.
Lowe v. Alexander (1869), 15 Cal. 297, § 792.
Ludlam, In re Charles (1893), 17 L. D. 22, § 503.
Ludlam v. Ludlam (1865), 26 N. Y. 356, § 224.
Lunsford v. La Motte Lead Co. (1873), 54 Mo. 426; 9 Morr. 308, § 860.
Lux v. Haggin (1886), 69 Cal. 255; 10 Pac. 674, §§ 80, 838, 841.
Lyon, In re (1895), 20 L. D. 556, § 502.
Lyons v. State (1885), 67 Cal. 380; 7 Pac. 763, § 238.

Mackie, In re (1886), 5 L. D. 199, §§ 327, 670, 671.
Magalia Gold M. Co. v. Ferguson (1887), 6 L. D. 218; 14 C. L. O. 212, §§ 94, 207.

Magistrates of Glasgow v. Farie (1888), L. R. 13 App. C. 657, §§ 88, 90, 92.
Magruder, In re (1881), 1 L. D. 526, § 772.
Magoffin v. Holt, 1 Duvall 95 (1864), § 859.
Maguire v. Tyler (1862), 1 Black. 195; L. ed. 17; 135, § 663.
Mahoney v. Van Winkle (1863), 21 Cal. 552, § 123.
Mallett v. Uncle Sam Min. Co. (1865), 1 Nev. 188; 90 Am. Dec. 484; 1 Morr. 17, §§ 271, 274, 537, 643, 644, 700.
Malone v. Big Flat G. M. Co. (1888), 76 Cal. 578; 18 Pac. 772, § 327.
Mamer v. Lussem (1872), 65 Ill. 484, § 833.
Manhattan M. Co. v. San Juan M. Co. (1883), 2 L. D. 698, § 742.
Mann v. Tacoma Land Co. (1894), 153 U. S. 273; L. ed. 38; 714, §§ 80, 322.
Mann v. Wilson (1860), 23 How. 457; L. Ed. 16; 584, § 181.
Manning v. San Jacinto Tin Co. (1882), 7 Saw. 419; 9 Fed. 726, §§ 125, 126, 142, 161.
Manning v. Strehlow (1888), 11 Colo. 451; 18 Pac. 625, §§ 754, 755, 763.
Mantle v. Noyes (1888), 5 Mont. 274; 5 Pac. 856, § 720.
Manuel v. Wulff (1894), 152 U. S. 505; L. ed. 38; 532, §§ 232, 233, 539, 642, 643.
Manville v. Parks (1883), 7 Colo. 128; 2 Pac. 212, §§ 797, 798, 801.
Marcus Daly, In re (1883), 10 C. L. O. 167, § 679.
Marquart v. Bradford (1872), 43 Cal. 526; 5 Morr. 528, § 644.
Marquez v. Frisbie (1879), 101 U. S. 473; L. ed. 25; 800, §§ 175, 207, 438, 662, 666.
Mars v. Oro Fino Min. Co. (1895), 7 S. Dak. 605; 65 N. W. Rep. 19, §§ 754, 757.
Marsh v. Brooks (1850), 8 How. 223; L. ed. 12; 1056, § 181.
Marsh v. Holley (1875), 42 Conn. 453; 14 Morr. 687, § 791.
Marshall v. Harney Peak Tin M. Co. (1890), 1 S. Dak. 350; 47 N. W. 290, §§ 339, 345, 356, 372, 643.
Marshall v. Kirtley (1888), 12 Colo. 410; 21 Pac. 492; 16 Morr. 6, §§ 742, 754.
Marshall v. Wellwood (1876), 38 N. J. 339; 20 Am. Rep. 394, § 808.
Martin v. Hunter's Lessee (1816), 1 Wheat. 304; L. ed. 4; 97, § 749.
Marvin v. Brewster (1874), 55 N. Y. 538; 14 Am. Rep. 322; 13 Morr. 40, §§ 812, 813, 814, 827.
Massott v. Moses (1871), 3 S. C. 168; 16 Am. Rep. 697; 8 Morr. 607, §§ 812, 860.
Masterson, In re (1888), 7 L. D. 172; 15 C. L. O. 133, § 502.
Masterson, In re (on review) (1888), 7 L. D. 577, § 502.
Mattingly v. Lewisohn (1888), 8 Mont. 259; 19 Pac. 310, §§ 728, 754.
Mattingly v. Lewisohn (1893), 13 Mont. 508; 35 Pac. 111, §§ 635, 643.
Maxwell Land Grant Case (1887), 121 U. S. 325; L. ed. 30; 949, § 784.
Maxwell v. Brierly (1883), 10 C. L. O. 50, §§ 138, 139, 158, 210, 421.
Maye v. Yappen (1863), 23 Cal. 306; 10 Morr. 101, § 868.
Mayor of Baltimore v. Appold (1875), 42 Md. 442, § 840.

Mayor of New York v. Baily (1845), 2 Denio, 433, § 808.
McCaig v. Bryan (1887), 10 Colo. 309; 15 Pac. 413, § 629.
McCallum v. Germantown W. Co. (1867), 4 P. F. Smith, 40; 54 Pa. St. 40; 93 Am Dec. 656, § 840.
McCandless's Appeal (1871), 70 Pa. 210, § 256.
McCharles v. Roberts (1895), 20 L. D. 564, § 208.
McConnell, In re (1894), 18 L. D. 414, § 501.
McCord v. Oakland Quicksilver Min. Co. (1883), 64 Cal. 134; 27 Pac. 863, §§ 788, 790.
McCormick v. Baldwin (1894), 104 Cal. 227; 37 Pac. 903, §§ 630, 652.
McCormick v. Sutton (1893), 97 Cal. 373; 32 Pac. 444, §§ 127, 142, 170, 175.
McCormick v. Varnes (1878), 2 Utah, 355; 9 Morr. 505, §§ 60, 270, 364, 586.
McCowan v. Maclay (1895), 16 Mont. 234; 40 Pac. 290, §§ 251, 688.
McCraig v. Bryan. See McCaig v. Bryan.
McCully v. Clarke (1861), 40 Pa. St. 399; 80 Am. Dec. 584, § 832.
McDaniel v. Bell (1889), 9 L. D. 15, § 504.
McDonald v. Montana Wood Co. (1894), 14 Mont. 88; 43 Am. St. Rep. 616; 35 Pac. 668, §§ 432, 438, 454, 628.
McEvoy v. Hyman (1885), 25 Fed. 539; 15 Morr. 300, § 759.
McEvoy v. Hyman (1885), 25 Fed. 596; 15 Morr. 397, §§ 330, 382, 398.
McFeters v. Pierson (1890), 15 Colo. 201; 22 Am. St. Rep. 388; 24 Pac. 1076, §§ 192, 233, 322, 327, 539, 754.
McGarrahan v. New Idria (1885), 3 L. D. 422; 11 C. L. O. 370, § 738.
McGarrity v. Byington (1859), 12 Cal. 426; 2 Morr. 311, §§ 274, 631.
McGillicuddy v. Tompkins (1892), 14 L. D. 633, § 501.
McGinnis v. Egbert (1884), 8 Colo. 41; 5 Pac. 654; 15 Morr. 329, §§ 75, 330, 398, 623, 632, 636, 651, 754, 755, 763.
McGlenn v. Weinbroeer (1892), 15 L. D. 370, §§ 97, 138, 210, 421.
McGowan v. Alps Cons. M. Co. (1896), 23 L. D. 113, § 772.
McGuire v. Grant (1856), 25 N. J. L. 356; 67 Am. Dec. 49, § 833.
McIntosh v. Perkins (1893), 13 Mont. 143; 32 Pac. 653, § 798.
McKay v. McDougal (1897, Mont.), 48 Pac. 988, § 754.
McKean v. Buell (1878), Copp's Min. Lands, 343, § 97.
McKeon v. Bisbee (1858), 9 Cal. 137; 70 Am. Dec. 642; 2 Morr. 309, §§ 535, 792.
McKiernan v. Hesse (1877), 51 Cal. 594, § 409.
McKinley v. Wheeler (1889), 130 U. S. 630; L. ed. 22; 1048; 16 Morr. 65, §§ 226, 449.
McKinstry v. Clark (1882), 4 Mont. 370; 1 Pac. 759, §§ 329, 337.
McLane v. Bovee (1874), 35 Wis. 27, § 542.
McLaughlin v. Del Re (1886), 71 Cal. 230; 16 Pac. 881, § 841.
McLaughlin v. Powell (1875), 50 Cal. 64; 10 Morr. 424, § 161.
McLaughlin v. Thompson (1892), 2 Col. App. 135; 29 Pac. 816, § 335.
McLaughlin v. United States (1882), 107 U. S. 526; L. ed. 27; 806, §§ 94, 161, 784.

McMaster's Appeal (1883), 2 L. D. 706, § 737.
McMillan, In re John (1888), 7 L. D. 181, § 501.
McNeil v. Pace (1884), 3 L. D. 267; 11 C. L. O. 307, §§ 630, 632.
McShane v. Kenkle (1896), 18 Mont. 208; 44 Pac. 979, §§ 336, 643.
McWilliams v. Green River Coal Assn. (1896), 23 L. D. 127, § 496.
Meagher v. Reed (1890), 14 Colo. 335; 24 Pac. 681, §§ 706, 707.
Medley v. Robertson (1889), 55 Cal. 396, §§ 142, 448.
Megarrigle, In re (1882), 9 C. L. O. 113, § 515.
Melton S. Lambard (1876), 51 Cal. 258; 14 Morr. 695, § 642.
Merced M. Co. v. Fremont (1857), 7 Cal. 317; 68 Am. Dec. 262; 7 Morr. 313, § 872.
Mercur v. State Line & S. R. Co. (1895), 171 Pa. St. 12; 32 Atl. Rep. 1126, § 791.
Merrell, W. S. (1877), 5 C. L. O. 5, § 633.
Merrill v. Dixon (1880), 15 Nev. 401, § 94.
Merritt v. Cameron (1892), 137 U. S. 542; L. ed. 34; 772, § 666.
Merritt v. Judd (1859), 14 Cal. 59; 6 Morr. 62, §§ 409, 535.
Merritt v. Judd (1859), 14 Cal. 59; 6 Morr. 62, § 792.
Mesick v. Sunderland (1856), 6 Cal. 298, § 392.
Mesick v. Sunderland (1856), 6 Cal. 298, § 646.
Metcalf v. Prescott (1891), 10 Mont. 283; 25 Pac. 1037; 16 Morr. 137, §§ 381, 383.
Meyer v. Hyman (1888), 7 L. D. 83; 15 C. L. O. 147, § 759.
Meyerdorf v. Frohner (1879), 3 Mont. 282; 5 Morr. 559, §§ 161, 233, 409.
Meylette v. Brennan (1894), 20 Colo. 242; 38 Pac. 75, § 858.
Michael v. Mills (1896), 22 Colo. 439; 45 Pac. 429, §§ 337, 754.
Mickle v. Douglass (1888), 75 Ia. 78; 39 N. W. Rep. 198, § 818.
Micklethwait v. Winter (1851), 6 Exch. 644, § 92.
Midland Railway v. Checkley (1867), L. R. 4 Eq. C. 19, §§ 90, 92.
Midland Ry. Co. v. Haunchwood B. & T. Co. (1882), L. R. 20 Ch. D. 552, §§ 88, 89, 90, 92.
Midland Railway Co. v. Robinson (1889), L. R. 15 App. C. 19, § 92.
Migeon v. Montana Cent. Ry. Co. (1896), 77 Fed. 249, §§ 289, 291, 294, 336, 781.
Miller v. Butterfield (1889), 79 Cal. 62; 21 Pac. 543, § 858.
Miller v. Girard (1893), 3 Colo. App. 278; 33 Pac. 69, § 338.
Miller v. Taylor (1881), 6 Colo. 41; 9 Morr. 547, § 373.
Mills v. Fletcher (1893), 100 Cal. 142; 34 Pac. 637, §§ 632, 634.
Milton v. Lamb (1896), 22 L. D. 339, § 673.
Mimbres M. Co., In re (1889), 8 L. D. 457, §§ 690, 691.
Miner, In re Abraham, L. (1889), 9 L. D. 408, § 142.
Miner v. Mariott (1884), 2 L. D. 709; 10 C. L. O. 339, §§ 690, 738.
Mint Lode and Millsite (1891), 12 L. D. 624, § 524.
Minter v. Crommelin (1856), 18 How. 87; L. ed. 15; 279, § 181.
Mississippi v. Johnson (1867), 4 Wall. 475; L. ed. 18; 437, § 699.
Mississippi & Rum River Boom Co. v. Patterson (1879), 98 U. S. 403; L. ed. 25; 206, § 252.

Missouri, Kansas & Texas R. Co. v. Kansas P. R. R. Co. (1878), 97 U. S. 491; L. ed. 24; 1095, § 154.
Missouri, Kansas & Texas Ry. Co. v. Roberts (1894), 152 U. S. 114; L. ed. 38; 377, § 183.
Missouri, Kansas & Texas Ry. Co. v. United States (1876), 92 U. S. 760; L. ed. 23; 645, § 183.
Mitchell, In re (1884), 2 L. D. 752, § 335.
Mitchell v. Brown (1884), 3 L. D. 65; 11 C. L. O. 214, §§ 207, 496, 502.
Mitchell v. Cline (1890), 84 Cal. 469; 24 Pac. 164, §§ 450, 750.
Moffatt v. United States (1884), 112 U. S. 24; L. ed. 28; 623, § 784.
Mongrain v. Northern Pac. R. R. Co. (1894), 18 L. D. 105, § 521.
Monitor Lode (1894), 18 L. D. 358, §§ 646, 728.
Monmouth Canal Co. v. Harford (1834), 1 Cr. M. & R. 614, § 813.
Mono Min. Co. v. Magnolia E. & W. Co. (1875), 2 C. L. O. 68, §§ 398, 728, 766.
Monroe Lode (1885), 4 L. D. 273; 12 C. L. O. 264, §§ 171, 766.
Mont Blanc Cons. G. M. Co. v. Debour (1882), 61 Cal. 364; 15 Morr. 286, § 758.
Montague v. Dobbs (1882), 9 C. L. O. 165, §§ 97, 323, 420.
Montana Cent. Ry. Co. v. Migeon C. C. (1895), 68 Fed. 811, §§ 175, 336, 777, 781.
Montana Co., Limited, v. Clark (1890), 42 Fed. 626; 16 Morr. 80, §§ 365, 482, 551, 582, 666, 866.
Montana Co., Limited, v. St. Louis Mining & Milling Co. (1894), 152 U. S. 160; L. ed., 38; 398, § 873.
Moody v. McDonald (1854), 4 Cal. 297; 2 Morr. 187, § 814.
Mooney, In re John (1876), 3 C. L. O. 68, § 227.
Moore, In re (1883), 11 C. L. O. 326, § 321.
Moore v. Besse (1872), 43 Cal. 511, § 542.
Moore v. Hamerstag (1895), 109 Cal. 122; 41 Pac. 805, §§ 270, 273, 331, 398, 642.
Moore v. Miller (1848), 8 Pa. St. 272, § 861.
Moore v. Robbins (1878), 96 U. S. 530; L. ed. 24; 848, §§ 161, 175, 207, 665, 666, 765, 784.
Moore v. Smaw (1861), 17 Cal. 199; 79 Am. Dec. 123; 12 Morr. 418, §§ 21, 125.
Moore v. Thompson (1873), 69 N. C. 120; 1 Morr. 221, § 688.
More v. Massini (1867), 32 Cal. 590; 7 Morr. 455, § 872.
More v. Steinbach (1888), 127 U. S. 70; L. ed. 32; 51, § 125.
Morenhaut v. Wilson (1877), 52 Cal. 263; 1 Morr. 53, §§ 329, 373, 643, 644.
Morgan v. Morgan (1871), 23 La. An. 502, § 790.
Morgan v. Tillottson (1887), 73 Cal. 520; 15 Pac. 88, §§ 624, 625.
Morgensen v. Middlesex Min. & M. Co. (1888), 11 Colo. 176; 17 Pac. 513, § 558.
Morgenstern v. Thrift (1885), 66 Cal. 577; 6 Pac. 689, § 800.
Moritz v. Lavelle (1888), 77 Cal. 10; 11 Am. St. Rep. 229; 18 Pac. 803; 16 Morr. 236, §§ 223, 331, 754, 797, 858.

Mormon Church v. United States (1890), 136 U. S. 1; L. ed. 34; 478, § 242.
Morrill v. Margaret Min. Co. (1890), 11 L. D. 563, § 515.
Morrison v. Lincoln Min. Co. (1879), 6 C. L. O. 105; Sickles Min. Dec. 208, § 738.
Morrow v. Whitney (1877), 95 U. S. 551; L. ed. 24; 456, § 216.
Morse v. De Ardo (1895), 107 Cal. 622; 40 Pac. 1018, § 327.
Morton v. Solambo M. Co. (1864), 26 Cal. 527; 4 Morr. 463, §§ 44, 331, 398.
Morton v. State of Nebraska (1874), 88 U. S. 660; L. ed. 22; 639; 12 Morr. 541, §§ 36, 47, 513, 609.
Mott v. Reyes (1873), 45 Cal. 379, § 123.
Mount Diablo M. & M. Co. v. Callison (1879), 5 Saw. 439; Fed. Cases, No. 9886; 9 Morr. 616, §§ 274, 290, 327, 373, 630, 631.
Mt. Joy Lode (1870), Copp's Min. Dec. p. 61, § 59.
Mount Joy Lode (1870), Copp's Min Dec. 27, § 730.
Mountain Maid Lode (1886), 5 L. D. 28, § 784.
Moxon v. Wilkinson (1876), 2 Mont. 421; 12 Morr. 602, §§ 62, 392, 419.
Moyle v. Bullene (1896), 7 Colo. App. 308; 44 Pac. 69, §§ 177, 337, 398.
Mullan v. United States (1886), 118 U. S. 271; L. ed. 30; 170, §§ 136, 140, 143, 157, 161, 495, 784.
Muller v. Dows (1877), 94 U. S. 444; 24; 207, § 226.
Mumford v. Whitney (1836), 15 Wendell, 380; 30 Am. Dec. 60, § 860.
Mundy v. Rutland (1882), 23 Ch. Div. 81, § 827.
Murchie v. Black (1865), 19 C. B., N. S., 190, § 833.
Murdock v. Stickney (1851), 8 Cush. 113, § 257.
Murley v. Ennis (1874), 2 Colo. 300; 12 Morr. 360, §§ 331, 339, 372, 797, 858.
Murphy v. Sanford (1890), 11 L. D. 123, § 773.
Murray v. Butte City (1887), 7 Mont. 61; 14 Pac. 656, § 530.
Murray v. Polglase (1896), 17 Mont. 455; 43 Pac. 505, §§ 208, 638, 772.
Muskett v. Hill (1839), 5 Bing. N. C. 694, §§ 860, 861.
Myers v. Spooner (1880), 55 Cal. 257; 9 Morr. 519, §§ 643, 644.

Naftger v. Gregg (1893), 99 Cal. 83; 33 Pac. Rep. 757; 37 Am. St. Rep. 23, § 764.
Natoma Water & M. Co. v. Clark (1860), 14 Cal. 554, § 872.
Natoma Water & Min. Co. v. Hancock (1894), 101 Cal. 42; 35 Pac. 334, § 872.
Natural Copper Co. v. Minnesota M. Co. (1885), 57 Mich. 83; 58 Am. Rep. 333; 23 N. W. Rep. 781, § 867.
Neal v. Clark (1878), 95 U. S. 704; L. ed. 24; 586, § 480.
Negus, In re (1890), 11 L. D. 32, §§ 504, 784.
Nelson v. O'Neal (1871), 1 Mont. 284; 4 Morr. 275, § 843.
Nerce Valle, In re (1875), 2 C. L. O. 178, § 211.
Nettie Lode v. Texas Lode (1892), 14 L. D. 180, §§ 738, 756.
Nevada Lode (1893), 16 L. D. 532, § 742.

New Cent. C. Co. v. George's Creek C. Co. (1872), 37 Md. 537, § 256.
New York Hill v. Rocky Bar (1886), 6 L. D. 318; 15 C. L. O. 3, § 730.
New York Lode & Millsite (1887), 5 L. D. 513; 14 C. L. O. 52, § 677.
New York P. & D. Establishment v. Fitch (1830), 1 Paige 97, § 790.
Newbill v. Thurston (1884), 65 Cal. 419; 4 Pac. 409, §§ 339, 372.
Newhall v. Sanger (1875), 92 U. S. 761; L. ed. 23; 769, §§ 80, 123, 322.
Newman v. Barnes (1896), 23 L. D. 257, § 765.
Newman v. Dreifurst (1886), 9 Colo. 228; 11 Pac. 98, § 790.
Nichols, In re (1889), 15 C. L. O. 255, § 501.
Nichols v. Becker (1890), 11 L. D. 8, §§ 630, 755.
Nichols v. Marsland (1876), 2 Exch. Div. 1, § 808.
Nichols v. Marsland (1875), L. R. 10 Exch. 255, § 808.
Nil Desperandum Placer (1890), 10 L. D. 198, § 677.
Nisbet v. Nash (1878), 52 Cal. 540; 11 Morr. 531, §§ 796, 800.
Noble v. Sylvester (1869), 42 Vt. 146; 12 Morr. 62, § 644.
Nolan v. Lovelock (1870), 1 Mont. 224; 9 Morr. 360, §§ 797, 801.
Noonan v. Caledonia G. M. Co. (1883), 10 C. L. O. 167, § 764.
Noonan v. Caledonia G. M. Co. (1887), 121 U. S. 393; L. ed. 30; 1061, § 184.
Norager, In re (1881), 10 C. L. O. 54, §§ 97, 136.
North Noonday Min. Co. v. Orient Min. Co. (1880), 6 Saw. 299; 1 Fed. 522; 9 Morr. 529, §§ 226, 232, 233, 250, 271, 272, 273, 294, 330, 335, 345, 361, 362, 373, 383, 651.
North Noonday Min. Co. v. Orient Min. Co. (1880), 6 Saw. 503; 11 Fed. 125; 9 Morr. 524, §§ 218, 227.
North Star M. Co. v. C. P. R. R. Co. (1891), 12 L. D. 608, § 155.
Northern Pac. R. R. Co. (1891), 13 L. D. 691, § 155.
Northern Pac. R. R. Co. v. Barden (1891), 46 Fed. 592, § 154.
Northern Pac. R. R. Co. v. Cannon (1893), 54 Fed. 252, §§ 144, 154, 156.
Northern Pac. R. R. Co. v. Champion C. M. Co. (1891) 14 L. D. 699, § 155.
Northern Pacific R. R. Co. v. Marshall (1893), 17 L. D. 545, §§ 106, 155, 335.
Northern Pac. R. R. v. Paine (1887), 119 U. S. 561; L. ed. 30; 513, § 872.
Northern Pac. R. R. Co. v. Sanders (1892), 49 Fed. 129, §§ 152, 154, 327.
Northern Pac. R. R. Co. v. Wright (1893), 54 Fed. 67, § 154.
Noteware v. Sterns (1871), 1 Mont. 311; 4 Morr. 650, § 531.
Noyes v. Black (1883), 4 Mont. 527; 2 Pac. 769, §§ 218, 329.
Noyes v. Mantle (1888), 127 U. S. 348; L. ed. 32; 168; 15 Morr. 611, §§ 176, 413, 415, 539, 720, 781.

Oaksmith v. Johnston (1876), 92 U. S. 343; L. ed. 23; 682, § 216.
Obert v. Obert (1846), 5 N. J. Eq. 397, § 790.
Oettel v. Dufur (1896), 22 L. D. 77, § 772.
Offerman v. Starr (1846), 2 Pa. St. 394; 44 Am. Dec. 211; 10 Morr. 614, § 861.

Ohio & Miss. R. R. Co. v. Wheeler (1862), 1 Black, 286; L. ed. 17; 130, § 226.
Ohio Oil Co. v. Kelley (1895), 9 Oh. Cir. Ct. R. 511; 3 Oh. Dec. 186, § 861.
O'Keiffe v. Cunningham (1858), 9 Cal. 589; 9 Morr. 451, § 843.
Oldtown v. Bangor (1870), 58 Me. 353, § 224.
Omaha G. M. Co. (1876), 3 C. L. O. 36, § 739.
Omaha & Grant S. & R. Co. v. Tabor (1889), 13 Colo. 41; 16 Am. St. Rep. 185; 21 Pac. 925; 16 Morr. 184, §§ 791, 868.
Omar v. Soper (1888), 11 Colo. 380; 7 Am. St. Rep. 240; 18 Pac. 443; 15 Morr. 496, §§ 330, 339, 345, 356, 397, 558, 643.
Ontario Nat. Gas Co. v. Gosfield (1891), 18 Ont. App. 626, § 423.
Ontario S. M. Co. (1886), 13 C. L. O. 159, § 521.
Orchard v. Alexander (1895), 157 U. S. 372; 39; 737, §§ 662, 772.
Oreamuno v. Uncle Sam G. & S. M. Co. (1865), 1 Nev. 217; 1 Morr. 32, §§ 274, 643, 644.
Original M. Co. v. Winthrop Min. Co. (1882), 60 Cal. 631, § 632.
Oro Placer, In re (1890), 11 L. D. 457, § 690.
Oscamp v. Crystal River M. Co. (1893), 58 Fed. 293, §§ 363, 558, 651.
Osterman v. Baldwin (1867), 6 Wall. 122; L. ed. 18; 730, § 232.
Oury v. Goodwin (1891, Ariz.), 26 Pac. 376; §§ 257, 259.
Ovens v. Stephens (1882), 2 L. D. 699; 9 C. L. O. 190, §§ 738, 759.
Overman S. M. Co. v. Corcoran (1880), 15 Nev. 147; 1 Morr. 691, § 258.
Overman v. Dardanelles M. Co. (1873), Copp's Min. Dec. 181, § 737.
O'Donnell v. Glenn (1888), 8 Mont. 248; 19 Pac. 302, §§ 250, 251, 336, 346, 383.
O'Gorman v. Mayfield (1894), 19 L. D. 522, § 505.
O'Rielly v. Campbell (1885), 116 U. S. 418; L. ed. 29; 669, §§ 233, 373, 684.
Ouimette v. O'Conner (1896), 22 L. D. 538, § 504.

Pacific Coast Min & M. Co. v. Spargo, (1883), 8 Saw. 647; L. ed. 16 Fed. 348; 16 Morr. 75, §§ 107, 127, 208, 612.
Pacific Slope Lode (1891), 12 L. D. 686, §§ 173, 174, 180.
Packer v. Heaton (1858), 9 Cal. 569; 4 Morr. 447, §§ 629, 631.
Page, In re (1883), 1 L. D. 614, § 523.
Page v. Summers (1886), 70 Cal. 121; 12 Pac. 120; 15 Morr. 617, §§ 407, 800.
Pagosa Springs, In re (1882), 1 L. D. 562, § 515.
Palmer v. Fleshees (1663), 1 Sid. 167, § 833.
Panton v. Holland (1819), 17 Johns. 92; 8 Am. Dec. 369, § 832.
Papina v. Alderson (1883), 10 C. L. O. 52, §§ 171, 722.
Pardee v. Murray (1882), 4 Mont. 234; 15 Morr. 515, §§ 559, 560.
Paris v. Gibson (1895), 21 L. D. 327, §§ 139, 141.
Park Coal Co. v. O'Donnell ( ), 7 Leg. Gaz. 149, § 814.
Parker v. Duff (1874), 47 Cal. 554, §§ 664, 690.
Parley's Park v. Kerr (1889), 130 U. S. 256; L. ed. 32; 906, §§ 161, 207, 275, 778.

Parsons v. Venzke (1896), 164 U. S. 89, §§ 637, 772.
Partridge v. McKinney (1858), 10 Cal. 181; 1 Morr. 185, § 644.
Partridge v. Scott (1838), 3 M. & W. 220; 13 Morr. 640, § 833.
Patchen v. Keeley (1887), 19 Nev. 404; 14 Pac. 347, §§ 335, 868.
Patrick v. Weston (1895), 22 Colo. 45, § 796.
Patten Extension Lode (1892), 15 L. D. 133, § 782.
Patterson v. Hitchcock (1877), 3 Colo. 533; 5 Morr. 542, §§ 58, 339, 350, 372, 553.
Patterson v. Keystone M. Co. (1866), 23 Cal. 575; 13 Morr. 169, § 270.
Patterson v. Keystone Min. Co. (1866), 30 Cal. 360, § 800.
Patterson v. Tarbell (1894), 26 Ore. 29; 37 Pac. 76, §§ 371, 372.
Patterson Q. M. Co. (1876), 4 C. L. O. 3, § 521.
Payne, In re (1888), 15 C. L. O. 97, § 690.
Pearsall and Freeman (1887), 6 L. D. 227; 14 C. L. O. 210, § 448.
Pecard v. Camens (1885), 4 L. D. 152, § 677.
Peck, In re Mary G. (1883), 10 C. L. O. 119, § 728.
Peirano v. Pendola (1890), 10 L. D. 536, §§ 95, 207.
Pelican Lode (1872), C. M. D. 126, § 756.
Pelican & Dives v. Snodgrass (1886), 9 Colo. 339; 12 Pac. 206, §§ 330, 408.
Pennington v. Coxe (1804), 2 Cranch, 33; L. ed. 2; 199, § 480.
Pennoyer v. McConnaughy (1891), 140 U. S. 1; L. ed. 35; 363, §§ 482, 666.
Pennsylvania Coal Co. v. Sanderson (1880), 94 Pa. St. 302; 39 Am. Rep. 785; 11 Morr. 79, § 840.
Pennsylvania Coal Co. v. Sanderson (1888), 102 Pa. St. 370, § 840.
Pennsylvania Coal Co. v. Sanderson (1886), 113 Pa. St. 126; 57 Am. Rep. 445; 6 Atl. Rep. 453, § 840.
Pennybecker v. McDougal (1874), 48 Cal. 160, § 409.
People ex. rel. Aspen Min. & S. Co. v. District Court (1887), 11 Colo. 147, §§ 252, 256.
People ex. rel. Darby v. District Court (1894), 19 Colo. 343; 35 Pac. 731, § 713.
People v. District Court (1888), 11 Colo. 147; 17 Pac. 298, § 531.
People v. Folsom (1855), 5 Cal. 373, § 233.
People v. Gold Run D. & M. Co. (1884), 66 Cal. 138; 56 Am. Rep. 80; 4 Pac. 1150, §§ 843, 888, 889.
People v. Morrill (1864), 26 Cal. 336, § 872.
People v. Parks (1881), 58 Cal. 624, § 806.
People v. Pittsburgh Ry. Co. (1879), 53 Cal. 694; 12 Morr. 518, § 256.
People v. Shearer (1866), 30 Cal. 645, § 535.
People v. Taylor (1865), 1 Nev. 88, § 535.
Peralta v. United States (1866), 3 Wall. 434; L. ed. 18; 221, § 116.
Perego v. Dodge (1896), 163 U. S. 160; L. ed. 41; 113, §§ 749, 754, 763, 765.
Pereria v. Jacks (1892), 15 L. D. 273, § 142.
Perkins v. Hendrix (1885), 23 Fed. Rep. 418, § 872.

Perkins v. Peterson (1892), 2 Colo. App. 242; 29 Pac. 1135, § 798.
Perrott v. Connick (1891), 13 L. D. 598, § 772.
Peru Lode and Millsite (1890), 10 L. D. 196, § 523.
Peters v. United States (1893, Okl.), 33 Pac. 1031, § 660.
Peterson, In re Adolph (1887), 6 L. D. 371; 15 C. L. O. 14, § 501.
Petit v. Buffalo G. & S. M. Co. (1889), 9 L. D. 563, § 742.
Peyton v. Mayor and Communality of London (1829), 9 Barn. & Cress. 725, § 833.
Pfister v. Dascey (1884), 65 Cal. 403; 4 Pac. 393, § 872.
Pharis v. Muldoon (1888), 75 Cal. 264; 17 Pac. 70; 15 Morr. 348, §§ 339, 372, 373, 408, 646, 652.
Philadelphia M. Co. v. Finley (1884), 10 C. L. O. 340, § 735.
Philipps v. Moore (1879), 100 U. S. 208; L. ed. 25; 603, § 233.
Phillips v. Homfray (1871), 6 L. R. Ch. App. 770; 14 Morr. 677, § 807.
Phillips v. Watson (1884), 63 Iowa, 28; 18 N. W. Rep. 659, § 256.
Philadelphia Min. Claim v. Pride of The West (1876) 3 C. L. O. 82, §§ 396, 582, 671.
Phillpotts v. Blasdell (1872), 8 Nev. 62; 4 Morr. 341, § 294.
Phoenix Water Co. v. Fletcher (1863), 23 Cal. 482; 15 Morr. 185, § 841.
Pike's Peak Lode (1890), 10 L. D. 200, § 415.
Pike Peak's Lode (1892), 14 L. D. 47, § 180.
Pinney v. Berry (1875), 61 Mo. 359, § 844.
Piru Oil Co. (1893), 16 L. D. 117, §§ 138, 422.
Pixley v. Clark (1866), 35 N. Y. 520; 91 Am. Dec. 72, § 808.
Platt v. Union Pac. R. R. (1879), 99 U. S. 48; L. ed. 25; 424, §§ 480, 612.
Plymouth Lode (1891), 12 L. D. 513, §§ 173, 174, 180.
Poire v. Wells (1882), 6 Colo. 406, §§ 161, 175, 777.
Pollard's Heirs v. Kibbe (1840), 14 Peters, 352; L. ed. 10; 490, § 428.
Pollard (Lessee) v. Hagan (1845), 3 How. 212; 11; 565, §§ 80, 115, 428.
Pollard v. Shively (1880), 5 Colo. 309; 2 Morr. 229, §§ 371, 375, 379, 383, 642.
Poplar Creek Cons. Quartz Mine (1893), 16 L. D. 1, § 337.
Poppe v. Athearn (1872), 42 Cal. 606, §§ 472, 662.
Port v. Tuston (1763), 2 Wils. 169, § 9.
Postal Telegraph C. Co. v. Alabama (1894), 155 U. S. 482; L. ed. 39; 231, § 750.
Potter v. Mercer (1879), 53 Cal. 667, § 860.
Potter v. United States (1883), 107 U. S. 126; 27; 330, § 660.
Poujade v. Ryan (1893), 21 Nev. 449; 33 Pac. 659, §§ 272, 273, 355, 379.
Powell v. Ferguson (1896), 23 L. D. 173, § 717.
Powers v. Leith (1879), 53 Cal. 711, § 207.
Pralus v. Jefferson G. & S. M. Co. (1868), 34 Cal. 558; 12 Morr. 473, § 537.
Pralus v. Pacific G. & S. M. Co. (1868), 35 Cal. 30; 12 Morr. 478, §§ 273, 363.
Pratt v. Avery (1880), 7 L. D. 554; 15 C. L. O. 244, § 677.

Prendergast v. Turton (1841), 1 Younge & C. R. 98, § 859.
Prentice v. Geiger (1878), 74 N. Y. 341, § 840.
Preston v. Hunter (1895), 67 Fed. 996, §§ 251, 330, 390.
Pride of the West Mine (1877), 4 C. L. O. 34, § 756.
Prince of Wales Lode (1875), 2 C. L. O. 2, §§ 355, 381, 383, 692.
Princeton Min. Co. v. First Nat'l. Bank (1888), 7 Mont. 530; 19 Pac. 210, § 226.
Pringle v. Vesta Coal Co. (1896), 172 Penn. St. 438; 33 Atl. Rep. 690, § 818.
Protector Lode (1891), 12 L. D. 662, §§ 173, 174, 180.
Proud v. Bates (1865), 34 L. J. Ch. 406; 15 Morr. 227, §§ 818, 819.
Pumpelly v. Green Bay Co. (1871), 13 Wall. 166; L. ed. 20; 557, § 843.
Putnam v. Wise (1841), 1 Hill, 234; 37 Am. Dec. 309, § 861.

Quigley v. Gillett (1894), 101 Cal. 462; 35 Pac. 1040, §§ 274, 636, 643, 645, 737, 750.
Quimby v. Boyd (1884), 8 Colo. 194; 6 Pac. 462, §§ 383, 635.
Quinby v. Conlan (1882), 104 U. S. 420; L. ed. 26; 800, §§ 175, 207, 217, 438, 665.
Quincy v. Jones (1875), 76 Ill. 231; 20 Am. Rep. 243, § 833.
Quinn v. Chapman (1884), 111 U. S. 445; L. ed. 28; 476, § 123.
Quinn v. Kenyon (1869), 38 Cal. 499, § 542.

Rabbins Placer (1884), 2 L. D. 764; 10 C. L. O. 338, §§ 428, 448.
Racouillat v. Sansevain (1867), 32 Cal. 376, § 233.
Rader v. Allen (1895), 27 Or. 344; 41 Pac. 154, § 773.
Ralston v. Plowman (1875), 1 Idaho, 595; 5 Morr. 160, §§ 272, 843.
Ramage, In re (1875), 2 C. L. O. 114, § 718.
Randall v. Merideth (1890), 76 Tex. 669; 13 S. W. Rep. 576, §§ 798, 801.
Randolph, In re Simon (1896), 23 L. D. 329, §§ 210, 421.
Rankin, In re (1888), 7 L. D. 411; 15 C. L. O. 208, § 170.
Rankin's Appeal (1888, Pa.), 16 Atl. Rep. 82, § 812.
Rattlesnake Jack Placer (1883), 10 C. L. O. 87, § 184.
Raunheim v. Dahl (1886), 6 Mont. 167; 9 Pac. 892, §§ 720, 742.
Raynolds v. Hanna (1893), 55 Fed. Rep. 783, § 861.
Rea v. Stephenson (1892), 15 L. D. 37, § 208.
Rebel Lode (1891), 12 L. D. 683, § 413.
Rebellion M. Co., In re (1881), 1 L. D. 542, § 679.
Rector & Hale v. United States (1876), 92 U. S. 698; L. ed. 23; 690, § 183.
Red Mountain Cons. M. Co. v. Essler (1896), 18 Mont. 174; 44 Pac. 523, § 790.
Red River Roller Mills v. Wright (1883), 30 Minn. 249; 44 Am. Rep. 194; 15 N. W. Rep. 167, § 840.
Reed, In re (1888), 6 L. D. 563, § 772.
Reed v. Hoyt (1882), 1 L. D. 603, § 737.

Reed v. Reed (1863), 16 N. J. Eq. 248, § 789.
Reins v. Murray (1896), 22 L. D. 409, §§ 432, 437, 454.
Remmington v. Baudit (1886), 6 Mont. 138; 9 Pac. 819, §§ 629, 631.
Reno Smelting M. & R. Works v. Stevenson (1889), 20 Nev. 269; 19 Am. St. Rep. 364; 21 Pac. 317, § 838.
Renshaw v. Switzer (1887), 6 Mont. 464; 13 Pac. 127; 15 Morr. 345, §§ 624, 643.
Republican Min. Co. v. Tyler Min. Co. (1897), 79 Fed. 733, § 699.
Rex. v. Pagham Commissioners of Sewers (1828), 8 B. & C. 355, § 807.
Reynolds v. Iron Silver Min. Co. (1886), 116 U. S. 687; L. ed. 29; 774; 15 Morr. 591, §§ 293, 413, 414, 415, 419, 491, 720, 781, 806.
Rhea v. Hughes (1840), 1 Ala. 219; 34 Am. Dec. 772, § 542.
Rhodes v. Otis (1859), 33 Ala. 578; 73 Am. Dec. 430, § 800.
Rhodes v. Treas (1895), 21 L. D. 502, §§ 106, 432, 438.
Riborado v. Quang Pang Co. (1885), 2 Idaho, 131; 6 Pac. 125, § 272.
Rice, In re (1890), 11 L. D. 213, § 679.
Rich v. Maples (1867), 33 Cal. 102, § 123.
Richards v. Dower (1883), 64 Cal. 62; 28 Pac. 113, § 872.
Richards v. Dower (1889), 81 Cal. 44; 22 Pac. 304, §§ 127, 142, 176, 209.
Richards v. Jenkins (1868), 18 Law Times (U. S.), 438, § 818.
Richards v. Wolfing (1893), 98 Cal. 195; 32 Pac. 971, § 338.
Richardson v. McNulty (1864), 24 Cal. 339; 1 Morr. 11, §§ 642, 643.
Richmond Min. Co. v. Eureka Min. Co. (1881), 103 U. S. 839; L. ed. 26; 557; 9 Morr. 634, § 576.
Richmond M. Co. v. Rose (1882), 114 U. S. 576; L. ed. 29; 273, §§ 362, 583, 737, 740, 741, 742, 759, 766.
Rico Lode (1889), 8 L. D. 223, § 682.
Rico-Aspen Cons. Min. Co. v. Enterprise Min. Co. (1892), 53 Fed. 321, §§ 364, 481, 482, 487.
Rico Reduction Works v. Musgrave (1890), 14 Colo. 79; 23 Pac. 458, § 790.
Rico Townsite (1882), 1 L. D. 556; 9 C. L. O. 90, §§ 171, 520, 521.
Riddle v. Brown (1852), 20 Ala. 412; 56 Am. Dec. 202; 9 Morr. 219, §§ 175, 860.
Rigby v. Bennett (1882), 21 Ch. Div. 559; 40 L. T. 47, § 833.
Riley v. Heisch (1861), 18 Cal. 198, § 123.
Risdon v. Davenport (1894), 4 S. Dak. 555; 57 N. W. Rep. 482, §§ 662, 772.
Roach v. Gray (1860), 16 Cal. 383; 4 Morr. 450, § 270.
Robb v. Carnegie (1891), 145 Pa. St. 324; 27 Am. St. Rep. 694; 22 Atl. Rep. 649, § 840.
Roberts v. Eberhardt (1853), Kay, 148; 11 Morr. 301, § 790.
Roberts v. Gebhart (1894), 104 Cal. 67, § 143.
Roberts v. Jepson (1885), 4 L. D. 60, §§ 106, 138, 207, 422.
Roberts v. Wilson (1876), 1 Utah, 292; 4 Morr. 498, §§ 272, 391, 537.
Robertson v. Jones (1874), 71 Ill. 405; 10 Morr. 190, § 868.
Robertson v. Smith (1871), 1 Mont. 410; 7 Morr. 196, § 531.

Robertson v. Youghiogeny R. R. Co. (1896), 172 Pa. St. 566; 33 Atl. Rep. 706, § 821.
Robinson v. Black Diamond Coal Co. (1881), 57 Cal. 412; 40 Am. Rep. 118; 14 Morr. 93, § 843.
Robinson v. Grave (1872), 27 L. T. 648, § 833.
Robinson v. Imperial S. M. Co. (1869), 5 Nev. 44; 10 Morr. 370, § 634.
Robinson v. Mayger (1882), 1 L. D. 538; 9 C. L. O. 5, §§ 734, 759.
Rockwell v. Graham (1886), 9 Colo. 36; 10 Pac. 284; 15 Morr. 299, §§ 530, 729.
Rocky Lode, In re (1892), 15 L. D. 571, § 679.
Rocky Mountain C. & I. Co. (1873), 1 C. L. O. 1, §§ 158, 496.
Rogers, In re (1885), 4 L. D. 284; 12 C. L. O. 288, §§ 138, 422.
Rogers v. Brenton (1847), 10 Q. B. 25, § 839.
Rogers v. Cooney (1872), 7 Nev. 215; 14 Morr. 85, §§ 373, 426.
Rogers v. Taylor (1858), 2 Hurl. & N. 828, § 820.
Rogers v. Taylor (1857), 1 H. & N. 706, § 813.
Rolfe, In re (1875), 2 C. L. O. 66, § 158.
Rose Lode Claim (1896), 22 L. D. 83, §§ 226, 273, 396, 671.
Rose v. Nevada & G. V. Wood & Lumber Co. (1887), 73 Cal. 385, § 472.
Rose v. Richmond (1882), 17 Nev. 25; 27 Pac. 1105, §§ 362, 583, 737, 740.
Rosenthal v. Ives (1887), 2 Idaho, 244; 12 Pac. 904; 15 Morr. 324, §§ 233, 268, 754, 755, 763.
Roseville Alta Co. v. Iowa Gulch (1890), 15 Colo. 29; 24 Pac. 920; 16 Morr. 93, §§ 409, 535.
Rough v. Simmons (1884), 65 Cal. 227; 3 Pac. 804; 15 Morr. 298, § 754.
Rowbotham v. Wilson (1857, Eng.), 8 E. & B. 123, § 9.
Rowbotham v. Wilson (1857, Eng.), 8 E. & B. 123, § 9.
Rowe v. Portsmouth (1876), 56 N. H. 291; 22 Am. Rep. 464, § 843.
Rowena Lode (1888), 7 L. D. 477, § 677.
Royston v. Miller (1896), 76 Fed. 50, §§ 406, 629, 630, 646.
Ruabon B. & T. C. Co. v. Great Western Ry. Co. (1893), L. R. 1 Ch. 427, § 92.
Rucker v. Knisley (1892), 14 L. D. 113, § 496.
Rush v. French (1874), 1 Ariz. 99; 25 Pac. 816, §§ 271, 274, 331.
Rush v. Valentine (1882), 12 Neb. 513; 11 N. W. Rep. 746, § 660.
Russell Lode (1877), 5 C. L. O. 18, § 671.
Russell v. Brosseau (1884), 65 Cal. 605; 4 Pac. 645, §§ 405, 645.
Russell v. Chumasero (1882), 4 Mont. 309; 1 Pac. 713; 15 Morr. 508, §§ 373, 379, 383.
Russell v. Hoyt (1882), 4 Mont. 412; 2 Pac. 25, § 218.
Russell v. Merchants' Bank (1891), 47 Minn. 286; 28 Am. St. Rep. 368; 50 N. W. Rep. 228; § 789.
Rutland Marble Co. v. Ripley (1870), 10 Wall. 339; L. ed. 19; 955; 3 Morr. 291, § 175.
Rutter v. Shoshone Min. Co. (1896), 75 Fed. 37, §§ 748, 754.
Ryckman v. Gillis (1874), 57 N. Y. 68, § 812.

Rylands v. Fletcher (appeal), (1868), 3 L. R. H. L. 330; 6 Morr. 129. § 808.

Salt Bluff Placer (1888), 7 L. D. 549, §§ 513, 514.
Sanderson v. Pennsylvania Coal Co. (1878), 86 Pa. St. 401; 27 Am. Rep. 711; 11 Morr. 60, § 840.
Sanderson v. Scranton City (1884), 105 Pa. St. 469, § 812.
Sanford, In re (1874), 1 C. L. O. 98, § 684.
Santa Clara Min. Ass'n. v. Quicksilver M. Co. (1882), 8 Saw. 330; 17 Fed. 657, § 797.
Saratoga Lode v. Bulldozer Lode (1879), Sickles' Min. Dec. 252, § 730.
Satisfaction Extension Millsite (1892), 14 L. D. 173, § 523.
Satterfield v. Rowan (1889), 83 Ga. 687; 9 S. E. Rep. 677, § 840.
Saunders v. Mackey (1885), 5 Mont. 523; 6 Pac. 361, §§ 331, 405, 406, 646.
Savage v. Boynton (1891), 12 L. D. 612, §§ 95, 207, 496.
Sayer v. Hoosac Cons. G. & S. M. Co. (1879), 6 C. L. O. 73, § 739.
Sayers v. Hoskinson (1885), 110 Pa. St. 473; 1 Atl. Rep. 308, § 789.
Schoolfield v. Houle (1889), 13 Colo. 394; 22 Pac. Rep. 781, § 542.
Schulenberg v. Harriman (1875), 21 Wall. 44; L. ed. 22; 551, § 154.
Schultz v. Allyn (1897, Ariz.), 48 Pac. 900, § 754.
Schultz v. Keeler (1887), 2 Idaho 305; 13 Pac. 481, § 331.
Scott v. Clark (1853), 1 Ohio St. 382; 12 Morr. 276, § 858.
Scott v. Maloney (1896), 22 L. D. 274, § 737.
Scott v. Sheldon (1892), 15 L. D. 361, § 496.
Scranton v. Phillips (1880), 94 Pa. St. 15; 14 Morr. 48, § 812.
Scudder v. Trenton Del. Falls Co. (1832), 1 N. J. Eq. 694, § 257.
Seamon v. Vandray (1810), 16 Ves. 390; 13 Morr. 62, § 9.
Searle Placer (1890), 11 L. D. 441, § 208.
Sears J. P., In re (1881), 8 C. L. O. 152, § 688.
Sears v. Sellew (1870), 28 Iowa 501, § 790.
Sears v. Taylor (1877), 4 Colo. 38; 5 Morr. 318, § 792.
Settembre v. Putnam (1866), 30 Cal. 490; 11 Morr. 425, §§ 797, 798, 800.
Settle v. Winters (1886), 2 Idaho, 199; 10 Pac. 216, § 859.
Seymour v. Fisher (1891), 16 Colo. 188; 27 Pac. 240, §§ 192, 323, 397, 398, 660, 742, 755.
Seymour v. Wood (1892), 4 C. L. O. 2, §§ 735, 756.
Shafer v. Constans (1879), 3 Mont. 369; 1 Morr. 147, §§ 192, 542, 724.
Shafer's Appeal (1884), 106 Pa. St. 49, § 802.
Shafto v. Johnson (1863), 8 Best. & Smith, 252, § 821.
Shanklin v. McNamara (1891), 87 Cal. 371; 26 Pac. 345, §§ 123, 207, 664.
Shanks v. Dupont (1840), 3 Peters 242; 7 L. ed. 666, § 224.
Sheldon v. Sherman (1870), 42 N. Y. 484; 1 Am. Rep. 569, § 808.
Shepherd v. Bird (1893), 17 L. D. 82, §§ 97, 158, 421.
Shepley v. Cowan (1876), 91 U. S. 330; L. ed. 23; 424, §§ 175, 192, 207, 438, 665.

Sherman v. Buick (1893), 45 Cal. 656, § 142.
Shively v. Bowlby (1894), 152 U. S. 1; L. ed. 38; 331, § 80.
Shiver v. United States (1895), 159 U. S. 491; L. ed. 40; 231, § 208.
Sholl v. German C. Co. (1887), 118 Ill. 427; 10 N. E. Rep. 199, § 256.
Shonbar Lode (1883), 1 L. D. 551, §§ 415, 720.
Shonbar Lode (1885), 3 L. D. 388, §§ 415, 720.
Shoo Fly and Magnolia Lode v. Gisborn (1874), 1 C. L. O. 135, § 719.
Shreve v. Copper Bell M. Co. (1891), 11 Mont. 309; 28 Pac. 315, §§ 294, 336.
Sierra Grande Min. Co. v. Crawford (1890), 11 L. D. 338, §§ 521, 523.
Silsby v. Trotter (1878), 29 N. J. Eq. 228; 3 Morr. 137, § 860.
Silva v. Rankin (1887), 80 Ga. 79; 4 S. E. Rep. 756, § 812.
Silver Bow M. & M. Co. v. Clarke (1885), 5 Mont. 378; 5 Pac. 573, §§ 47, 125, 169, 170, 177, 539, 604, 609, 722, 783.
Silver Jennie Lode (1888), 7 L. D. 6, § 337.
Silver King Min. Co. (1895), 20 L. D. 116, § 226.
Silver M. Co. v. Fall (1870), 6 Nev. 454; 5 Morr. 283, § 866.
Silver Queen Lode (1893), 16 L. D. 186, § 338.
Simmons, In re (1883), 7 L. D. 283; 15 C. L. O. 156, § 171.
Sims v. Smith (1857), 7 Cal. 148; 13 Morr. 161, § 841.
Single v. Schneider (1869), 24 Wis. 299, § 868.
Sioux City & I. F. T. L. & L. Co. v. Griffey (1892), 143 U. S. 32; L. ed. 36; 64, § 154.
Sioux City & St. P. R. R. v. Chicago, M. & St. P. R. R. (1886), 117 U. S. 406; L. ed. 29; 928, § 157.
Skillman v. Lachman (1863), 23 Cal. 199; 83 Am. Dec. 96; 11 Morr. 381, §§ 796, 797, 801.
Slade v. Sullivan (1860), 17 Cal. 103; 7 Morr. 519, § 842.
Slaughterhouse Cases (1873), 16 Wall. 36; L. ed. 21; 394, § 224.
Slavonian M. Co. v. Vacavich (1881), 7 Fed. 331; 7 Saw. 217; 1 Morr. 541, §§ 75, 623, 632, 634.
Slidell v. Grandjean (1883), 111 U. S. 412; L. ed. 28; 321, § 96.
Smart v. Morton (1855), 5 Ellis & Bl. (40 Eng. Eq.) 30; 13 Morr. 655,
Smith, In re (1889), 16 C. L. O. 112, § 501.
Smith Bros., In re (1879), 7 C. L. O., § 688.
Smith, G. D. (1886), 13 C. L. O. 28, § 156.
Smith v. Buckley (1892), 15 L. D. 321, § 496.
Smith v. Cooley (1884), 65 Cal. 46; 2 Pac. 886, § 792.
Smith v. Darby (1872), 7 L. R. Q. B. C. 716, § 821.
Smith v. Doe (1860), 15 Cal. 101; 5 Morr. 218, §§ 537, 218.
Smith v. Ewing (1885), 11 Sawy. 56; 23 Fed. 741, § 772.
Smith v. Fletcher (appeal), (1872), 7 L. R. Exch. 305, § 808.
Smith v. Hill (1891), 89 Cal. 122; 26 Pac. 644, §§ 127, 142, 175, 176.
Smith v. Kenrick (1849), 7 Com. B. 515; 6 Morr. 142, § 807.
Smith v. Moore (1861), 26 Ill. 392, § 558.
§ 821.
Smith v. North American Min. Co. (1865), 1 Nev. 423; 13 Morr. 579, § 272.

Smith v. N. P. R. R. Co. (1893), 58 Fed. 513, §§ 153, 154.
Smith v. Townsend (1893), 148 U. S. 490; L. ed. 37; 533, § 612.
Smokehouse Lode Case (1886), 4 L. D. 555; 13 C. L. O. 36, § 723.
Smokehouse Lode Cases (1887), 6 Mont. 397; 12 Pac. 858, §§ 125, 169, 170, 171, 177, 604, 609, 722, 783.
Smuggler Min. Co. v. Trueworthy Lode Claim (1894), 19 L. D. 356, § 730.
Snow Flake Lode (1885), 4 L. D. 30, §§ 679, 742.
Snyder v. Burnham (1882), 77 Mo. 52; 15 Morr. 562, §§ 796, 797.
Snyder v. Sickles (1878), 98 U. S. 203; L. ed. 25; 97, § 663.
Snyder v. Waller (1897), 24 L. D. 7, § 717.
Souter v. Maguire (1889), 78 Cal. 543; 21 Pac. 183, §§ 273, 322, 363, 373, 754.
South Comstock G. & S. M. Co. (1875), 2 C. L. O. 146, § 173.
South Dakota v. Vermont S. Co. (1893), 16 L. D. 263, §§ 97, 138.
South End M. C. v. Tinney (1894, Nev.)) 35 Pac. 89, § 633.
South Spring Hill G. M. Co. v. Amador-Medean G. M. Co. (1892), 145 U. S. 300; L. ed. 36; 712, § 612.
South Star Lode (1893), 17 L. D. 280, § 180.
South Star Lode (on review), (1895), 20 L. D. 204, §§ 180, 413, 721.
South Yuba Water Co. v. Rosa (1889), 80 Cal. 333; 22 Pac. 222, § 838.
Southern Cross G. & S. M. Co. v. Europa M. Co. (1880), 15 Nev. 383; 9 Morr. 513, §§ 273, 336, 355, 373, 383.
Southern Pac. R. R. v. Allen G. M. Co. (1891), 13 L. D. 165, § 157.
Southern Pac. R. R. Co. v. Griffin (1895), 20 L. D. 485, §§ 156, 432, 438.
Southern Pac. R. R. Co. v. Whitaker (1895), 109 Cal. 268, § 154.
Southmayd v. Southmayd (1881), 4 Mont. 100; 5 Pac. 518, § 798.
Southwestern Min Co. (1892), 14 L. D. 597, §§ 513, 514, 515.
Southwestern Min. Co. v. Gettysburg M. Co. (1885), 4 L. D. 271; 12 C. L. O. 253, § 742.
Spalding v. Chandler (1896), 160 U. S. 394; L. ed. 40; 469, § 183.
Sparks v. Pierce (1885), 115 U. S. 408; L. ed. 29; 428, §§ 170, 216, 409.
Sparrow v. Strong (1865), 3 Wall. 97; L. ed. 18, 49; 2 Morr. 320, §§ 44, 56.
Speake v. Hamilton (1890), 21 Ore. 3; 26 Pac. 855, § 838.
Spear v. Cutter (1849), 5 Barb. 486, § 790.
Spencer v. Winselman (1871), 42 Cal. 479; 2 Morr. 334, §§ 535, 792.
Spratt v. Edwards (1892), 15 L. D. 290, § 208.
Spur Lode (1885), 4 L. D. 160; 12 C. L. O. 100, § 338.
Staples v. Wheeler, (1854), 38 Me. 372, § 858.
Stark v. Starr (1868), 6 Wall. 402; L. ed. 18; 925, §§ 609, 771.
Starr, In re (1883), 2 L. D. 759, §§ 723, 784.
State v. Indiana & Ohio O. G. M. & Co. (1889), 2 Int. St. Com. Rep. 758, § 423.
State v. McGraw (1882), 12 Fed. 449, § 784.
State v. Pacific Guano Co. (1884), 22 S. C. 50, § 808.
State of California, In re (1895), 20 L. D. 327, § 197.

State of California, In re (1896), 22 L. D. 294, 402, § 144.
State of California, In re (1896), 23 L. D. 423, §§ 106, 144.
State of Calif. v. Moore (1859), 12 Cal. 56; 14 Morr. 110, § 535.
State of California v. Poley (1877), 4 C. L. O. 18, §§ 136, 142.
State of California v. Smith (1886), 70 Cal. 153; 12 Pac. 121, § 238.
State of Colorado, In re (1887), 6 L. D. 412, § 142.
State of Colorado, In re (1890), 10 L. D. 222, § 514.
State of Florida v. Charlotte Harbor Phosphate Co. (1896), 74 Fed. 578, § 750.
State of Iowa v. Adams (1876), 45 Iowa. 99; 24 Am. Rep. 760, § 224.
State of Kansas v. Bradley (1885), 26 Fed. 289, § 491.
State of Montana v. Buley (1896), 23 L. D. 116, § 496.
State of Oregon v. Jones (1897), 24 L. D. 116, § 514.
State of Texas v. Parker (1884), 61 Tex. 265, § 513.
State of Washington v. McBride (1894), 18 L. D. 199, § 106.
St. Clair v. Cash Gold M. & M. Co. (1896, Colo. App.); 47 Pac. 466, § 868.
Stearns v. United States (1840 (?) ), 2 Paine, 300; Fed. Cases No. 13,341, § 750.
Steel v. Gold Lead G. & S. Min. Co. (1883), 18 Nev. 80; 1 Pac. 448; 15 Morr. 293, §§ 643, 679, 718, 758.
Steel v. St. Louis Smelting & R. Co. (1882), 106 U. S. 447; L. ed. 27; 226, §§ 126, 161, 168, 169, 170, 175, 207, 662, 777, 784.
Steele, In re (1884), 3 L. D. 115, § 685.
Stem Winder Min. Co. v. Emma and Last Chance M. Co. (1889), 2 Idaho, 421; 21 Pac. 1040, § 362.
Stemwinder Min. Co. v. Emma and Last Chance M. Co. (1892, U. S. Sup.), L. ed. 37; 941, § 362.
Stenger v. Edwards (1873), 70 Ill. 631; 9 Morr. 368, § 790.
Stephenson v. Wilson (1875), 37 Wis. 482; 13 Morr. 408, § 688.
Stevens v. Gill (1879), Fed. Cases No. 13,398; 1 Morr. 576, §§ 301, 866, 615, 866.
Stevens & Leiter v. Murphy (1879), Fed. Cases No. 8, 158; 4 Morr. 380, § 301.
Stevens & Leiter v. Williams (1879), 1 McCrary, 480; Fed. Cases, No. 13, 413; 1 Morr. 566, §§ 293, 294, 298, 301, 311, 366, 615.
Stevens & Leiter v. Williams (1879), Fed. Cases, No. 13414; 1 Morr. 557, §§ 293, 301, 311, 364, 367, 615.
Stevens v. McKibbin (1895), 68 Fed. 406, § 790.
Stevens v. Thompson (1845), 17 N. H. 103, § 790.
Stevenson v. Wallace (1876), 27 Gratt. 77, § 833.
Steves v. Carson (1890), 42 Fed. 821; 16 Morr. 12, § 755.
Stewart, In re (1874), 1 C. L. O. 34, § 323.
Stewart's Appeal (1867), 56 Pa. 413, § 256.
Stewart v. Chadwick (1859), 8 Iowa. 463; 12 Morr. 236, § 175.
Stewart v. McHarry (1895), 159 U. S. 643; L. ed. 40; 290, § 665.
Stewart v. N. E. C. & I. Co. (1892), 147 Pa. St. 612; 23 Atl. Rep. 882, § 861.

Stewart v. Rees (1895), 21 L. D. 446, § 688.
St. Helen's Smelting Co. v. Tipping (1865), 11 H. L. Cas. 642; 11 Morr. 50, § 840.
Stimson v. Clarke (1891), 45 Fed. 760, § 770.
Stinchfield v. Gillis (1892), 96 Cal. 33; 30 Pac. 839, §§ 294, 335, 614.
Stinchfield v. Gillis (1895), 107 Cal. 84, § 614.
Stinchfield v. Pierce (1894), 19 L. D. 12, § 208.
St. John v. Kidd (1864), 26 Cal. 264; 4 Morr. 454, §§ 274, 623, 643.
St. Joseph & Denver C. R. Co. v. Baldwin (1881), 103 U. S. 426; L. ed. 26; 578, §§ 153, 154.
St. Louis v. Wiggin's Ferry Co. (1871), 11 Wall. 423; L. ed. 20; 192, § 226.
St. Louis Min & Milling Co. v. Montana Co., Limited (1890), 9 Mont. 228; 23 Pac. 510, § 873.
St. Louis Smelting & Refining Co. v. Kemp (1879), Fed. Cas. No. 12,-239 A, § 447.
St. Louis Smelting & Refining Co. v. Kemp (1881), 104 U. S. 636; L. ed. 26; 875; 11 Morr. 673, §§ 45, 56, 62, 63, 72, 126, 161, 175, 175, 207, 327, 447, 449, 604, 608, 609, 625, 629, 630, 631, 665, 670, 671, 777, 783.
Stockbridge Iron Co. v. Cone Iron Works (1869), 102 Mass. 80; 6 Morr. 317, § 873.
Stone v. Bumpus (1873), 46 Cal. 218; 4 Morr. 278, §§ 530, 631, 841.
Stone v. Geyser Q. M. Co. (1877), 52 Cal. 315, 1 Morr. 59, §§ 643, 644.
Stone v. United States (1865), 2 Wall. 525; L. ed. 17; 765, §§ 175, 190.
Stork and Heron Placer (1888), 7 L. D. 359, § 631.
Stoughton's Appeal (1878), 88 Pa. St. 198, §§ 138, 422.
Stoughton v. Leigh (1808), 1 Taunt. 402, § 9.
St. Paul & Pac. Ry. Co. v. N. P. R. R. Co. (1891), 139 U. S. 1; L. ed. 35; 77, § 154.
Strang v. Ryan (1873), 46 Cal. 33; 1 Morr. 48, §§ 270, 331.
Strasburger v. Beecher (1890), 44 Fed. 209, §§ 748, 749.
Strepey v. Stark (1884), 7 Colo. 614; 5 Pac. 111, §§ 227, 329, 330, 346, 371, 390, 392, 398.
Strettell v. Ballon (1881), 9 Fed. 256; 11 Morr. 220, §§ 535, 792.
Strother v. Lucas (1838), 12 Peters, 410; L. ed. 9; 1137, § 116.
Stuart v. Adams (1891), 89 Cal. 367; 26 Pac. 970, §§ 244, 797, 799, 801, 858, 861.
Sucia Island Stone Mine (1896), 23 L. D. 329, § 191.
Suffolk Gold M. & M. Co. v. San Miguel Cons. M. & M. Co. (1897), Colo. App.), 48 Pac. Rep. 828, § 841.
Sullivan v. Hense (1874), 2 Colo. 424; 9 Morr. 487, §§ 271, 272.
Sullivan v. Iron S. M. Co. (1892), 143 U. S. 431; L. ed. 36; 214, §§ 413, 781.
Sulphur Springs L. M. Co. (1895), 22 L. D. 715, § 680.
Sunnyside Coal & Coke Co. v. Reitz (1895, Ind.), 39 N. E. Rep. 541, § 868.

Sussenbach v. First National Bank (1889), 5 Dak. 477; 41 N. W. Rep. 662, §§ 406, 646, 728.
Swaim v. Craven (1891), 12 L. D. 294, § 759.
Sweeney v. Northern Pacific R. R. Co. (1895), 20 L. D. 394, §§ 106, 438, 630, 673.
Sweeney v. Wilson (1890), 10 L. D. 157, § 632.
Sweet v. Webber (1884), 7 Colo. 443; 4 Pac. 752, §§ 218, 250, 329, 371, 432, 625, 626.
Swift Co. v. United States (1882), 105 U. S. 691; L. ed. 26; 1108, § 666.
Swigart v. Walker (1892), 49 Kan. 100; 30 Pac. 162, §§ 602, 772.

Table Mountain T. Co. v. Stranahan (1862), 20 Cal. 199; 9 Morr. 457, §§ 270, 272, 537, 642.
Table Mountain T. Co. v. Stranahan (1866), 31 Cal. 387, § 270.
Tabor v. Dexter (1878), Fed. Cases No. 13723; 9 Morr. 614, § 301.
Tabor v. Sullivan (1888), 12 Colo. 136; 20 Pac. 437, §§ 646, 728.
Talbott v. King (1886), 6 Mont. 76; 9 Pac. 439, §§ 170, 171, 177, 539, 604, 609, 632, 723, 783.
Tam v. Story (1895), 21 L. D. 440, §§ 326, 633.
Tameling v. U. S. Freehold Co. (1877), 93 U. S. 644; L. ed. 23; 998, § 116.
Tangerman v. Aurora Hill M. Co. (1889), 9 L. D. 538, § 692.
Tartar v. Spring Valley M. Co. (1855), 5 Cal. 396; 14 Morr. 371, § 838.
Taylor, In re (1882), 9 C. L. O. 52, § 361.
Taylor, In re (1882), 9 C. L. O. 92, § 765.
Taylor v. Baldwin (1850), 10 Barb. 582; 73 Am. Dec. 736, § 790.
Taylor v. Benham (1850), 5 How. 233; L. ed. 12; 130, § 233.
Taylor v. Castle (1871), 42 Cal. 367; 11 Morr. 484, §§ 796, 801, 803.
Taylor v. Longworth (1840), 14 Pet. 172; L. ed. 10; 405, § 859.
Taylor v. Middleton (1885), 67 Cal. 656; 8 Pac. 594; 15 Morr. 284, §§ 373, 644.
Tennessee v. Union & P. Bank (1894), 152 U. S. 454; L. ed. 38; 511, § 750.
Tennessee Coal I. & R. Co. v. Hamilton (1893), 100 Ala. 252; 46 Am. St. Rep. 48; 14 So. Rep. 167, § 840.
Tennessee Lode (1888), 7 L. D. 392, § 677.
Territory v. Lee (1874), 2 Mont. 124; 6 Morr. 248, § 223.
Territory v. McKay. See Territory of Mont. v. Mackey.
Territory of Montana v. Mackey (1888), 8 Mont. 168; 19 Pac. 395, § 326.
Thomas v. Chisholm (1889), 13 Colo. 105; 21 Pac. 1019; 16 Morr. 122, §§ 226, 763.
Thomas v. Oakley (1811), 18 Vesey Jr. 184; 7 Morr. 254, § 790.
Thomas Iron Co. v. Allenton Min. Co. (1877), 28 N. J. Eq. 77; 8 Morr. 36, § 873.
Thompson v. Jacobs (1883), 3 Utah, 346; 2 Pac. 715, § 623.
Thompson v. McElarney (1876), 82 Pa. St. 174, § 800.

Thompson v. Noble (1870), 3 Pittsb. 201; 11 Morr. 137, §§ 93, 97, 138.
Thompson v. Spray (1887), 72 Cal. 528; 14 Pac. 182, §§ 225, 227, 233, 273, 330, 331, 362, 397, 398, 754.
Thor Mine (1877), 5 C. L. O. 51, § 671.
Thornburgh v. Savage M. Co. (1867), Fed. Cases No. 13986; 7 Morr. 667, § 873.
Thornton v. Mahoney (1864), 24 Cal. 569, § 123.
Thurber v. Martin (1854), 2 Gray, 394; 61 Am. Dec. 468, § 840.
Thurston v. Dickinson (1846), 2 Rich. (S. C.), 317; 46 Am. Dec. 56, § 790
Thurston v. Hancock (1815), 12 Mass. 220; 7 Am. Dec. 57, § 833.
Tibbits v. Ah Tong (1882), 4 Mont. 536; 2 Pac. 761, § 233.
Tiernan v. Salt Lake Min. Co. (1874), 1 C. L. O. 25, § 738.
Tilden v. Intervenor M. Co. (1882), 1 L. D. 572; 9 C. L. O. 93, §§ 691, 737, 738.
Tilley v. Mayers (1862), 43 Pa. St. 404; 4 Morr. 320, § 861.
Timm v. Bear (1871), 29 Wis. 254, § 840.
Tinkham v. McCaffrey (1891), 13 L. D. 517, § 207.
Tipping v. Eckersley (1855), 2 K. & J. 264, § 841.
Tipping v. Robbins (1888), 71 Wis. 507; 37 N. W. Rep. 427, § 791.
Tioga Cons. M. Co. (1881), 8 C. L. O. 88, § 725.
Titamore v. Southern Pacific R. R. Co. (1890), 10 L. D. 463, § 232.
Titcomb v. Kirk (1876), 51 Cal. 288; 5 Morr. 10, § 56.
Todd v. Cochell (1860), 17 Cal. 97; 10 Morr. 655, § 808.
Tomay v. Stewart (1882), 1 L. D. 570, § 685.
Tombstone Min. & M. Co. v. Way Up M. Co. (1883), 1 Ariz. 426; 25 Pac. 794, § 367.
Tombstone Townsite Cases (1887, Ariz.), 15 Pac. 26, §§ 170, 176, 177, 397.
Topsy Lode, In re (1880), 7 C. L. O. 20, § 682.
Townsite of Butte (1876), 3 C. L. O. 114, §§ 171, 173.
Townsite of Central City, Colo. (1875), 2 C. L. O. 150, § 171.
Townsite of Coalville (1877), 4 C. L. O. 46, § 97.
Townsite of Deadwood (1880), 8 C. L. O. 18, § 171.
Townsite of Deadwood v. Mineral Claimants (1880), 8 C. L. O. 153, § 184.
Townsite of Eureka Springs v. Conant (1881), 8 C. L. O. 3, § 171.
Townsite of Silver Cliff (1879), 6 C. L. O. 152; Copp's Land Dec. 161, § 142.
Trafton v. Nougues (1877), 4 Saw. 178; 8 Morr. 138, § 748.
Treadway v. Sharon (1871), 7 Nev. 37, § 409.
Tredennick v. Red Cloud Min. Co. (1887), 72 Cal. 78; 13 Pac. 152, § 327.
Trevaskis v. Peard (1886), 111 Cal. 566; 44 Pac. 246, §§ 634, 643, 644.
Trickey Placer Claim (1888), 7 L. D. 52; 15 C. L. O. 147, § 631.
Trout v. McDonald (1876), 83 Pa. St. 144; 9 Morr. 32, § 814.
Trulock v. Taylor (1870), 26 Ark. 54, § 542.

Tuck v. Downing (1875), 76 Ill. 71; 7 Morr. 83, §§ 796, 797.
Tucker v. Florida Ry. & N. Co. (1894), 19 L. D. 414, §§ 97, 158, 425.
Tucker v. Masser (1885), 113 U. S. 203; L. ed. 28; 379, § 778.
Turner v. Lang (1870), 1 C. L. O. 51, § 171.
Turner v. Reynolds (1854), 23 Pa. St. 199, § 813.
Turner v. Sawyer (1893), 150 U. S. 578; L. ed. 37; 1189, §§ 406, 646, 728.
Two Sisters Lode and Millsite (1888), 7 L. D. 557, §§ 521, 523, 524, 708.
Twort v. Twort (1809), 16 Vesey Jr. 128, § 790.
Tyler Min. Co. v. Last Chance M. Co. (1895), 71 Fed. 848, §§ 364, 365, 589.
Tyler v. Sweeney (1893), 54 Fed. 284, §§ 364, 365, 367, 396, 582, 591, 592, 599, 609.
Tyler v. Sweeney (1897), 79 Fed. 277, § 609.

Uhlig v. Garrison (1878), 2 Dak. 71, §§ 183, 184.
Union Coal Co. (1893), 17 L. D. 351, § 501.
Union Cons. Silver M. Co. v. Taylor (1879), 100 U. S. 37; L. ed. 25; 541; 5 Morr. 323, §§ 270, 642.
Union National Bank v. Matthews (1879), 98 U. S. 621; L. ed. 25. 188, § 226.
Union Oil Co., In re (1896), 23 L. D. 222, §§ 97, 138, 158, 422, 432, 438.
United States v. Alger (1894), 152 U. S. 384; L. ed. 38; 488, § 666.
United States v. Beebe (1887), 127 U. S. 338; L. ed. 32; 121, § 784.
United States v. Benjamin (1884), 10 Saw. 264; 21 Fed. 285, § 210.
United States v. Breward (1842), 16 Peters, 143, 10; 916, § 106.
United States v. Carpenter (1883), 111 U. S. 347; L. ed. 28; 451. §§ 183, 184.
United States v. Castillero (1863), 67 U. S. 371; L. ed. 17; 360, §§ 80, 371.
United States v. Cook (1874), 86 U. S. 591; L. ed. 22; 210, § 181.
United States v. Cruikshank (1876), 92 U. S. 542; L. ed. 23; 588, § 224.
United States v. Culver (1892), 52 Fed. 81, § 784.
United States v. Culver (1892), 52 Fed. 898, § 161.
United States v. Curtner (1889), 38 Fed. 1, § 124.
United States v. Fossat (1859), 21 How. 446; L. ed. 16; 185, § 123.
United States v. Gratiot (1840), 1 McLean, 454; Fed. Cases No. 15,-249; 14 Peters, 526, § 80.
United States v. Hancock (1889), 133 U. S. 193; L. ed. 33; 601, § 784.
United States v. Hanson (1842), 16 Peters, 196; L. ed. 10; 935, § 106.
United States v. Hill (1887), 120 U. S. 169; L. ed. 30; 627, § 482.
United States v. Iron Silver Min. Co. (1885), 24 Fed. 568, §§ 629, 631.
United States v. Iron Silver Min. Co. (1888), 128 U. S. 673; L. ed. 32; 571, §§ 94, 175, 176, 290, 293, 336, 413, 584, 673, 777, 781, 784.
United States v. Johnston (1888), 124 U. S. 236; L. ed. 31; 389, § 666.
United States v. King (1889), 9 Mont. 75; 22 Pac. 498, § 396.
United States v. Marshall S. Min. Co. (1889), 129 U. S. 579; L. ed. 32. 734; 16 Morr. 205, §§ 669, 784.

United States v. Maxwell L. G. Co. (1887), 121 U. S. 325; L. ed. 30; 949, §§ 125, 660.
United States v. McLaughlin (1888), 127 U. S. 428; L. ed. 32; 213, §§ 122, 123, 124, 183.
United States v. Miller (1802), 14 L. D. 617, § 772.
United States v. Minor (1885), 114 U. S. 233; L. ed. 29; 110, §§ 175, 207, 784.
United States v. Missouri K. & T. R. R. (1891), 141 U. S. 358; L. ed. 35; 766, §§ 157, 784.
United States v. Moore (1877), 95 U. S. 760; L. ed. 24; 588, §§ 96, 419, 482, 666.
United States v. Moreno (1863), 1 Wall. 400; L. ed. 17; 633, § 116.
United States v. Mullan (1882), 7 Saw. 466; 10 Fed. 785, §§ 136, 140, 143, 157, 161, 495, 784.
United States v. North Bloomfield G. M. Co. (1892), 53 Fed. 625, §§ 888, 842
United States v. North Bloomfield M. Co. (1897), 81 Fed. 243, §§ 889, 892.
United States v. Philbrook, 120 U. S. 52; L. ed. 30; 559, § 482.
United States v. Reed (1886), 12 Saw. 99; 28 Fed. 482, §§ 94, 162, 207, 209.
United States v. Rumsey (1896), 22 L. D. 101, § 784.
United States v. San Jacinto Tin Co. (1887), 125 U. S. 273; L. ed. 31; 747, § 784.
United States v. San Pedro etc. Co. (1888), 4 New Mex. 225; 17 Pac. 337, §§ 114, 125, 126.
United States v. Schurz (1880), 102 U. S. 378; L. ed. 26; 167, § 662.
United States v. Smith (1882), 8 Saw. 101; 11 Fed. 487, § 210.
United States v. S. P. R. R. Co. (1892), 146 U. S. 570; L. ed. 36; 1091, § 154.
United States v. Steenerson (1892), 50 Fed. 504, §§ 208, 772.
United States v. Tanner (1893), 147 U. S. 661; L. ed. 37; 321, § 666.
United States v. Throckmorton (1878), 98 U. S. 61; L. ed. 25; 93, § 784.
United States v. Trinidad Coal & C. Co. (1890), 137 U. S. 160; L. ed. 34; 640, §§ 501, 784.
United States v. Tygh Valley Land & T. S. Co. (1896), 76 Fed. 693, § 322.
United States v. Union Pacific R. R. Co. (1875), 91 U. S. 72; L. ed. 23; 224, § 612.
United States v. White (1883), 17 Fed. 561, § 784.
United States v. Winona & St. P. R. R. (1895), 67 Fed. 948, §§ 157, 161, 175, 207, 609, 659.
Upton v. Larkin (1885), 5 Mont. 600; 6 Pac. 66, §§ 329, 330, 337, 345.
Upton v. Larkin (1888), 7 Mont. 449; 17 Pac. 728; 15 Morr. 404, §§ 335, 337, 381, 383.
Utah Min. & M. Co. v. Dickert & M. S. Co. (1889), 6 Utah, 183; 21 Pac. 1002, §§ 407, 634.

Utah Salt Lands (1886), 13 C. L. O. 53, § 513.

Valentine v. Valentine (1891), 47 Fed. 597, §§ 154, 160.
Valley City Salt Co. v. Brown (1874), 7 W. Va. 191; 5 Morr. 397, §§ 257, 264, 262.
Valley Lode (1896), 22 L. D. 317, § 781.
Valley Lode (on review), (1896), 22 L. D. 713, § 781.
Vance v. Burbank (1880), 101 U. S. 514; L. ed. 25; 929, §§ 175, 207.
Vance v. Kohlberg (1875), 50 Cal. 346, §§ 208, 772.
Van Doren v. Plested (1893), 16 L. D. 508, §§ 97, 210, 421.
Van Reynegan v. Bolton (1877), 95 U. S. 33; L. ed. 24; 351, § 123.
Van Sickle v. Haines (1872), 7 Nev. 249, § 838.
Vantongeren v. Heffernan (1888), 5 Dak. 180; 38 N. W. Rep. 52, §§ 208, 772.
Van Valkenburg v. Huff (1865), 1 Nev. 142; 9 Morr. 468, § 331.
Van Wyck v. Knevals (1882), 106 U. S. 360; L. ed. 27; 201, § 154.
Van Zandt v. Argentine M. Co. (1881), 2 McCrary, 159; 8 Fed. 725; 4 Morr. 441, §§ 336, 345, 364, 587.
Vervalen v. Older (1849), 8 N. J. Eq. 98; 10 Morr. 540, § 789.
Victor M. Co. v. Morning Star M. Co. (1892), 50 Mo. App. 525, §§ 832, 834.
Virginia Lode (1888), 7 L. D. 459, § 142.
Vizina Cons. Min. Co. (1882), 9 C. L. O. 92, § 171.
Vollmer's Appeal (1868), 61 Pa. St. 118, § 860.

Wabash R. Co. v. Barbour (1896), 73 Fed. 513, § 750.
Waddell's Appeal (1877), 84 Pa. St. 90, § 261.
Walker v. Fletcher (1804), 3 Bligh. 172; 8 Morr. 1, § 873.
Walker v. Taylor (1896), 23 L. D. 110, § 504.
Wallace, In re (1882), 1 L. D. 582; 8 C. L. O. 188, § 735.
Walrath v. Champion Min. Co. (1896), 72 Fed. 978, §§ 599, 610.
Walrath v. Champion M. Co. (1894), 63 Fed. 552, §§ 58, 60, 350, 567, 576, 599, 610.
Walton v. Batten (1892), 14 L. D. 54, §§ 95, 106, 207.
Wandering Boy (1875), 2 C. L. O. 2, §§ 227, 684.
Wardell v. Watson (1887), 93 Mo. 107; 5 S. W. Rep. 605, § 813.
War Eagle Mine (1873), Copp's Min. Dec. 195, § 737.
Waring v. Crow (1858), 11 Cal. 366; 5 Morr. 204, §§ 270, 643, 644, 800.
Warnock v. Dewitt (1895), 11 Utah, 524; 40 Pac. 205, §§ 373, 405.
Warren v. State of Colorado (1892), 14 L. D. 681, §§ 95, 142.
Warren v. Van Brunt (1874), 19 Wall. 646; L. ed. 22; 219, §§ 175, 207.
Warren Mill Site v. Copper Prince (1882), 1 L. D. 555; 9 C. L. O. 71, §§ 724, 742.
Washington Market Co. v. Hoffman (1879), 101 U. S. 112; L. ed. 25; 782, § 480.
Waterhouse v. Scott (1891), 13 L. D. 718, §§ 690, 738.
Waterloo Min. Co. v. Doe (C. C.), (1893), 56 Fed. 685, §§ 335, 336, 742, 778.

Waterman v. Banks (1892), 144 U. S. 394; L. ed. 36; 479, § 859.
Waterman v. Buck (1885), 58 Vt. 519, § 840.
Waters v. Stevenson (1878), 13 Nev. 157; 29 Am. Rep. 293; 10 Morr. 240, § 868.
Watervale Min. Co. v. Leach (1893, Ariz.), 33 Pac. 418, §§ 364, 367, 560, 726.
Watkins v. Garner (1891), 13 L. D. 414, § 504.
Watson v. King (1815), 4 Camp. 272, § 860.
Watson v. O'Hern (1837), 6 Watts, 362; 8 Morr. 333, § 861.
Watts v. Kellar (1893), 56 Fed. 1, § 859.
Watts v. White (1859), 13 Cal. 321; 13 Morr. 11, §§ 535, 792.
Weaver v. Fairchild (1875), 50 Cal. 360, § 662.
Wedkind v. Craig (1880), 56 Cal. 642, § 136.
Weill v. Lucerne Min. Co. (1876), 11 Nev. 200; 3 Morr. 372, §§ 398, 642.
Weise, In re A. V. (1875), 2 C. L. O. 130, § 211.
Weise v. Barker (1884), 7 Colo. 178; 2 Pac. 921, § 218.
Welland v. Huber (1873), 8 Nev. 203; 13 Morr. 363, § 331.
Welland v. Williams (1892), 21 Nev. 230; 29 Pac. 403, § 790.
Wenner v. McNulty (1887), 7 Mont. 30; 14 Pac. 643, § 251.
Westchester R. R. Co. v. McElwee (1871), 67 Pa. St. 311, § 832.
West Granite M. & M. Co. v. Granite Min. & M. Co. (1888), 7 Mont. 356; 17 Pac. 547, §§ 365, 373.
West Hickory Min. Assn. v. Reed (1875), 80 Pa. St. 38, § 802.
West Virginia Trans. Co. v. Volcanic C. Co. (1872), 5 W. Va. 382; 5 Morr. 389, § 255.
Western Pac. R. R. Co. v. Tevis (1871), 41 Cal. 489, § 153.
Western Pac. Ry. Co. v. United States (1883), 108 U. S. 510; L. ed. 27; 806, § 784.
Western Pac. R. R. Co. v. United States (1883), 108 U. S. 510; L. ed. 27; 806, § 161.
Westmoreland & Cambria Nat. Gas Co. v. Dewitt (1889), 130 Pa. St. 235; 18 Atl. Rep. 724, §§ 93, 423.
Weymouth v. C. & N. Co. (1863), 17 Wis. 550; 84 Am. Dec. 763, § 868.
Whaley v. Braucker (1864), 10 L. T., N. S., 155; 8 Morr. 29, § 873.
Wheatley v. Baugh (1855), 25 Pa. St. 528; 64 Am. Dec. 721; 13 Morr. 374, § 814.
Wheatley's Heirs v. Calhoun (1841), 12 Leigh. 264; 37 Am. Dec. 654, § 802.
Wheeler v. Smith (1896), 23 L. D. 395, §§ 323, 738.
Wheeler v. Smith (1893), 5 Wash. 704; 32 Pac. 784, §§ 96, 97, 142, 210, 323, 421.
Wheeler v. West (1886), 71 Cal. 126; 11 Pac. 871, § 860.
White Cloud Copper Min. Co. (1896), 22 L. D. 252, §§ 631, 673.
White Oaks Imp. Co. (1886), 13 C. L. O. 159, § 505.
White v. Lee (1889), 78 Cal. 593; 12 Am. St. Rep. 115; 21 Pac. 363, §§ 373, 432, 454.

Whitman v. Haltenhoff (1894), 19 L. D. 245, §§ 742, 766.
Wight v. Dubois (1884), 21 Fed. 693, §§ 679, 713, 742, 758.
Wight v. Tabor (1884), 2 L. D. 738; 10 C. L. O. 392, §§ 250, 335, 397, 742.
Wilcox v. Jackson (1839), 13 Peters, 498; L. ed. 10; 264, §§ 190, 197, 322, 660, 665.
Wilcox v. McConnel (1839), 13 Pet. 498; L. ed. 10; 264, § 80.
Wildey v. Bonny (1853), 26 Miss. 35, § 540.
Wildman Q. M. Co., In re (1880), Sickles Min. Dec. 270, §§ 679, 758.
Wilhelm v. Silvester (1894), 101 Cal. 358; 35 Pac. 997; §§ 557, 560.
Wilkinson v. N. P. R. R. Co. (1885), 5 Mont. 538; 6 Pac. 359, § 153.
Willey v. Hunter (1884), 57 Vt. 479, § 844.
Williams, In re (1890), 11 L. D. 462, § 496.
Williams, In re (1895), 20 L. D. 458, § 337.
Williams, F. A., In re (on review), (1893), 17 L. D. 282, § 691.
Williams v. Bagnall (1866), 12 Jurist N. S. 987; 13 Morr. 686, § 821.
Williams v. Gibson (1887), 84 Ala. 228; 5 Am. St. Rep. 368; 4 So. Rep. 350; 16 Morr. 253, §§812, 813, 814, 821.
Williams v. Groncott (1863), 4 B. & Sm. 149, § 814.
Williams v. Hay (1888), 120 Pa. St. 485; 6 Am. St. Rep. 719; 14 Atl. Rep. 379, §§ 818, 819, 821.
Williams v. Pomeroy Coal Co. (1882), 37 Oh. St. 583; 6 Morr. 195, § 807.
Williams v. Santa Clara Min. Assn. (1884), 66 Cal. 103; 5 Pac. 85, § 327.
Williamson v. Jones (1894), 39 W. Va. 231, § 299.
Wills v. Blain (1889), 4 New Mex. 378; 20 Pac. 798, §§ 404, 539.
Willson v. Cleaveland (1866), 30 Cal. 192, §§ 643, 644.
Wilms v. Jess (1880), 94 Ill. 464; 34 Am. Rep. 242; 14 Morr. 56, §§ 818, 819, 820.
Wilson Creek Cons. M. & M. Co. v. Montgomery (1896), 23 L. D. 476, § 781.
Wilson v. Fine (1889), 14 Sawy. 224; 40 Fed. 52, § 772.
Wilson v. Henry (1874), 35 Wis. 241; 1 Morr. 152, § 688.
Wilson v. Waddell (1876), 2 L. R. App. Cases, 95; 14 Morr. 25, § 808.
Winchester v. Craig (1876), 33 Mich. 205, § 868.
Wingate Placer (1896), 22 L. D. 704, § 208.
Winscott v. Northern Pac. R. R. (1893), 17 L. D. 274, §§ 106, 155, 156.
Winship v. Pitts (1832), 3 Paige, 259, § 790.
Winter Lode (1896), 22 L. D. 362, § 337.
Winters v. Bliss (1892), 14 L. D. 59, §§ 95, 207.
Wirth v. Branson (1878), 98 U. S. 118; L. ed. 25; 86, § 771.
Wisconsin Central R. R. v. Forsythe (1895), 159 U. S. 46; L. ed. 40; 71, §§ 125, 666.
Wisconsin Cent. R. R. Co. v. Price Co. (1890), 133 U. S. 496; L. ed. 33; 687, §§ 143, 157, 208.
Wisconsin Mfg. Co. v. Cooper (1883), 10 C. L. O. 69, § 671.
Wise v. Nixon (1896), 76 Fed. 3, §§ 748, 750.

Witherspoon v. Duncan (1866), 4 Wall. 210; L. ed. 18; 339, §§ 208, 542, 771.
Wolf v. St. Louis Water Co. (1858), 10 Cal. 541; 10 Morr. 636, § 808.
Wolfley v. Lebanon Min. Co. (1878), 4 Colo. 112; 13 Morr. 282, §§ 58, 60, 125, 268, 350, 364, 553, 586, 604, 713.
Wolsey v. Chapman (1880), 101 U. S. 755; L. ed. 25; 915, § 197.
Wolverton v. Nichols (1886), 119 U. S. 485; L. ed. 30; 474; 15 Morr. 309, §§ 754, 755.
Wood, William S., In re (1876), 3 C. L. O. 69, § 232.
Wood v. Aspen Min. & Smelting Co. (1888), 36 Fed. 25, § 227.
Wood v. Hyde (1874), 1 C. L. O. 66, § 756.
Wood v. Leadbetter (1845), 13 M. & W. 838, § 860.
Wood v. Morewood (1841), 3 Q. B. 440; 10 Morr. 77, § 868.
Wood v. Sutcliffe, 2 Sim., N. S., 163; 16 Jur. 75; 8 Eng. Law. Eq. 217, § 842.
Woodenware Co. v. United States (1882), 106 U. S. 432; L. ed. 27; 230, § 868.
Woodruff v. North Bloomfield G. M. Co. (1883), 8 Saw. 628; 18 Fed. 774, §§ 252, 270, 531.
Woodruff v. North Bloomfield G. M. Co. (1884), 9 Sawy. 441; 18 Fed. 753, §§ 843, 888, 892.
Woodward v. Worcester (1876), 121 Mass. 245, § 843.
Worcester v. State of Georgia (1832), 6 Pet. 515; L. ed. 8; 483, § 181.
Wright v. Roseberry (1887), 121 U. S. 488; L. ed. 30; 1039, § 175.
Wulff v. Manuel (1890), 9 Mont. 279; 23 Pac. 723, §§ 232, 233, 643.
Wyatt v. Harrison (1832), 3 Barn. & Adolph. 871, § 833.
Wynn v. Garland (1857), 19 Ark. 23; 68 Am. Dec. 190, § 860.

Yandes v. Wright (1879), 66 Ind. 319; 32 Am. Rep. 109; 14 Morr. 32, §§ 818, 819.
Yoakum, In re (1874), 1 C. L. O. 3, § 140.
York Railway Co. v. Winans (1854), 17 How. 31; L. ed. 15; 27, § 773.
Young v. Ellis (1895), 91 Va. 297; 21 S. E. Rep. 480, § 861.
Young v. Hanson (1895, Iowa), 64 N. W. Rep. 654, § 772.

Zadig v. C. P. R. R. (1895), 20 L. D. 26, § 208.
Zeckendorf v. Hutchison (1871), 1 New Mex. 476; 9 Morr. 483, §§ 337, 630.
Zollars v. Evans (1880), 2 McCrary, 39; 5 Fed. 172, § 345.
Zumwalt, In re (1895), 20 L. D. 32, § 197.

# AMERICAN LAW RELATING TO MINES AND MINERAL LANDS.

# TITLE I.

## COMPARATIVE MINING JURISPRUDENCE.

CHAPTER
I. MINING LAWS OF FOREIGN COUNTRIES.
II. LOCAL STATE SYSTEMS.

# CHAPTER I.

## MINING LAWS OF FOREIGN COUNTRIES.


§ 1. Introductory.
§ 2. Property in mines under the common law.
§ 3. Royal mines.
§ 4. Local customs.
§ 5. Tin mines of Cornwall.
§ 6. Tin mines of Devonshire.
§ 7. Coal, iron, and other mines in the Forest of Dean.
§ 8. Lead mines of Derbyshire.
§ 9. Severance of title.
§ 10. Existing English laws.
§ 11. Mines under the civil law.
§ 12. Mining laws of France:— *Mines* — *Minières* — *Carrières.*
§ 13. Mining laws of Mexico:— Nature and condition of mining concessions — Right of discoverer; *pertenencias* — Right to mine, how acquired — Denouncement of abandoned mines — Right to denounce mines in private property — Rights of one not a discoverer — Placers — Foreigners and religious orders — Extent of *pertenencias;* surface limits — Marking boundaries; rights in depth — Right to all veins found within boundaries of *pertenencias* — Forfeiture for failure to work — Royalties.


§ 1. **Introductory.**—To the student of the system of mining laws in force in the United States, a comparative review of the mining jurisprudence of the different countries of the world is not of controlling importance. The evolution and development of the American system have their parallels in the history of older nations; other countries have recognized and established by written codes the customs of mining communities, and it is by no means difficult to discover in some of the details of our own system the earmarks of ancient mining regulations: yet in construing our laws and applying them to existing conditions we will receive but little material aid from the experience or legal literature of other countries. While this is true, we must consider that the common law of England

was to a certain extent ingrafted into our legal system when we separated from the mother country, and was, and still is, the rule of action in the absence of legislation, and that, at least in the earlier history of our government, English precedents were of controlling force. In this light, not only the English common law, but the rules governing the subject of mines in Great Britain, are worthy of at least passing comment.

When we also consider that, approximately, all of our public mineral domain over which the Federal laws are now in force was originally acquired by treaty or purchase from France and Mexico, wherein the civil law was the basis of jurisprudence, and that at the time of cession both of these nations had well-established and defined codes of mining law, it is apparent that a brief presentation of the laws of these ceding nations will not be out of place. We may confidently expect to find in the growth and development of our own system the influence of these laws. These considerations justify the author in presenting such a brief outline of the mining jurisprudence of these several countries as will enable us to note the theories of government upon which the laws are based, their salient features, and to observe to what extent, if any, they have left their impress upon the American law of mines.

§ 2. **Property in mines under the common law.**—As a general rule, under the common law, minerals were the property of the owner of the land, the property in the surface carrying with it the ownership of everything beneath and above it.[1]

Therefore, the ownership of the surface was the best *prima facie* title to the ownership also of the mines.[2]

This *prima facie* ownership continued until rebutted, by showing either —

(1) That the land contained "royal mines"; or —

[1] 2 Blackstone's Comm., p. 18; Arundel on Mines, p. 3.

[2] Bainbridge on Mines, 4th ed., p. 118; MacSwinney on Mines, p. 27; Rogers on Mines, p. 247.

(2) That it was subject to some particular custom that defeated the *prima facie* ownership, as in the case of the tin mines of Cornwall and Devon and the lead mines of Derbyshire; or—

(3) That the ownership of the mines and minerals had become in fact, from divers causes, several and distinct from the ownership of the soil and surface.[1]

§ 3. **Royal mines.**—By the term "royal mines" was meant mines of gold and silver. These belonged exclusively to the crown, by prerogative, although in lands of subjects. In this respect, the rule was the same as under the civil law. It was at one time contended that mines or mineral deposits containing the baser metals in combination with either gold or silver were royal mines. This contention, however, was set at rest by statutes enacted during the reign of William and Mary,[2] wherein it was declared that no mine should be deemed royal by reason of its containing tin, copper, iron, or lead in association with gold or silver. Thus, those mines only came to be classed as royal in which were found the precious metals in the pure state. There is no authentic record of any such ever having been known to exist in England, unless we accept the traditional accounts of the Roman invasion as establishing their existence.

In certain reigns the crown claimed a right to mines of alum and saltpeter; but the asserted prerogative was rarely exercised, and then only in an arbitrary way.[3]

Mines and minerals of all descriptions underlying the beds of navigable streams belonged to the crown.

As to mines under the sea or its shores, generally speaking, the rule of proprietorship of the soil obtained. The crown owned the sea-bottom adjoining the coasts of the United Kingdom and that part of the seashore from low-water mark to the line of the neap tides. Mines under-

[1] Bainbridge on Mines, 4th ed., p. 27.
[2] 1 William and Mary, c. 30; 5 William and Mary, c. 6.
[3] Bainbridge on Mines, 4th ed., p. 133.

neath the seashore belonged *prima facie* to the littoral owner or to the crown, as the superjacent soil belonged to the one or the other.[1]

The right of the crown to royal mines, as a branch of the royal prerogative, is said to have had its origin in the king's right of coinage.[2] But, as Mr. Bainbridge observes, it is more probable that the royal right arose in Roman times, and was transmitted to successive sovereigns. As regards mines of gold and silver, there is no difference between the Roman, or civil, law and the English mining laws, as regards imperial mining rights.

A mine royal was not an incident inseparable from the crown, but might be severed from it by apt and precise words. But a grant by the crown of lands would not pass gold or silver mines, unless they were expressly named, and this applied to a grant of lands in the colonies.[3]

Briefly stated, the regalian right to mines, as recognized in England, was confined to those of the precious metals—gold and silver. The baser substances belonged to the owner of the soil, except in certain localities where immemorial custom had modified the rule.

§ 4. **Local Customs.**—In certain parts of England and Wales so-called "local customs" were recognized which modified the general rule of the common law. In these excepted localities the ownership of the baser mineral substances continued in the crown, subject to certain so-called customary rights in the subject, which customary rights have been from time to time recognized and defined by statute.[4]

These excepted districts were the Forest of Dean (including the hundred of St. Briavels), in the county of Gloucester, certain parts of Derbyshire, Cornwall, and Devon, and other places of minor importance.

[1] MacSwinney on Mines, pp. 30-31; Bainbridge on Mines, 4th ed., p. 171; Rogers on Mines, p. 178.

[2] Bainbridge on Mines, 4th ed., p. 120.

[3] MacSwinney on Mines, p. 40.

[4] Bainbridge on Mines, 4th ed., p. 113.

These customs undoubtedly had their origin during the Roman occupation; but they were recognized and established by acts of Parliament upon the theory that they existed by virtue of some antecedent grant or concession made by the crown. These customs are of more than passing interest, not only on account of the antiquity of their origin, but because they afforded to the early miners of California, in many particulars, valuable precedents to guide them in framing their primitive local rules. A brief consideration of them will not be out of place.

§ 5. **The tin mines of Cornwall.**—The right of working tin mines was conferred upon all "free tinners," upon the render of a certain proportion of the minerals raised to the owner or lord of the soil. This proportion was called "dish," or "toll," tin, and was usually one fifteenth of the product. Any tinner was allowed to "bound" any unappropriated waste lands, or inclosed lands which had formerly been waste lands, subject to the custom. He "bounded" the same by delivery of toll tin to the lord of the soil. A tin bound generally consisted of about an acre of land, the four corners of which were marked by turfs or stones at each corner. A side bound of triangular form was also allowed.[1]

The bounder was required to proclaim his bounds at the next ensuing stannary courts, announcing the limits of his bounds and the names of his co-adventurers, if any. This proclamation was repeated at the two ensuing stannary courts; and if no opposition appeared, a writ of possession issued from the court commanding the bailiff to put him in possession. Possession was then delivered, and the tinner became entitled to search for and extract ore.

Bounds were required to be annually renewed, by remarking the corners. The tinner failing to renew his bounds within the year might, however, be restored to his estate by renewing them at any time before others should enter and bound.[2]

[1] Bainbridge on Mines, 4th ed., p. 149. [2] MacSwinney on Mines, p. 431.

Tin bounds might be sold or demised, were frequently farmed out for a render called "farm tin," and were liable to the payment of debts and legacies. The estate was in the nature of a chattel real, and passed to the executor.[1]

If the owners of bounds left them unworked for a year, other tinners might enter and work them, if they gave the owners notice of their desire to work, and the owners did not within two months resume operations.

A bounder was not compelled to prosecute his work continuously with absolute strictness. He was allowed a reasonable time for consideration, preparation, and selection of places; but he should not cease to pursue in good faith his original object. If he did, the owner of the soil might resume his exclusive rights.[2]

Stannary courts were local tribunals, existing from time immemorial, and recognized by royal charters. They were courts of record, with both common-law and equity jurisdiction, wherein controversies concerning miners or their property rights were adjusted.

§ 6. **Tin mines in Devonshire.**—Tin-bounding in Devonshire was governed generally by customs similar to those of Cornwall. The estate, however, of the bounder was that of fee simple, and descended to the heir at law.[3]

§ 7. **Coal, iron, and other mines in the Forest of Dean and the hundred of St. Briavels.**—The "free miners" within the hundred of St. Briavels (which embraces the Forest of Dean) were entitled by immemorial custom to have granted to them "gales" of the mines of coal and iron and leases of the quarries of stone within the lands of the crown, and within enclosed lands under certain restrictions. By the term "free miner" was meant all male persons born and abiding within the hundred, of the age of twenty-one and upwards, who had worked a year and a day in the mines within the hundred.

[1] MacSwinney on Mines, p. 432. [2] *Id.*, p. 432. [3] *Id.*, p. 438.

All free miners were required to register with the gaveler of the forest or his deputy, the gaveler being the representative of the crown.

A "gale" was the name given to the holding of mines of coal or iron and quarries of stone, the free miner acquiring a gale being styled the "galee," and the rentals paid were called "galeage."[1]

A gale was acquired by written application in writing to the gaveler, setting forth the situation of the proposed gale and the name of the vein proposed to be worked: After obtaining the approval of the commissioner of the woods, the gaveler set out the metes and bounds, and a grant thereof was made and entered in the gaveler's book, and subsequently enrolled in the office of land revenue.

The estate thus granted to a galee was in the nature of an estate in fee simple, and descended to the heir.[2]

The galee was obliged to work in a fair, orderly, and workmanlike manner, and not to desist from working for five years at any one time after the vein in question had been gained.[3]

Gales might be assigned and disposed of by deed or will. Transfers were required to be entered within three months in the books of the gaveler, and unregistered transfers were void. Non-payment of galeage and failure to comply with the rules subject to which gales were held worked a forfeiture.

§ 8. **The lead mines of Derbyshire.**—The customs recognized and established in certain portions of Derbyshire were confined to lead mines. Under these regulations, any subject of the realm might enter and search for ore in all lands and places within the district, excepting churches, burial-grounds, dwelling-houses, and highways. The first discoverer of a vein was entitled to have assigned to him two "meers" of ground. If the vein was a "rake" vein—that is, one having an inclination from the horizontal,—the meer was from twenty-seven to thirty-two yards, meas-

[1] MacSwinney on Mines, p. 482. [2] *Id.*, p. 483. [3] *Id.*, p. 489.

ured along the vein. If the vein, or stratum, was bedded, or flat, the meer was fourteen square yards, or thereabouts. The meers were measured and set out by the "barmaster," an official who acted as an agent of the crown or its lessees, and also looked after the interest of the miner and enforced the customs of the manor.

The miner was entitled to so much surface land in connection with his vein as was thought necessary by the barmaster and two of the grand jury, for the purpose of laying rubbish, dressing ore, buddling, etc. This was called the "quarter-cord," as originally in the "Low Peak" it consisted of a quarter of a meer in breadth.

Whether this was to be measured from the middle of the vein or the walls, was a mooted question.

Before any ground was set apart, however, ore was required to be raised and the meer freed. "Freeing the meer" was accomplished by delivering to the crown or its lessee the first "dish" of ore.

This dish, called the "freeing dish," was provided by the barmaster, and was of sufficient size to contain fifteen pints of water.

In like manner, each successive meer allotted on the vein must have been "freed." This ceremony was equivalent to the livery of seisin, and without it title did not pass.

The "duties," or royalties, exacted from the miner were called "lot and cope." "Lot" was usually one thirteenth part of all the ore raised, payable to the crown or its lessees.[1] "Cope" was fourpence for every load of ore, a load consisting of nine dishes.

It was always necessary that the mine should continue to be fairly worked. Originally, if it was capable of being worked, and was suffered to remain idle for several weeks, the barmaster was required to "nick the spindle" once a week — the spindle being a stake fixed in the ground, marking the boundaries of the meer, and the nick was a notch. An examination of the spindle disclosed the num-

[1] These duties are usually farmed out.

ber of notches, and the mine became forfeited a few weeks after the third "nicking," unless the warning was heeded and work resumed. This ceremony was equivalent to an entry after breach of condition, by which the lord or lessor was restored to his former estate. Under the regulations now in force, forfeiture is worked by notice to resume given by the barmaster. If resumption does not take place within three weeks, the claim is forfeited, and may be assigned by the barmaster to any person willing to work it.

The right of possession and enjoyment was guaranteed so long as the regulations were complied with.

Once freed, and kept in lawful possession, the mine was declared to be an estate of inheritance liable to dower and capable of absolute disposition.[1]

While we do not find anything in the authorities expressly defining the extent to which the miner might follow his "rake vein" in depth, it is quite manifest that the vein was the principal thing acquired, and that the surface ground allotted by the barmaster was a mere incident, and that the miner might pursue his vein on its downward course, even under excepted lands, provided no injury resulted to the surface. The working might be suspended or regulated by the steward and grand jury.[2]

§ 3. **Severance of title.**—Under the English law, rights of property in the surface and in the underlying mines might be shown to be in different owners. Nothing was more common than to sell or demise a piece of land excepting the mines. In like manner, the different strata of the subsoil might be shown to be the subject of different rights.[3] And there might be also in one mine different minerals which were the property of different persons.[4]

Thus, one person might be entitled to the iron, and another to the limestone. One seam or stratum of coal, if

[1] Bainbridge on Mines, 4th ed., p. 141. [2] MacSwinney on Mines, p. 509.

[3] MacSwinney on Mines, p. 27; Cox *v.* Glue, 5 C. B. 549; Arundel on Mines, p. 5; Bainbridge on Mines, 4th ed., p. 28.

[4] Arundel on Mines, p. 5.

in the same lands, might belong to a third person, and another distinct seam to a fourth owner.[1]

When the surface and underlying mines or the different strata of the subsoil were differently owned, they were separate tenements, with all the incidents of separate ownership[2]—a distinct possession and distinct inheritance;[3] and the mines of each stratum might be held in fee simple,[4] or fee tail,[5] or otherwise, as in the case of surface property.[6]

§ 10. **Existing English laws.**—The legislation in England on the subject of mines, except as to the particular districts heretofore noted, is limited, generally speaking, to acts providing for official inspection and regulations concerning manner of working. England has no general mining laws. Legal questions governing the ownership of mines and minerals have been determined upon the general principles of the common law, except in the localities where ancient customs have been recognized and established by acts of parliament. As we have seen, under the common law, generally speaking, the owner of the soil is the owner of the minerals. The owner of the minerals may deal with them as he pleases, subject only to the general rule governing all classes of property, that he shall injure no one else.

§ 11. **Mines under the civil law.**—Under the Roman law, the ownership proper of all lands was vested in the state. This was the *dominium strictum*. The individual subject could acquire the possessory ownership, with the

[1] Bainbridge on Mines, 4th ed., p. 28.

[2] MacSwinney on Mines, p. 27, (citing Rowbotham *v.* Wilson, 8 E. & B. 142; Hamilton *v.* Graham L. R., 2 Sc. & D. 166; Seaman *v.* Vaudray, 16 Ves. 392; Guest *v.* East Dean L. R., 7 Q. B. 337).

[3] Bainbridge on Mines, 4th ed., p. 28; Cullen *v.* Rich, Bull N. P. 102; 2 Str. 1142, *sub nom.* Rich *v.* Johnson.

[4] Stoughton *v.* Leigh, 1 Taunt. 402.

[5] Port *v.* Tuston, 2 Wils. 172.

[6] MacSwinney on Mines, p. 27.

right to extract minerals, upon the payment of royalties. This was the *dominium utile.*

Under a decree of the Emperor Gratian (A. D. 367–383), the right to the crown in mines of gold and silver was exclusive; that is, the *dominium strictum* and *dominium utile* were united in the state. As to other mines, the crown had a right to receive a proportion of the produce, which proportion, or the measure thereof, was called the *canon metallicus.*

This decree of the Emperor Gratian was embodied in an imperial constitution, which was recognized and adopted by subsequent emperors, and thus became the expression of the measure of Roman imperial rights in mines.[1]

Gamboa, in his commentaries on the mining ordinances of Spain, thus states the rule of the civil law:—

"By the civil law, all veins and mineral deposits of gold "or silver ore, or of precious stones, belonged, if in public "ground, to the sovereign, and were part of his patrimony; "but if in private property, they belonged to the owner of "the land, subject to the condition, that if worked by the "owner, he was bound to render a tenth part of the pro- "duce to the prince as a right attaching to his crown; and "if worked by any other person, by consent of the owner, "the former was liable to the payment of two tenths, one "to the prince and one to the owner.

"Subsequently, it became an established custom in most "kingdoms, and was declared by the particular laws and "statutes of each, that all veins of the precious metals, and "the produce of such veins, should vest in the crown, and "be held to be a part of the patrimony of the king or sov- "ereign prince."[2]

Mr. Arundel Rogers thus states his conclusions from the various authorities consulted:—

"Under the civil law, in its purest times, gold, silver, "and other precious metals usually belonged to the state, "whilst all other minerals, mines, and quarries belonged to "the owner of the soil, subject in some cases to a partial, and "in others to a more general, control of the *fiscus* (treasury)."

[1] Bainbridge on Mines, 4th ed., p. 116.

[2] Commentaries of Gamboa—Heathfield Trans., vol. i., p. 15.

This feature of the civil law underlies most of the continental systems, as well as those of the Spanish-American republics. It is the regalian doctrine, which also prevails as to royal mines (gold and silver), under the common law of England.[1]

The equitable estate, the *dominium utile*, which was vested in the subject, was permanent in its character, and has been defined as an ownership which the possessor could describe and claim as such against all the world, save and except his lord the emperor.

This estate was analogous to the tenancy by copyhold under the English common law, the tenant being seized thereof as against all the world, saving and excepting only his lord.[2]

It also bears a striking resemblance to the tenure by which a mining claimant holds a perfected but unpatented mining location upon the public mineral lands of the United States.

The theory of the civil law is thus clearly stated by Mr. Halleck:—

"All continental publicists who have written upon the "subject lay down the fundamental rule, that mines, from "their very nature, are not a dependence of the ownership "of the soil; that they ought not to become private prop- "erty in the same sense as the soil is private property; but "that they should be held and worked with the under- "standing, that they are by nature public property, and "that they are to be used and regulated in such a way as "to conduce most to the general interest of society."[3]

§ 12. **Mining laws of France.**—From the earliest times, the French law placed all mines, whether in public or in private lands, at the disposition of the nation, and made the working of them subject to its consent and to the surveillance of the government.[4]

The French law divided the subject of mining into three classes—*mines*, *minières*, and *carrières*.

[1] Bainbridge on Mines, 4th ed., p. 117. [2] *Id.*, p. 200.
[3] Introduction to De Fooz on the Law of Mines, p. x, § 2.
[4] *Id.*, p. xv., § 8.

*Mines*, properly speaking, were those wherein the substances were obtained from underground workings, the extraction of which required extensive development and elaborate machinery. In the language of De Fooz,—

"Mines of this kind constitute a part of the domain of the "state: they are to be ranked as the property of society, "and should be confided to the sovereign authority; and "this authority should have a general control over their "extraction. In this consists the system of the regalian "right of mines."[1]

Taking the act of April 21, 1810, as the basis of the French law, as it existed during the period presently under consideration, we give the following outline of its general features:—

*Mines.*—Those were considered as mines which were known to contain, in veins, beds, or strata, gold, silver, platinum, quicksilver, lead, iron (in veins or beds), copper, tin, zinc, bismuth, arsenic, manganese, antimony, molybdenite, plumbago, or other metallic substances; sulphur, coal, fossilized wood, bituminous substances, alum, or sulphates. To this category, by law of June 17, 1840, salt springs and salt mines were added.

*Mines* could only be worked in virtue of an act of concession, which vested the property in the *concessionaire*, with power to dispose of and transmit the same like other property, except that they could not be sold in lots or divided without the consent of the government, given in the same form as the concession. Royalties were payable to the owners of the surface and to the government. No one could make searches for the discovery of mines in land which did not belong to him, unless with the consent of the proprietor of the surface, or with the authorization of the government, subject to a previous indemnity to the proprietor and after he shall have been heard. The proprietor might make searches without previous formality; but he was required to obtain a concession before he could establish a mine-working. From the moment a mine was

[1] Halleck's De Fooz on the Law of Mines, p. 10.

conceded, even to the proprietor of the surface, this property was distinguished from that of the surface, and was thereafter considered as a new property. Concessions were obtained by petition, addressed to the prefect, who registered it, and posted notice thereof for a period of four months. Proclamations were required to be made at certain places and times at least once a month during the continuation of the postings. Investigations were required to be made by the prefect of the department on the opinion of the engineer of mines, the results being transmitted to the minister of the interior. In the absence of opposition, concessions were granted by an imperial decree, deliberated upon in council of state. The act of concession determined the extent, which was to be bounded by fixed points taken on the surface of the soil, and by passing vertical planes from the surface into the interior of the earth to an indefinite depth. The engineers of mines exercised, under the orders of the interior and the prefects, a surveillance of police, for the preservation of edifices and the security of the soil. Royalties were payable to the government proportional to the yield, in addition to a fixed tax, called "ground tax." Forfeiture of the privilege granted by the concession resulted from a failure to comply with its terms, or from suspension of the works, if by such suspension the wants of consumers were affected, or if the suspension had not been authorized by the mining authorities.

*Minières* included the iron ores called alluvial, pyritous earths suitable for being converted into sulphate of iron, aluminous earths and peats, and such substances as could be worked by open pits or temporary subterranean works. The ownership of *minières* was in the surface proprietor; but they could not be worked by subterranean works except by permission. When worked by open workings, a declaration was required to be made to the prefect of the department. No royalties were paid to the government.

*Carrières* (quarries) included slates, building-stones, marble, limestones, chalks, clays, and all varieties of earthy or

stony substances, including pyritous earths, regarded as fertilizers, all worked in open cut or with subterranean galleries.

Workings of *carrières* in open cut were made without permission, under the simple surveillance of the police. When the working was carried on by means of subterranean galleries, it was subject to surveillance as in the case of mines. No royalties were paid to the government.

§ 13. **Mining laws of Mexico.** — We have no immediate concern with the present mining laws of Mexico. The existing code of that republic is a substantial departure from the old order of things, and furnishes the best example of a liberal and progressive system of mining laws of any which has heretofore been adopted in any country. But we are dealing with matters of history, and are called upon to consider the state of the Mexican law of mines at the time of the discovery of gold in California and the acquisition by our government of the territory ceded by the treaty of Guadalupe Hidalgo.

Upon the establishment of the independence of Mexico (1821), it adopted, in reference to mining, the laws existing previous to its separation from Spain, with such modifications only as were rendered necessary by the alteration from a monarchical to a republican form of government.[1]

Questions concerning mines and mining rights in the republic depended, in a great measure, during the period which engages our present attention, upon the provisions of the Spanish ordinance of the 23d of May, 1783; and, in fact, until a comparatively recent period, these ordinances were still in force, and constituted the principal Mexican code on that subject.[2]

The following is an epitome of such parts of these ordinances as are germane to the present inquiry: —

*Nature and conditions of mining concessions.*—Mines were declared to be the property of the royal crown. Without

[1] Rockwell's Spanish and Mexican Law, p. 21.
[2] Castillero v. United States, 2 Black, 371.

being separated from the royal patrimony, they were granted to subjects in property and possession in such manner that they might sell, exchange, pass by will, or in any other manner dispose of all their property in them upon the terms on which they themselves possessed it, and to persons legally capable of acquiring it. This grant was made upon two conditions: First, that the grantees should pay certain proportions of the metal obtained to the royal treasury; second, that they should carry on their operations in the mines subject to the provisions of these ordinances, on failure of which at any time the mines of persons so making default should be considered as forfeited, and might be granted to any person who should denounce them.

*Rights of discoverer — Pertenencia.*—The discoverers of new mineral districts were permitted to acquire three *pertenencias*, or claims, on the principal vein, a *pertenencia* being two hundred *varas*, or yards, along the course of the vein.[1] The discoverer of a new vein in a district known and worked in other parts was entitled to two *pertenencias*, either contiguous or separated.

*Right to mine, how acquired.*—The organization of district tribunals was provided for, called deputations of miners, to whom, within ten days after discovery, the discoverer should present a written statement. This statement was required to contain the discoverer's name and those of his associates, his place of birth, residence, and occupation, together with the most particular and distinguishing features of the tract, mountain, or vein discovered, all of which were noted in the registry of the deputation. Notices of this statement, its object and contents, were required to be fixed to the doors of the church, the government houses, and other public buildings of the town, for the sake of general notoriety. Within ninety days thereafter, the discoverer

[1] The term "claim" is here used as the equivalent of the Spanish word *pertenencia* (literally, a portion), without regard to the technical definition of the word given by some of the American courts in later years.

was required to make in the vein or veins so registered an opening a yard and one half wide and ten yards in depth, that one of the deputies, with an expert and two witnesses, might inspect it and determine the course and direction of the vein, its size, its dip, or inclination from the horizon, and the principal species of mineral found therein.

The report of the deputy was added to the registry, together with the act of possession, which must be given to the discoverer, measuring off his *pertenencias*, and requiring him to mark their boundaries. A copy of the entries in the register constituted his "titulo de possession," or evidence of his possessory right.

If during the period of ninety days any adverse claimant appeared and claimed the property, as being a prior discoverer, a brief judicial hearing was granted, and judgment given in favor of him who best proved his claim. If a question arose as to who had been the first discoverer of a vein, he was considered as such who first found metal therein, even though others might have made an opening previously; and in case of further doubt, priority of registration established a priority of right.

*Denouncement of abandoned mines.*—Restorers of ancient mines which had been abandoned enjoyed the same privileges as discoverers. In case of such abandoned mines, the party desiring to acquire them was called upon to present to the deputation a statement similar to that required of a discoverer, showing, in addition, the name of the last possessor and those of the neighboring miners, all of whom should be lawfully summoned. If no one appeared within ten days, the denouncements were required to be publicly declared on the three following Sundays. This meeting with no opposition, the denouncer was required within sixty days to clear and reinstate the abandoned workings to some considerable depth, or at least ten yards perpendicular and within the bed of the vein, in order that it might be inspected and the facts ascertained as required in case of original discoveries. These things being done, the

*pertenencias* were measured, boundaries marked, and possession given as in other cases.

*Right to denounce mines in private property.*—Any one might discover or denounce a vein, not only on common land, but also on the property of any individual, provided he paid for the overlying surface and compensated the owner of the soil for the damage caused by exploration, the amount of such damage to be fixed by arbitration, in case of disagreement between the parties.

*Rights of one not a discoverer.*—One not a discoverer was prohibited from denouncing two contiguous mines upon one and the same vein; but there was no limit to the number he might acquire by purchase, gift, inheritance, or just title.

*Placers.*—Placers and other deposits in beds of gold and silver, precious stones, copper, lead, tin, quicksilver,[1] antimony, zinc, bismuth, rock salt, or fossils, perfect or mixed metals, bitumen, mineral tar, asphaltum, etc., might also be registered and denounced.

*Foreigners and religious orders.*—Foreigners were originally prohibited from working the mines; but by decree (October 27, 1823) they were permitted to supply miners with capital and hold shares (*acciones*) in the enterprise, and later (March 16, 1842), foreigners resident in the republic might acquire ownership of mines. Religious orders of both sexes were prohibited from acquiring mines, "as "being contrary to the sanctity and exercise of their "profession."

*Extent of pertenencia — Surface limits — Rights in depth.*—With reference to surface ground in connection with the vein, and the extent to which the vein might be worked, it

[1] As to quicksilver, it was originally provided that the government should have the preferential right of working the mines, indemnifying the discoverer in some equitable way; or the discoverer might work them, but was required to deliver the product to the agents of the royal treasury, and receive therefor a stipulated price. These provisions, however, became obsolete and inoperative in Mexico.

would seem that prior to promulgation of the "new ordi-"nances" it was "one of the greatest and most frequent "causes of litigation and dissension among the miners." To avoid this, it was decreed that the lateral extent of a *pertenencia* on a vein was to be regulated according to the inclination of the vein. To illustrate: A *pertenencia* was two hundred yards along the vein. The miner was to have a parallelogram two hundred yards long by one hundred yards wide, the lateral measurement to be at right angles to the former. The inspection of the preliminary work by the deputy and expert was supposed to determine the position of the vein in the earth. If it was perpendicular, the one hundred yards was to be measured on either side of the vein, or divided on both sides, as the miner might prefer. If the vein was not perpendicular — as it never was,— the miner was allowed lateral measurement proportionally to the inclination of the vein, the maximum being two hundred yards on the square, on the declivity, or "pitch," of the vein. So that a *pertenencia* on a vein might equal, but could never exceed, "the square of "two hundred level yards." Ordinarily, the miner was limited to vertical planes drawn through his surface boundaries, and was therefore compelled to stop the pursuit of his vein upon reaching his bounding plane, unless the ground outside was unclaimed (*terreno virgen*), in which case he was called upon to denounce the adjoining ground.

As to placers and other kindred deposits, the size of the *pertenencias* was regulated by the district deputations of mines, attention being paid to the extent and richness of the place and to the number of applicants for the same, with preference to the discoverers.

*Marking boundaries.*— The *pertenencias* having been regulated by the deputation, the miner was required to mark his boundaries by permanent stakes or landmarks such as should be secure and easy to be distinguished, and to enter into an obligation to keep and observe them forever, without being able to change them, though he may

allege that his vein has varied in course or direction; "but "he must content himself with the lot Providence has "decreed him, and enjoy it without disturbing his neigh- "bors." If he had no neighbors, he might alter his boundaries, with the consent and under the authority of the deputation.

*Right to all veins found within boundaries of pertenencia.*— The mine owner was entitled to possess not only the principal vein in the *pertenencia* denounced by him, but likewise all those which in any form or manner whatever are to be found in his property; so that if a vein takes its rise in one property, and, passing on, is found in another, each proprietor was entitled to enjoy the part of it which passes through his particular limits, and no one was entitled to claim entire possession of a vein from having its source in his portion, or on any other pretense whatever.

*Forfeiture for failure to work.*— With reference to working the mine, stringent regulations were established, compelling the mine owner to work at least four paid workmen in "some exterior or interior work of real utility" for eight months during each year, counting from the day of his coming into possession.

*Royalties.*— A certain percentage of the product of mines was payable to the government the amount of which varied at different periods.

§ 14. **Authorities consulted.**— In the preparation of the foregoing chapter, the author has availed himself of the painstaking labor of jurists and writers on the subject of foreign mining laws, whose works should be specially mentioned. That due credit may be given, and to the end that those desiring to pursue the study of comparative mining jurisprudence beyond what we consider the legitimate scope of this treatise, may be invited into broader fields of investigation, we take pleasure in here enumerating the various authors whose works we have been so fortunate as to possess.

The monographs of Dr. Rossiter W. Raymond, at present secretary of the American institute of mining engineers, scientist, scholar, and lawyer, one of the ablest living contributors not only to the literature of mining jurisprudence, but to mining subjects generally, have been freely consulted. Such of the productions of his pen as deal directly with the subject of foreign mining laws are, his treatise on "Relations of Governments to Mining," forming part II. of his first report as commissioner of mining statistics,[1] and his contribution to Lalor's "Cyclopædia of Political Science," under the title of "*Mines*."[2]

General H. W. Halleck's introduction to "De Fooz on the Law of Mines,"[3] and Hon. Gregory Yale's "Mining Claims and Water Rights"[4] contain valuable contributions on the subject of foreign mining systems, and have been freely consulted.

Arundel Rogers, Esq., in his work on the "Law of Mines, Minerals, and Quarries,"[5] devotes considerable space to a discussion of foreign systems, including a chronological review of legislation on mining subjects in the United States.

From the standpoint of practical utility, the recent work of Oswald Walmesley, Esq., barrister at law of Lincoln's Inn, "Guide to the Mining Laws of the World,"[6] is commended.

Mr. Walmesley has gathered and grouped together a vast amount of valuable authentic information. While written principally as a guide to persons seeking mining investments in foreign countries, it is the work of a trained lawyer, and valuable to the professional student of comparative mining jurisprudence.

Other authorities which have been consulted on this subject will be found in the notes.

[1] Mineral Resources, 1869, pp. 173-256.
[2] 1883, vol. ii., pp. 844-854.
[3] San Francisco, 1860.
[4] San Francisco, 1867.
[5] London, 1876.
[6] London, 1894.

## CHAPTER II.

### LOCAL STATE SYSTEMS.


§ 18. Classification of states.
§ 19. First group.
§ 20. Second group.
§ 21. Third group.
§ 22. Limit of state control after patent.


§ 18. **Classification of states.**—Many of the states of the union have enacted laws governing the mining industry. These states may be grouped into three classes:—

(1) Those states wherein the federal government acquired no public mineral land, and for that reason were not included in the scope of federal mining legislation;

(2) Those states which are public land states, but are exempted from the operation of the congressional mining laws, either for the reason that the mineral lands therein were sold under special laws prior to the enactment of general laws on the subject of mining, or because congress has by later laws in terms excluded them from the operation of these general laws;

(3) Those public land states and territories wherein the federal system is in full force, and wherein supplemental state and territorial legislation is authorized by the expressed terms of the federal laws.

§ 19. **First group.**—In states falling within the first group, such as the thirteen original states, and those carved out of the territory claimed by them, it is quite manifest that no federal legislation touching mining tenures is possible, and that such regulations as are found must be sought in the laws of the several states. The individual states

comprised within this group, being the paramount proprietors of their mineral lands, could alone prescribe the terms upon which mining rights could be acquired thereon. To this class the states of Tennessee and Texas may be added.

In most of these states there is no distinction between the method of acquiring mineral lands and lands that do not fall within this designation. Some of them, particularly those where coal mining is carried on extensively, have elaborate systems in the nature of police regulations, prescribing the manner in which mines shall be worked, providing for their official inspection, proper ventilation, means of escape in case of accident, and provisions looking to the protection of the miners. Pennsylvania,[1] Kentucky,[2] West Virginia,[3] and Tennessee[4] have more or less elaborate codes, confined, however, to regulating the manner of working the mines. No mining legislation of a general character is found in Delaware, New Jersey, Georgia, Connecticut, Massachusetts, North Carolina, Rhode Island, Vermont, or Maine.

Some of the states, such as Massachusetts,[5] Kentucky, and Tennessee,[6] regard the industry of mining as in the nature of a public use, and permit private property to be condemned for purposes of rights of way and drainage.

South Carolina has enacted some special legislation affecting phosphatic deposits in navigable waters, marshes, and creeks belonging to the state, and providing for a system by which licenses may be granted to extract them upon payment of royalties to the state;[7] but no distinction is made between the method of acquiring mineral lands and other lands, or in the tenures by which they are held. Of all the states found within the first group, New York[8]

[1] Brightley's Purdon's Digest, 1894, vol. xi., pp. 1340 to 1386.

[2] Laws 1891-92, p. 54; 1894, p. 55; Gen. Stats. 1887, p. 267; *Id.*, p. 1130.

[3] Laws 1893, ch. 22, p. 54; 1891, ch. 15, p. 22; 1891, ch. 35, p. 60; 1891, ch. 82, p. 209; 1889-90, p. 161.

[4] Laws 1887, ch. 206, p. 336; Code 1884, p. 75, 327 *et seq.*; Laws 1891, p. 263; Whitney's Land Laws, p. 335.

[5] Pub. Stats., 1882, ch. 189, §§ 19 to 28.

[6] Code 1884, § 1854, p. 328.

[7] Rev. Stats. South Carolina, 1893-94, vol i., pp. 36-38.

[8] Laws 1894, vol. i., ch. 317, p. 589 *et seq.*; *Id.*, vol. ii., ch. 745, p. 1852.

and Texas[1] are the only ones having anything like a general mining code.

*New York.*—New York has from the earliest period of its history asserted its ownership of mines of the precious metals by virtue of its sovereignty. A history of the legislation in this state would serve no useful purpose in this treatise. Briefly stated, the existing laws contain the following declaration as to the state's ownership.

The following mines are the property of the people of the state in their right of sovereignty:—

(1) All mines of gold and silver discovered or hereafter to be discovered;

(2) All mines of other metals discovered, or upon lands owned by persons not being citizens of the United States;

(3) All mines of other metals discovered upon lands owned by a citizen of the United States, the ore of which on an average shall contain less than two equal third parts in value of copper, tin, iron, and lead, or any of these metals;

(4) All mines and all minerals and fossils, discovered, or hereafter to be discovered, upon lands belonging to the state.[2]

It is not our purpose to either analyze or criticise this law,[3] but simply to outline it. As will be observed, its fundamental theory bears a striking analogy with that of the civil law. Citizens of the state discovering mineral upon lands of the state are required to give notice of the discovery to the secretary of state. The simple filing of this notice inaugurates the right to work. There are no statutory provisions fixing the area or extent of the property which may be worked under this notice; nor is there any direction as to marking of boundaries. The discoverer

[1] Sayle's Civil Digest, Sup. 1888-93, tit. 64*b*, art. 3961*b*.

[2] Laws 1894, vol. i., ch. 317, p. 589.

[3] For review of the New York mining laws, see Dr. Raymond's monographs—Trans. Am. Inst. M. E., vol. xvi., p. 770, and vol. xxiv., p. 712; Eng. & Min. Journal, vol. lviii., p. 560.

is exempted from paying any royalty for the term of twenty-one years, and after the end of that period he or his personal representative shall be preferred in any contract for the working of such mine made with the legislature or under its authority.

Mining corporations are authorized to condemn property for the purpose of mining easements, under certain conditions and restrictions.

*Texas.*— Texas has a general mining law,[1] which in the main follows the congressional laws, with the exception that no extralateral right is conferred, and the miner is not granted anything beyond vertical planes drawn through his surface boundaries. Patents are issued if applied for within five years, the price being twenty-five dollars per acre for lode claims, and ten dollars per acre for placer claims. Prior to patent, one hundred dollars must be expended on each claim annually, and fifty dollars per claim per annum must be paid to the state treasurer, the amount of such payments to be credited upon the purchase price when patent is obtained. The state after patent exacts no royalty, and does not concern itself with the manner of working the mines. After title passes from the state, the tenure by which mining property is held is the same as other property.

§ 20. **Second group.**—In the states of Arkansas, Illinois, Missouri, Iowa, Michigan, Minnesota, and Wisconsin, lands of the government containing the baser metals (lead and copper) were ordered sold under special laws prior to the discovery of gold in California. The precious metals are not found in any appreciable quantities in any of these states. By acts of congress, passed at different times, Alabama,[2] Michigan, Minnesota, Wisconsin,[3] Kansas, and Missouri[4] were excepted from the operation of the federal mining laws.

[1] Sayle's Civil Digest Sup., tit. 64b., art. 3361b.
[2] 22 Stats. at Large, p. 487.
[3] 17 Stats. at Large, p. 465.
[4] 19 Stats. at Large, p. 52.

The extent of the power of these states over the mining industry is limited to regulating the manner in which mines may be worked with regard to the safety of the miners; that is to say, police regulations such as are found in Pennsylvania.[1] This power has been exercised in Illinois,[2] Iowa,[3] Kansas,[4] and Missouri,[5] where codes more or less elaborate are found. With these exceptions, there is no mining legislation of any importance found in any of the states in this group.

§ 21. **Third group.**— This group includes what may be generally called the precious-metal-bearing states and territories, and will be fully considered when dealing generally with the federal system, as by that system supplemental state and territorial legislation is permissive. This local legislation, where found, is essentially a part of the national law, as administered in the respective local jurisdictions. These state and territorial laws, to a large extent, supplant the local rules and customs, and in some of the states and territories are quite elaborate, embodying so many elements that they demand individual treatment in another portion of this work, after we shall have laid the foundation therefor.

It may be of historical interest to note that it was at one time held in California that the mines belonged to the state, in virtue of her sovereignty, and that the state alone could authorize them to be worked. The doctrine was asserted that the several states of the union, in virtue of their respective sovereignties, were entitled to the *jura regalia* which pertained to the king at common law.[6]

In support of this view, the rules followed in the states of New York and Pennsylvania were cited. Of course, in

[1] Brightley's Purdon's Digest, 1894, vol. ii., p. 1340 *et seq.*

[2] Starr & Curtiss's Revision, 1885, p. 1618 *et seq.*; Starr & Curtiss's Sup., 1885–92, p. 872; Laws 1895, p. 252 *et seq.*

[3] Acts 1894, p. 95; Acts 1890, p. 71; Revision 1888, § 2449 *et seq.*

[4] Gen. Stats. 1889, vol. i., § 3835 *et seq.*; Laws 1895, p. 312; Laws 1893, p. 270.

[5] Rev. Stats. 1889, vol. ii., § 7034 *et seq.*; Laws 1895, p. 225.

[6] Hicks *v.* Bell, 3 Cal. 219.

those two states the national government owned no lands. The primary ownership was in the states, and not in the general government. Therefore, the states were at liberty to determine for themselves the policy to be pursued with reference to their own property.

This early California doctrine was subsequently repudiated.[1]

§ 22. **Limit of state control after patent.**— It may not be out of place to here remark that the government of the United States does not concern itself with mining lands or the mining industry after it parts with the title. This title vests in the patentee absolutely, to the extent of the property granted. No royalties are reserved; nor is any governmental supervision (except, perhaps, in the isolated case of hydraulic mines in California) attempted. Upon the issuance of the deed of the government, the mineral land becomes private property, subject to the same rules as other property in the state with reference to the transfer, devolution by descent, and all other incidents of private ownership prescribed by the laws of the state. The federal law remains, of course, a muniment of title; but beyond that it possesses no potential force. Its purpose has been accomplished, and, like a private vendor, the government loses all dominion over the thing granted. The state may not increase, diminish, nor impair the rights conveyed by a federal patent, but may, of course, and frequently does, exercise its police power and regulate the manner of working the mines, in the same manner that it might regulate any other industry. Briefly stated, property in mines, once vested absolutely in the individual, becomes subject to the same rules of law as other real property within the state.

[1] Moore v. Smaw, 17 Cal. 199, 217; Doran v. C. P. R. R., 24 Cal. 245.

# TITLE II.

## HISTORICAL REVIEW OF THE FEDERAL POLICY AND LEGISLATION CONCERNING MINERAL LANDS.


CHAPTER

I. INTRODUCTORY—PERIODS OF NATIONAL HISTORY.

II. FIRST PERIOD: FROM THE FOUNDATION OF THE GOVERNMENT TO THE DISCOVERY OF GOLD IN CALIFORNIA.

III. SECOND PERIOD: FROM THE DISCOVERY OF GOLD IN CALIFORNIA UNTIL THE PASSAGE OF THE LODE LAW OF 1866.

IV. THIRD PERIOD: FROM THE PASSAGE OF THE LODE LAW OF 1866 TO THE ENACTMENT OF THE GENERAL LAW OF MAY 10, 1872.

V. FOURTH PERIOD: FROM THE ENACTMENT OF THE LAW OF 1872 TO THE PRESENT TIME.

VI. THE FEDERAL SYSTEM.

# CHAPTER I.

## INTRODUCTORY.

§ 25. Introductory — Periods of national history.

**§ 25. Introductory — Periods of national history.** — Positive law is the result of social evolution. Its development keeps pace with the intellectual and industrial progress of a nation. The history of a nation's laws is the history of the economic forces of which they are but the resultants, or, as aptly stated by a distinguished writer, "Each nation has evolved its existing economy as the "outcome of its history, character, environment, institu- "tions, and general progress."

A brief historical review of the growth of our nation, its policy and legislation on the subject of mineral lands, and the discovery and development of its mineral resources, will materially aid us in arriving at a proper interpretation of the existing system of laws governing the acquisition and enjoyment of property rights and privileges on the public mineral domain of the United States.

This branch of national history logically divides itself into four distinct periods, marked either by the occurrence of important events or emphasized by a distinctive change of national policy. These periods may be defined as follows: —

*First* — From the foundation of the government to the discovery of gold in California.

*Second* — From the discovery of gold in California until the passage of the lode law of 1866.

*Third* — From the passage of that law to the enactment of the general law of May 10, 1872.

*Fourth* — From that event to the present time.

## CHAPTER II.

### FIRST PERIOD: FROM THE FOUNDATION OF THE GOVERNMENT TO THE DISCOVERY OF GOLD IN CALIFORNIA.


§ 28. Original nucleus of national domain.

§ 29. Mineral resources of the territory ceded by the States.

§ 30. First congressional action on the subject of mineral lands.

§ 31. Reservation in crown grants to the colonies.

§ 32. No development of copper mines until 1845.

§ 33. The Louisiana purchase and legislation concerning lead mines.

§ 34. Message of President Polk.

§ 35. Sales of land containing lead and copper under special laws.

§ 36. Reservation in pre-emption laws.


**§ 28. Original nucleus of the national domain.**—The national government acquired no rights of property within the present boundaries of the thirteen original states, nor in the states of Vermont, Kentucky, Maine, or West Virginia, which were severally carved out of territory originally forming a part of some of the original states.

The first acquisition of national domain which became subject to the disposal of congress was by cessions of territory claimed by seven of the original states. These cessions, commencing with that by the state of New York (March 1, 1781), and ending with that of Georgia (April 24, 1802), brought within the jurisdiction and control of the federal government all that portion of the present area of the United States now comprising the states of Tennessee, Illinois, Indiana, Ohio, Michigan, Wisconsin, those portions of Alabama and Mississippi lying north of the thirty-first parallel, and that portion of Minnesota lying east of the

Mississippi river. This area, with the exception of Tennessee (in which the public lands were practically absorbed by the claims of North Carolina, the surplus being subsequently ceded to the state),[1] constituted the original nucleus of our national domain.[2]

§ 29. **Mineral resources of the territory ceded by the states.**—In this period of our national history but little was known of the mineral resources of the country, and economic minerals were but little known or used.[3]

Gold had been found in moderate quantities in use among the Indian tribes of the present southern states, and the Spaniards, under the leadership of De Soto, were supposed to have discovered gold in North and South Carolina and Georgia: but the existence of this royal metal in any considerable quantity was purely legendary.[4]

Copper was known to exist in the Lake Superior region. The Jesuit priests had made extensive explorations on the upper peninsula, and had given glowing accounts of the abundance of copper there found. Other explorers confirmed these discoveries, and brought back legends of gold and precious stones.[5]

In 1771, when this region had passed from the dominion of France, a company was organized in London, the Duke of Gloucester being one of the incorporators, to mine copper on the Ontonagon river. What little metal was obtained was shipped to England; but nothing resulted from the venture.[6]

This was practically the extent of public information upon the subject at the time congress passed its first ordinance on the subject of mineral lands.

[1] Public Domain, p. 83.

[2] Florida was ceded to us in 1821 by Spain (Public Domain, 116), but until a very recent period was not known to contain any substances commercially classed as mineral. Its phosphate deposits on public lands are subject to the general mining laws of congress.

[3] Public Domain, p. 306.

[4] Century of Mining—Trans. Am. Inst. M. E., vol. v., p. 166.

[5] *Id.*, p. 169.

[6] Trans. Am. Inst. M. E., vol. xix., p. 679.

**§ 30. First congressional action on the subject of mineral lands.**—The definitive treaty of peace between Great Britain and the United States, concluded at Paris, September 3, 1783, practically settled our northern boundary, although this was a subject of controversy for several years after. When the lake region became subject to the unquestioned jurisdiction of the United States, the territory was in the occupancy of the Indians, and no settlements were attempted in that section until a much later period.

The first legislative declaration of congress with reference to mineral lands is found in the ordinance of May 20, 1785, entitled "An ordinance for ascertaining the mode of disposing of lands in the western territory."

Under this ordinance surveyors were to be appointed from each state, to act under the direction of the geographer. The territory was to be divided into townships six miles square, and these townships subdivided into sections one mile square (six hundred and forty acres). Meridian and base lines were to be established, and the rectangular system of surveys was adopted, which has ever since been in general use.

In making these surveys, the surveyors were required to note all mines, salt licks, and mill seats that should come to to their knowledge.

Reservations were made of four sections in each township for the use of the United States, one section (the sixteenth) for the maintenance of schools in that township, and a certain proportion, equal to one seventh of all the lands surveyed, was to be distributed to the late continental army.

There was also reserved, to be sold or otherwise disposed of as congress should thereafter direct, one third of all gold, silver, lead, and copper mines.

The unreserved sections or lots were to be allotted to the several states, according to their *pro rata*, and the lands thus allotted were to be sold at public vendue by the commissioners of the loan offices of the several states, by whom

deeds were to be given. These deeds were to contain a clause, "excepting therefrom and reserving one third part of all gold, silver, lead, and copper mines within the same."[1]

Considering the then state of public information as to the mineral resources of the newly acquired national domain, it is manifest that the reservations in the ordinance were not based upon any economic reasons. The impression undoubtedly existed, as it had from the period of the earliest discoveries and explorations in America, that the newly acquired territory was rich in precious and economic metals, and that some day they might prove a source of national revenue. But it is apparent that the policy of thus reserving a portion of this class of lands was but an adaptation of the system pursued by the mother country in dealing with her colonies, and following the example set by the crown, to whose rights the American confederation had succeeded.

**§ 31. Reservation in crown grants to the colonies.**— In almost all of the crown grants to the colonies, clauses were inserted reserving to the sovereign a certain fixed proportion of the royal metals discovered.

The charter of North Carolina (1584), granted to Sir Walter Raleigh by Elizabeth, contained the following reservation:—

"Reserving always to us, our heirs and successors, for all "services, duties, and demands the fifth part of all the ore "of gold and silver that from time to time, and at all times "after such discovery, subduing, and possessing, shall be "there gotten and obtained."[2]

This form of reservation, is found, with few exceptions, in all of the succeeding grants, viz: the three charters of Virginia (1606, 1609, 1611),[3] which also reserved one fifteenth of all copper; Massachusetts bay (1629);[4] the grant

[1] Journals of Congress, vol. x., p. 118.
[2] Charters and Constitutions, part ii., p. 1380.
[3] *Id.*, part ii., p. 1890, 1898, 1904.
[4] *Id.*, part i., p. 932.

of New Hampshire by the president and council of New England to Captain John Mason (1629—confirmed 1635);[1] the charter of Maryland to Lord Baltimore (1632), upon whom was imposed the additional burden of rendering annually two Indian arrows;[2] the grant of the province of Maine to Sir Ferdinando Gorges (1639);[3] Rhode Island and Providence plantations (1643);[4] Connecticut (1632);[5] the charter of Carolina, granted by Charles the Second to the Earl of Clarendon, Duke of Albermarle, and others (1663, 1665), reserved a royalty of one fourth of the royal metals and the annual payment of twenty marks.[6]

The grant of the province of Maine by Charles the Second to James Duke of York (1664), was an exception.[7] In this grant, "our dearest brother covenants and promises "to yield and render to his sovereign annually forty beaver "skins when they shall be demanded," and in return received a grant of all the mines and minerals.

William Penn was required to yield and pay "two beaver skins, to be delivered at our castle of Windsor on the first day of January of every year," in addition to the one fifth part of all gold and silver ores.

It was but natural that the United States in its first dealings with its public lands should provide for similar reservations. It was the force of precedent, rather than considerations of public and economic policy, that suggested those provisions of the ordinance reserving a part of the mineral lands for the use of the government.

**§ 32. No development of copper mines until 1845.**— By resolution of April 16, 1800, congress authorized the president to employ an agent to collect information relative to copper mines on the south side of Lake Superior, and "to ascertain whether the Indian title to such lands as "might be required for the use of the United States, in case

[1] Charters and Constitutions, part ii., *pp.* 1271, 1274.
[2] *Id.*, part i., p. 812.
[3] *Id.*, part i., p. 776.
[4] *Id.*, part ii., p. 1602.
[5] *Id.*, part i., p. 257.
[6] *Id.*, part ii., p. 1383.
[7] *Id.*, part i., p. 784.

"they should deem it expedient to work the said mines, "had been extinguished."

It is a matter of history that the Indian title was not extinguished until the treaty with the Chippewas in 1843; and it was not until 1845 that systematic mining in the copper regions was commenced. In 1845, the total production of copper in the United States was estimated at one hundred tons.[1] The total production from 1776 to 1851 is estimated at six thousand tons.[2] It is needless to remark that the government never deemed it expedient to embark in mining enterprises on its own account in any portion of its public domain.

§ 33. **The Louisiana purchase and legislation concerning lead mines.**—In 1803, the territory acquired by purchase from France, commonly called "the Louisiana purchase," added over a million square miles to the national domain, embracing parts of Alabama and Mississippi, the states of Louisiana, Arkansas, Missouri, Iowa, Kansas (except a portion in the southwest corner), Nebraska, all of Colorado east of the Rocky mountains and north of the Arkansas river, Oregon, North and South Dakotas, Montana, Idaho, Washington, a part of Wyoming, and the Indian territory.

Lead mining was begun in what is now the state of Missouri as early as 1720, while that section of country belonged to France, and under the patent granted to Law's famous Mississippi colony. Mine La Motte was one of the earliest discoveries (1702), and has been in operation at intervals ever since.[3] In 1788, Dubuque obtained from the Indians the grant under which he mined.[4]

The total production of lead in Missouri from 1720 to 1803 is estimated at sixteen thousand and ninety-five tons.[5]

[1] Mineral Industry, vol. i., p. 108.
[2] Trans. Am. Inst. M. E., vol. xi., p. 8.
[3] Century of Mining—Trans. Am. Inst. M. E., vol. v., p. 170.
[4] *Id.*, p. 170.
[5] Mineral Industry, vol. ii., p. 387.

From 1776 to 1824, it is estimated at four thousand four hundred and thirty-two tons.[1]

On March 3, 1807, congress passed a law wherein it was provided:—

"That the several lead mines in the Indiana territory " . . . shall be reserved for the future disposal of the " United States; and any grant which may hereafter be " made for a tract of land containing a lead mine which " had been discovered previous to the purchase of such tract " from the United States shall be considered fraudulent and " null, and the President of the United States shall be and " is hereby authorized to lease any lead mine which has " been or may hereafter be discovered in the Indiana terri- " tory for a term not exceeding five years."[2]

This legislation inaugurated the policy of the United States of leasing mineral lands.[3] These leases were to be given under the supervision of the war department. Where given, they covered tracts, at first three miles, afterwards one mile, square, and bound the lessees to work the mines with due diligence and return to the United States six per cent. of all the ores raised.

No leases were issued under the law until 1822, and but a small quantity of lead was raised until 1826, from which time the production began to increase rapidly.[4]

Hon. Abram S. Hewitt[5] gives the following interesting summary of the practical operation of this law and the policy inaugurated by it:

" For a few years the rents were paid with tolerable reg- " ularity, but after 1834, in consequence of the immense " number of illegal entries of mineral land at the Wiscon- " sin land office, the smelters and miners refused to make " any further payments, and the government was entirely " unable to collect them. After much trouble and expense, " it was, in 1847, finally concluded that the only way was " to sell the mineral land and do away with all reserves of

[1] Trans. Am. Inst. M. E., vol. v., p. 194.
[2] 2 Stats. at Large, p. 448, § 5.
[3] Public Domain, p. 307.
[4] Century of Mining — Trans. Am. Inst. M. E., vol. v., p. 180.
[5] In an address before the Am. Institute of Mining Engineers.

"lead or any other metal, since they had only been a "source of embarrassment to the department.

"Meanwhile, by a forced construction (afterward de- "clared invalid) of the same act, hundreds of leases were "granted to speculators in the Lake Superior copper region, "which was from 1843 to 1846 the scene of wild and base- "less excitement. The bubble burst during the latter year; "the issue of permits and leases was suspended as illegal, "and the act of 1847, authorizing the sale of the mineral "lands and a geological survey of the district, laid the "foundation of a more substantial property."[1]

**§ 34. Message of President Polk.**—President Polk, in his first message to congress (December 2, 1845) made the following special mention of these lands and the system of leasing them authorized by the act of March 3, 1807:—

"The present system of managing the mineral lands of "the United States is believed to be radically defective. "More than a million acres of the public lands, supposed "to contain lead and other minerals, have been reserved "from sale, and numerous leases upon them have been "granted to individuals upon a stipulated rent. The "system of granting leases has proved to be not only un- "profitable to the government, but unsatisfactory to the "citizens who have gone upon the lands, and must, if con- "tinued, lay the foundation of much future difficulty be- "tween the government and the lessees. According to the "official records, the amount of rents received by the gov- "ernment for the years 1841, 1842, 1843, and 1844, was "$6,354.74, while the expenses of the system during the "same period, including salaries of the superintendents, "agents, clerks, and incidental expenses, were $26,111.11, "the income being less than one fourth of the expense. "To this pecuniary loss may be added the injury sustained "by the public in consequence of the destruction of timber, "and the careless and wasteful manner of working the "mines. The system has given rise to much litigation "between the United States and individual citizens, pro- "ducing irritation and excitement in the mineral region, "and involving the government in heavy additional expen- "ditures. It is believed that similar losses and embarrass- "ments will continue to occur while the present system of "leasing these lands remains unchanged. These lands are

[1] Century of Mining — Trans. Am. Inst. M. E., vol. v., p. 181.

"now under the superintendence and care of the war de-
"partment, with the ordinary duties of which they have
"no proper or natural connection. I recommend the re-
"peal of the present system, and that these lands be placed
"under the superintendence and management of the gen-
"eral land office as other public lands, and be brought into
"market and sold upon such terms as congress in its wis-
"dom may prescribe, reserving to the government an equi-
"table percentage of the gross amount of mineral product,
"and that the pre-emption principle be extended to resident
"miners, and settlers upon them, at the minimum price
"which may be established by congress."

**§ 35. Sales of land containing lead and copper under special laws.**—The first sale of mineral lands was that of the reserved lead mines and contiguous lands in the state of Missouri, under the act of March 3, 1829.[1] They were to be exposed for sale as other public lands, at two dollars and fifty cents per acre; but lead and other mineral lands on the public domain, elsewhere than in Missouri, were still reserved from sale.

The act of July 11, 1846,[2] ordered the reserved lead mines and contiguous lands in Illinois, Arkansas, and the territories of Wisconsin and Iowa, to be sold as other public lands, after six months' public notice, following the Missouri act of 1829, with the addition of the provision that the lands should be offered and held subject to private entry before pre-emptions were allowed. The register and receiver were to take proof as to character of lands, whether mineral (*i. e.* containing lead) or agricultural.

The act of March 1, 1847,[3] opened for sale lands in the Lake Superior land district, state of Michigan, containing copper, lead, or other valuable ores, after geological examination and survey, and provided that there should be public advertisement for six months, and then public sale at not less than five dollars per acre, those not disposed of at public auction to be subject to private sale at five dollars per acre.

[1] 4 Stats. at Large, p. 361.
[2] 9 Stats. at Large, p. 37.
[3] 9 Stats. at Large, p. 146.

The act of March 3, 1847,[1] ordered sale of mineral lead land in Chippewa district, in Wisconsin.

It will be thus observed that from the period of 1785 to the discovery of gold in California, in 1848, the legislation of the congress of the United States as to survey, lease, and sale of mineral lands had been for lead, copper, and other base metals, and applied to the territory in the region of the great lakes, in the now states of Michigan, Wisconsin, Minnesota, Iowa, and Illinois, and the present state of Missouri. Under these various laws the copper, lead, and iron lands of the above mentioned regions were sold.[2]

§ 36. **Reservation in pre-emption laws.**— During this period numerous laws were passed granting pre-emption rights to settlers upon the public lands. These laws, as a general rule, excepted from their operation lands previously reserved from sale by former acts; but no specific reservation of mineral lands, or lands containing mines, was incorporated into any of them until the pre-emption act of September 4, 1841, was passed. This act[3] contained the provision that "no lands on which are situated any known salines or "mines shall be liable to entry under and by virtue of the "provisions of this act." It also embodied the limitation that its terms should not extend to lands reserved for salines, "or other purposes."

At the time of the passage of this act, the only mines that could have been in contemplation of congress were those of lead and other base metals in the region of the Mississippi valley and the copper mines in the regions of the great lakes.

As to salines, the policy of the government since the acquisition of the northwest territory, and the inauguration of our land system to reserve salt springs from sale, has been uniform.[4]

[1] 9 Stats. at Large, p. 179. [2] Pub. Domain, p. 319. [3] 5 Stats at Large, p. 453, § 10.

[4] See Morton *v.* State of Nebraska, 88 U. S. 660, wherein legislation as to salines is fully reviewed.

# CHAPTER III.

## SECOND PERIOD: FROM THE DISCOVERY OF GOLD IN CALIFORNIA UNTIL THE PASSAGE OF THE LODE LAW OF 1866.


§ 40. Discovery of gold in California and the Mexican cession.
§ 41. Origin of local customs.
§ 42. Scope of local regulations.
§ 43. Dips, spurs, and angles of lode claims.
§ 44. Legislative and judicial recognition by the state.
§ 45. Federal recognition.
§ 46. Local rules as forming part of present system of mining law.
§ 47. Federal legislation during the second period.
§ 48. Executive recommendations to congress.
§ 49. Coal land laws — Mining claims in Nevada — Sutro tunnel act.


**§ 40. Discovery of gold in California and the Mexican cession.**— Commodore Sloat raised the American flag at Monterey, July 7, 1846. Marshall discovered gold at Coloma in January, 1848. The treaty of Guadalupe Hidalgo was concluded February 2, exchanged May 30, and proclaimed July 4, 1848. This treaty added to the national domain an area of more than half a million square miles, embracing the states of California, Nevada, Utah, the territories of Arizona (except the Gadsden purchase of 1853) and New Mexico west of the Rio Grande and north of the Gadsden purchase, and the state of Colorado west of the Rocky mountains, and the southwestern part of Wyoming.[1]

The discovery of gold and reports of its extensive distribution throughout the foothill regions of the Sierra

[1] The Gadsden purchase added to the public domain 45,535 square miles, and formed part of the present territories of Arizona and New Mexico.

Nevadas brought to the shores of the Pacific a tide of immigration from all parts of the world. All nationalities, creeds and colors were soon represented and swarmed into the mineral regions of the golden state, which thenceforward became a beehive of gold-seekers, with their attendant camp-followers.

**§ 41. Origin of local customs.**— No system of laws had been devised to govern the newly acquired territory. By virtue of the treaty, the title to the lands containing the newly discovered wealth was vested in the federal government.

Until March 3, 1849, no attempt was made by congress to extend the operation of any of the federal laws over California, and on this date the revenue laws only were so extended.[1]

Until the admission of the state into the union, California was governed by the military authorities. Colonel Mason, on February 12, 1848, issued a proclamation as military governor, wherein he attempted to put an end to local uncertainty on this delicate subject of international law, by decreeing that "From and after this date the Mexican "laws and customs now prevailing in California relative to "the denouncement of mines are hereby abolished."[2]

Whether the power to abolish laws if they had a potential existence was confided to a military commandant or not, the force of the proclamation was recognized for the time, and the mining population found itself under the necessity of formulating rules for the government of the several mining communities, and establishing such regulations controlling the occupation and enjoyment of mining privileges as the exigencies of the case demanded and as the disorganized condition of society required. Of course, these pioneer miners were all trespassers. They had no warrant or license from the paramount proprietor. Colonel Mason, who, in connection with Lieutenant W. T. Sherman,

[1] 9 U. S. Stats. at Large, p. 400; Yale on Mining Claims, p. 16.
[2] Yale on Mining Claims, p. 17.

visited the scenes of the earliest mining operations, thus pictures the situation: —

"The entire gold district, with very few exceptions of "grants made some years ago by the Mexican authorities, "is on land belonging to the United States. It was a matter "of serious reflection with me how I could secure to the "government certain rents or fees for the privilege of pro- "curing this gold; but upon considering the large extent "of country, the character of the people engaged, and the "small scattered force at my command, I resolved not to "interfere, but permit all to work freely."[1]

Thus left to "work freely," some show of order was brought out of chaos by the voluntary adoption of local rules or general acquiescence in customs whose antiquity dated from the discovery of the "diggings."

Thus originated a system which, in the course of time, extended throughout the mining regions of the west as new discoveries were made, and subsequently came to be recognized as having the force of established law.

Naturally, these regulations varied in the different districts as local conditions varied.

§ 42. **Scope of local regulations.** — Some of the primitive codes were quite comprehensive in their scope, and undertook to legislate generally on the subject of civil rights and remedies, crimes and punishments, as well as providing rules for the possession and enjoyment of mining claims. For example, those adopted at Jacksonville, California, provided for the election of an alcalde, who propounded the law in a court from whose judgment there was no appeal, and wherein the rule of practice was "to conform "as nearly as possible to that of the United States; but the "forms of no particular state shall be required or adopted."

To steal a mule or other animal of "draught or burden," or to enter a tent or dwelling and steal therefrom gold-dust, money, provisions, goods, or other valuables, amounting in value to one hundred dollars or over, was considered a

[1] Public Domain, p. 311.

felony, and on conviction thereof the culprit should suffer "death by hanging."

Should the theft be of property of less value, the offender was to be "disgraced" by having his head and eyebrows close-shaved, and by being driven out of camp.

The willful and premeditated taking of human life was an offense of the same grade as stealing a mule, death being the penalty.

A sheriff was elected to carry judgments into effect, and, generally, to enforce the decrees of the judge and preserve the peace.

When we consider the conditions under which these rules were framed, we can readily appreciate their virtue. Generally speaking, however, the miner's code confined itself to regulating the mining industry. At first the miner's labor and research were confined to surface deposits, and to the banks, beds, and "bars" of the streams—that is, to the claims usually called "placers,"—quartz or lode mining not having been inaugurated until a later period.

A detailed review of the rules and customs adopted and in force in the various districts would serve no useful purpose. A unique collection of them will be found in the interesting and valuable report made by Mr. J. Ross Browne while acting as commissioner of mining statistics.[1]

Mr. Yale, in his work on mining claims and water rights,[2] also gives a full and accurate synopsis of the local mining codes.

The main object of the regulations was to fix the boundaries of the district, the size of the claims, the manner in which the claims should be marked and recorded, the amount of work which should be done to hold the claim, and the circumstances under which the claim was considered abandoned and open to occupation by new claimants.[3]

Of these rules and customs, Mr. Yale thus sums up his views:—

[1] Mineral Resources, 1867, pp. 235–247.
[2] Mining Claims and Water Rights, p. 73.
[3] J. Ross Browne in Mineral Resources, 1867, p. 236.

"Most of the rules and customs constituting the code "are easily recognized by those familiar with the Mexican "ordinances, the continental mining codes, especially the "Spanish, and with the regulations of the stannary convo- "cations among the tin bounders of Devon and Cornwall, "in England, and the High Peak regulations for the lead "mines in the county of Derby. These regulations are "founded in nature, and are based upon equitable princi- "ples, comprehensive and simple, have a common origin, "are matured by practice, and provide for both surface and "subterranean work, in alluvion, or rock *in situ*. In the "earlier days of placer diggings in California, the large "influx of miners from the western coast of Mexico, and "from South America, necessarily dictated the system of "work to Americans, who were almost entirely inexperi- "enced in this branch of industry. With few exceptions "from the gold mines of North Carolina and Georgia, and "from the lead mines of Illinois and Wisconsin, the old "Californians had little or no experience in mining. The "Cornish miners soon spread themselves through the state, "and added largely, by their experience, practical sense, "and industrious habits, in bringing the code into some- "thing like system. The Spanish-American system which "had grown up under the practical working of the mining "ordinances for New Spain, was the foundation of the rules "and customs adopted. . . . They reflect the matured "wisdom of the practical miner of past ages, and have their "foundation, as has been stated, in certain natural laws, "easily applied to different situations, and were propagated "in the California mines by those who had a practical and "traditional knowledge of them in their varied form in "the countries of their origin, and were adopted, and no "doubt gradually improved and judiciously modified, by "the Americans."

Halleck aptly states the main source and underlying theory of these local regulations:—

"The miners of California have generally adopted, as "being best suited to their peculiar wants, the main prin- "ciples of the mining laws of Spain and Mexico, by which "the right of property in mines is made to depend upon "*discovery* and *development*; that is, *discovery* is made the "source of title, and *development*, or *working*, the condition "of the continuance of that title. These two principles

"constitute the basis of all our local laws and regulations "respecting mining rights."[1]

§ 43. **Dips, spurs, and angles of lode claims.**— With respect to lode, or "quartz," claims, as they were then locally termed, in contradistinction to gravel claims, the miners' rules and customs established a rule of property at total variance with the Mexican laws. We refer to the right to work the vein to an indefinite depth, regardless of the occupation or possession of the surface underneath which it might penetrate, and to hold in connection with the main vein, without regard to any inclosing surface boundaries, the "dips, spurs, angles, and variations" of the located vein. Neither the form nor extent of the surface area controlled the rights in the located lode. It did not measure the miners' rights, either to the linear feet upon its course or to follow the dips, angles, and variations of the vein.[2] The lode was the principal thing, and the surface a mere incident.[3]

This departure from the rule of vertical planes drawn through surface boundaries may possibly be traced to the customs then in vogue among the lead miners of Derbyshire with reference to "*rake veins*."[4]

We find no trace of such an innovation in any other of the contemporaneous mining systems. Under the early German codes of the sixteenth and seventeenth centuries, what may be called an inclined location (*gestrecktfeld*) was sanctioned, which gave the right to follow the vein to an indefinite depth, and to work within planes parallel to the downward course of the vein, thirty feet from the hanging-wall and thirty feet from the foot-wall of the vein, forming a parallelopipedon.[5] But this system had become obsolete long before the discovery of gold in California.[6]

[1] Introduction to De Fooz on the Law of Mines, p. vii.

[2] Eureka Case, 4 Saw. 302–323.

[3] Johnson v. Parks, 10 Cal. 447.

[4] See, *ante*, § 8.

[5] Dr. R. W. Raymond — Mineral Resources, 1869, p. 195.

[6] Klosterman, in his treatise on the Prussian mining laws (Berlin, 1870), says that the abolition of inclined locations was brought about principally by the "interminable lawsuits inherent in the system."

This feature of the miners' rules and customs as adopted in California was embodied in the first mining legislation of congress,[1] and was the basis of what is now termed the extralateral right under the existing system.

A further discussion of this subject will be reserved for a succeeding chapter, where it will be dealt with in connection with the present laws.

**§ 44. Legislative and judicial recognition by the state.**—California was admitted as a state of the union, September 9, 1850. The act of admission contained no reference to mineral lands, and the new state came into existence with the local systems in full force and operation in the mining districts.

The legislature of the state in 1851 gave recognition to the existing conditions and the controlling force of the local system by inserting a provision in the civil practice act to the effect that the "customs, usages, or regulations, "when not in conflict with the constitution and laws of "the state, shall govern the decision of the action."

As to the effect of this legislative declaration, and generally with reference to the attitude of the state and federal government, upon the subject of mineral lands in California, during this interesting period, the supreme court of California, speaking through Chief Justice Sanderson, thus announced its views:—

"The six hundred and twenty-first section of the prac-"tice act provides that 'In actions respecting mining claims "'proof shall be admitted of the customs, usages, or regu-"'lations established and in force at the bar or diggings "'embracing such claims; and such customs, usages, or "'regulations, when not in conflict with the constitution "'and laws of this state, shall govern the decision of the "'action.'

"At the time the foregoing became a part of the law of "the land, there had sprung up throughout the mining "regions of the state local customs and usages by which "persons engaged in mining pursuits were governed in "the acquisition, use, forfeiture, or loss of mining ground

[1] Act of July 26, 1866.

"(we do not here use the word *forfeiture* in its common-law "sense, but in its mining-law sense, as used and understood "by the miners, who are the framers of our mining codes). "These customs differed in different localities, and varied "to a greater or less extent, according to the character of "the mines. They prescribed the acts by which the right "to mine a particular piece of ground could be secured and "its use and enjoyment continued and preserved, and by "what non-action on the part of the appropriator such "right should become forfeited or lost, and the ground "become, as at first, *publici juris* and open to the appropria- "tion of the next-comer. They were few, plain, and simple, "and well understood by those with whom they originated. "They were well adapted to secure the end designed to be "accomplished, and were adequate to the judicial determi- "nation of all controversies touching mining rights. And "it was a wise policy on the part of the legislature, not "only not to supplant them by legislative enactments, but, "on the contrary, to give them the additional weight of a "legislative sanction. These usages and customs were the "fruit of the times, and demanded by the necessities of "communities who, though living under the common law, "could find therein no clear and well-defined rules for their "guidance applicable to the new conditions by which they "were surrounded, but were forced to depend upon remote "analogies of doubtful application and unsatisfactory re- "sults. Having received the sanction of the legislature, "they have become as much a part of the law of the land "as the common law itself, which was not adopted in a "more solemn form. And it is to be regretted that the "wisdom of the legislature in thus leaving mining contro- "versies to the arbitrament of mining laws, has not always "been seconded by the courts and the legal profession, who "seem to have been too long tied down to the treadmill of "the common law to readily escape its thraldom while "engaged in the solution of a mining controversy. These "customs and usages have, in progress of time, become "more general and uniform, and in their leading features "are now the same throughout the mining regions of the "state; and, however it may have been heretofore, there is "no reason why judges or lawyers should wander with "counsel for the appellant in this case back to the time "when Abraham dug his well, or explore with them the "law of agency or the statute of frauds, in order to solve "a simple question affecting a mining right; for a more

"convenient and equally legal solution can be found nearer "home in the 'customs and usages of the bar or diggings "'embracing the claim' to which such right is asserted or "denied."[1]

Mr. Justice Field, who was the author of the provision of the California civil practice act referred to in the decision above quoted, and who is recognized as the "end of "the law" on mining subjects, in speaking for the supreme court of the United States, thus presents his views upon that branch of the law, as to which he was so peculiarly fitted to speak:—

"The discovery of gold in California was followed, as "is well known, by an immense immigration into the state, "which increased its population within three or four years "from a few thousand to several hundred thousand. The "lands in which the precious metals were found belonged "to the United States, and were unsurveyed and not open "by law to occupation and settlement. Little was known "of them further than that they were situated in the Sierra "Nevada mountains. Into these mountains the emigrants "in vast numbers penetrated, occupying the ravines, gulches, "and canyons, and probing the earth in all directions for "the precious metals. Wherever they went they carried "with them that love of order and system and of fair deal- "ing which are the prominent characteristics of our people. "In every district which they occupied they framed certain "rules for their government, by which the extent of ground "they could severally hold for mining was designated, "their possessory right to such ground secured and en- "forced, and contests between them either avoided or deter- "mined. These rules bore a marked similarity, varying "in the several districts only according to the extent and "character of the mines; distinct provision being made for "different kinds of mining, such as placer mining, quartz "mining, and mining in drifts or tunnels. *They all recog-* "*nized discovery*, followed by appropriation, as the founda- "tion of the possessor's title, and development by working "as the condition of its retention. And they were so framed "as to secure to all comers within practicable limits abso- "lute equality of right and privilege in working the mines. "Nothing but such equality would have been tolerated by "the miners, who were emphatically the law-makers, as

[1] Morton v. Solambo M. Co., 26 Cal. 527.

"respects mining upon the public lands in the state. The "first appropriator was everywhere held to have, within "certain well-defined limits, a better right than others to "the claims taken up; and in all controversies, except as "against the government, he was regarded as the original "owner, from whom title was to be traced. . . . These "regulations and customs were appealed to in controversies "in the state courts, and received their sanction; and prop- "erties to the value of many millions rested upon them. "For eighteen years, from 1848 to 1866, the regulations "and customs of miners, as enforced and molded by the "courts and sanctioned by the legislation of the state, con- "stituted the law governing property in mines and in water "on the public mineral lands."[1]

This exposition of the law governing mining rights, as it existed in the early history of the mining industry in the west, leaves nothing to be added by the author. The decision stands as a forensic classic. Judge Field was a part of the history of which he wrote. He served as an alcalde during the chaotic period antedating the admission of California as a state. He served his state in its first legislatures, and was the author of many of its early laws. As chief justice of its supreme court, his was the task to solve the great and overshadowing questions which arose over land titles in a new state coming into the union under peculiar and novel conditions, and he carried to the supreme bench of the United States, not only the practical knowledge acquired by personal contact with the mining communities, but a trained judicial mind.

These local systems are said to have constituted the American common law of mines,[2] and their binding force has been recognized from the beginning by a uniform line of decisions in the state and territorial courts.

§ 45. **Federal recognition.** — The federal judiciary followed the rule thus adopted.[3] Congress has always

[1] Jennison *v.* Kirk, 98 U. S. 453.
[2] King *v.* Edwards, 1 Mont. 235.
[3] Sparrow *v.* Strong, 3 Wall. 97.

recognized their binding force.[1] The land department of the government and the supreme court of the United States have uniformly acted upon the rule that all mineral locations were to be governed by the local regulations and customs in force at the time of the location, when such location was made prior to the passage of any mineral law made by congress.[2]

**§ 46. Local rules as forming part of present system of mining law.**—To a limited extent, local regulations have still a place in our legal system. They are permitted to have controlling force in certain directions and under certain restrictions; but they are gradually becoming superseded by statutory enactments in the various states and territories, which, of course, are but another form of expressing local rules. In many parts of the mining regions the right to supplement congressional laws by the adoption of local codes is not exercised. In other places we still find the right asserted. In this aspect district laws and regulations, as well as state and territorial enactments, form an integral part of the present system, and will be dealt with in their appropriate place. The purpose of this chapter has been largely historical, and enough has been said to show the origin, development, scope, and legal status of local rules to enable us to award them their proper place in the evolution of the existing system.

**§ 47. Federal legislation during the second period.**—On March 3, 1849, congress passed an act creating the department of the interior,[3] and thereupon the supervision of mineral lands was transferred to the general land office in that department.

The act of September 26, 1850,[4] ordered the mineral

[1] St. Louis Smelting Co. v. Kemp, 104 U. S. 636; Chambers v. Harrington, 111 U. S. 350; Golden Fleece v. Cable Cons., 12 Nev. 313; King v. Edwards, 1 Mont. 235.

[2] Glacier Mt. S. M. Co. v. Willis, 127 U. S. 471; Broder v. Natoma Water Co., 101 U. S. 274; Jackson v. Roby, 109 U. S. 440; Chambers v. Harrington, 111 U. S. 350.

[3] 9 Stats. at Large, p. 395. [4] *Id.*, p. 472.

lands in the Lake Superior district in Michigan to be offered at public sale, in the same manner, at the minimum, and with the same rights of pre-emption, as other public lands, but not to interfere with leased rights.[1]

This is the extent of affirmative action by congress during the second period touching its mineral lands, with the exception of the act providing for a district and circuit court for the district of Nevada, approved February 27, 1865.[2]

Section nine of this act provided:—

"That no possessory action between individuals in any "of the courts for the recovery of a mining title or for "damages to any such title shall be affected by the fact "that the paramount title to the land on which such mines "lie is in the United States, but each case shall be ad-"judged by the law of possession."

The same provision is perpetuated in the revised statutes.[3] This act was the first formal recognition by congress of the possessory rights of mineral occupants of the public lands.

In all general laws granting the right of pre-emption to settlers upon public land, mineral lands were reserved from their operation. The act of September 4, 1841, excepts from its operation all lands on which are situated any "known salines or mines." Whenever, upon the admission of a new state into the union, the provisions of this general pre-emption law were extended to it, this reservation was emphasized, if not enlarged. Thus, by the act of congress passed March 3, 1853, it was provided that all the public lands in the state of California, whether surveyed or unsurveyed, *excepting mineral lands*, should be subjected to the provisions of the act of 1841; and it was further provided that no person should obtain the benefits of the act by a settlement or location on *mineral lands*.

In grants to the several states, and in aid of the construction of railroads, similar reservations were made. The

[1] Public Domain, p. 308.
[2] 13 Stats. at Large, p. 440.
[3] Rev. Stats., § 910.

language of the reservation is not always precisely the same, but there is no departure from the established policy, that mineral lands were uniformly reserved for the use of the United States, or to be disposed of by such special laws as congress might see fit to enact.

In another portion of this treatise the extent and operation of the several excepting clauses contained in the different classes of grants will be considered. Sufficient historical data has here been given justifying the conclusion reached by the courts in announcing the doctrine that, prior to 1866, it had been the settled policy of the government in disposing of the public lands to reserve the mines and mineral lands for the use of the United States. Prior to that date, the uniform reservation of mineral lands from survey, from sale, from pre-emption, and from all grants, whether for railroads, public buildings, or other purposes, fixed and settled the policy of the government in relation to such lands.[1]

§ 48. **Executive recommendations to congress.** — Colonel Mason, in August, 1848, had made a graphic and interesting report to the war department, announcing officially the discovery of gold, giving a glowing account of the extent and richness of the deposits. He recommended the establishment of a mint at San Francisco, the survey of the districts into small parcels, and their sale at public auction to the highest bidder.

On December 2, 1849, President Fillmore, in his annual message to congress, referred to the subject in the following terms:—

"I also beg leave to call your attention to the propriety "of extending at an early day our system of land laws, "with such modifications as may be necessary, over the "state of California and the territories of Utah and New "Mexico. The mineral lands of California will, of course,

[1] Silver Bow M. & M. Co. v. Clarke, 5 Mont. 378, 410; Ivanhoe M. Co. v. Keystone Cons. M. Co., 102 U. S. 167; U. S. v. Gratiot, 14 Peters, 526; Morton v. State of Nebraska, 21 Wall. 660; Jennison v. Kirk, 98 U. S. 453, 458; Deffeback v. Hawke, 115 U. S. 392, 401.

"form an exception to any general system which may be "adopted. Various methods of disposing of them have "been suggested. I was at first inclined to favor the sys- "tem of leasing, as it seemed to promise the largest reve- "nue to the government, and to afford the best security "against monopolies; but further reflection and our expe- "rience in leasing the lead mines and selling lands upon "credit, have brought my mind to the conclusion that there "would be great difficulty in collecting the rents, and that "the relation of debtor and creditor between the citizens "and the government would be attended with many mis- "chievous consequences. I therefore recommend that in- "stead of retaining the mineral lands under the permanent "control of the government, they be divided into small "parcels and sold, under such restrictions as to quantity "and time as will insure the best price and guard most "effectually against combinations of capitalists to obtain "monopolies."

On the day following, Hon. Thomas Ewing, then secretary of the interior, laid before congress an elaborate report concerning the discovery of gold in California, wherein he called attention to the fact that no existing law gave the executive power to deal with the mines or protect them from intrusion, and some legal provision was necessary for their protection and disposition. He recommended a transfer by sale or lease reserving a part of the gold collected as seigniorage.

Nothing, however, came of these recommendations. Senator Fremont, on September 24, 1850, introduced a bill in the United States senate "to make temporary provision for "the working and discovery of gold mines and placers in "California, and preserving order in the mines," and contemplated a system of licenses to be granted upon payment of a nominal monthly rental. This bill passed the senate but not the house.[1]

§ 49. **Coal land laws — Mining claims in Nevada — Sutro tunnel act.**—There were several minor attempts made to pass a general mining law applicable to the gold regions,

[1] Yale on Mining Claims and Water Rights, pp. 340-349.

but they met with no success. While all admitted something should be done, sentiment was divided on questions of policy.

Laws were passed regulating the sale and disposal of coal lands; one on July 1, 1864,[1] and one on March 3, 1865;[2] and two laws, special and local in their nature — viz: the act of May 5, 1866,[3] concerning the boundaries of the state of Nevada, wherein it was provided that "all possessory "rights acquired by citizens of the United States to mining "claims discovered, located, and originally recorded, in "compliance with the rules and regulations adopted by "miners in the Pah Ranagat and other mining districts "in the territory incorporated by the provisions of this "act into the state of Nevada, shall remain as valid, sub-"sisting mining claims; but nothing herein contained shall "be so construed as granting a title in fee to any mineral "lands held by possessory titles in the mining states and "territories." The second was the Sutro tunnel act, approved July 27, 1866,[4] which granted the right of way and other privileges to Adolph Sutro and his assigns to aid in the construction of a draining and exploring tunnel to the Comstock lode in the state of Nevada. This act conferred upon Sutro the right of pre-emption as to lodes within two thousand feet on each side of the tunnel, cut or discovered by the tunnel, excepting the Comstock lode and other lodes in the actual possession of others. The act also recognized the mining rules and regulations prescribed by the legis-

[1] 13 Stats. at Large, p. 343.

[2] *Id.*, p. 529. These two acts provided for the disposal of coal lands and the sale of town property upon the public domain. The act of March 3, 1865, § 2, contains the following proviso, with reference to the sale of town lots: "*Provided, further*, That where mineral veins are possessed, which "possession is recognized by local authority, and to the extent so possessed "and recognized, the title to town lots to be acquired shall be subject to "such possession and the recognized use thereof. *Provided*, however, "that nothing herein shall be construed as to recognize any color of title "in possessors for mining purposes as against the government of the "United States."

[3] 14 Stats. at Large, p. 43.

[4] *Id.*, p. 242.

lature of Nevada.[5] On the day following, congress passed the law generally known as the "Lode and Water Law of "1866," to which we will now devote our attention.

[5] Yale on Mining Claims and Water Rights, pp. 351-352.

## CHAPTER IV.

### THIRD PERIOD: FROM THE PASSAGE OF THE LODE LAW OF 1866 TO THE ENACTMENT OF THE GENERAL LAW OF MAY 10, 1872.


§ 53. The act of July 26, 1866.
§ 54. Essential features of the act.
§ 55. Declaration of governmental policy.
§ 56. Recognition of local customs and possessory rights acquired thereunder.
§ 57. Title to lode claims.
§ 58. Relationship of surface to the lode.
§ 59. Construction of the act by the land department.
§ 60. Construction by the courts.
§ 61. Local rules and customs after the passage of the act.
§ 62. The act of July 9, 1870.
§ 63. Local rules and customs after the passage of the act.
§ 64. Accession to the national domain during the third period.


**§ 53. The act of July 26, 1866.**—This act was entitled "An act granting the right of way to ditch and canal "owners through the public lands, and for other pur- "poses." The title gives no clue to the scope of the act. As a matter of fact, the title belonged to another act which had passed the house, and for which the mining act was substituted in the senate, without any attempt to change the title, and in this form passed both houses.[1]

It was the first general law passed under which title might be acquired to any of the public mineral lands within what are known as the precious-metal-bearing states and territories. While most of the provisions of this act have been repealed and superseded by subsequent legislation, it remains a muniment of title to many mining

[1] Yale on Mining Claims and Water Rights, p. 12.

properties, rights to which attached prior to its repeal. To this extent it is still operative.[1]

§ 54. **Essential features of the act.**—No one has ever claimed that this act was a model piece of legislation. It is faulty and crude in the extreme, and the embarrassments surrounding its proper interpretation are still encountered in the courts, where property rights arising under it come in conflict with those acquired under the later laws. Yet the mining communities accepted it as being a step in the right direction. Mr. Yale says of it:—

"As the initial act to the legislation which must neces-
"sarily follow, it is more commendable as an acknowledg-
"ment of the justice and necessity which dictated it, and
"its expediency as a means to the advancement of the
"material interests of the state and nation, than for the
"perfection of its provisions or their exact adaptation to
"the accomplishment of the object intended. We must
"not, however, find fault with the law on account of its
"imperfections or the introduction of objectionable features
"in the mode to be followed in acquiring title under it.
"These imperfections can be remedied, the rights of the
"parties amplified in many particulars, and the system so
"changed as to work with more facility than now antici-
"paled."[2]

It is certainly due to Senators Stewart and Conness, the authors of the bill, to explain that at the time of its passage it was extremely difficult to secure the consideration of any measure touching the subject of mineral lands. Eastern sentiment was divided on questions of governmental policy, and the delegations from the western states were not harmonious. If future experience has shown defects to exist in the law, the authors and friends of the measure are entitled to the gratitude of those engaged in the mining industry for the establishment of at least three important and beneficent principles:—

*First*—That all the mineral lands of the public domain should be free and open to exploration and occupation:

[1] The full text of the act will be found in the appendix.
[2] Yale on Mining Claims and Water Rights, pp. 9-10.

*Second* — That rights which had been acquired in these lands under a system of local rules, with the apparent acquiescence and sanction of the government, should be recognized and confirmed;[1]

*Third* — That titles to at least certain classes of mineral deposits or lands containing them might be ultimately obtained.

§ 55. **Declaration of governmental policy.** — By the first of these provisions, the government, for the first time in its history, inaugurated a fixed and definite legislative policy with reference to its mineral lands. It forever abandoned the idea of exacting royalties on the product of the mines,[2] and gave free license to all its citizens, and those who had declared their intention to become such, to search for the precious and economic minerals in the public domain, and, when found, gave the assurance of at least some measure of security in possession and right of enjoyment. What had theretofore been technically a trespass became thenceforward a licensed privilege, untrammeled by governmental surveillance or the exaction of burdensome conditions. Such conditions as were imposed were no more onerous than those which the miners had imposed upon themselves by their local systems. That such a declaration of governmental policy stimulated and encouraged the development of the mining industry in the west, is a matter of public history.

§ 56. **Recognition of local customs and possessory rights acquired thereunder.** — As was observed in the preceding chapter, the federal government had practically acquiesced from the beginning in the system of local rules established in the various mining districts. That is to say, no overt act was done by the government to overthrow or repudiate the system. No attempt was made to interfere with mining upon the public domain. The process by

[1] Jennison v. Kirk, 98 U. S., 453, 458; Blake v. Butte S. M. Co., 101 U. S. 274.
[2] Ivanhoe M. Co. v. Keystone Cons. M. Co., 102 U. S. 167, 173.

which these primitive systems came to be recognized, first by the states, and then by the national government, was natural. When mineral discoveries were made in other territories and states, the system inaugurated in California was adopted to govern and regulate the new mining districts.[1]

Local legislatures and local courts followed the precedent set in California, by enacting and upholding laws confirming the right in the newly discovered mineral districts to establish rules governing the mining industry. As the supreme court of the United States said, before the act of 1866 was passed:—

"We can not shut our eyes to the public history which "informs us that under the legislation (state and territorial), "not only without interference by the national government, "but under its implied sanction, vast mining interests have "grown up, employing many millions of capital and con- "tributing largely to the prosperity and improvement of "the whole country."[2]

The unqualified legislative recognition of these local systems was a simple act of justice. Any other course would have involved a practical confiscation of property acquired and developed by the tacit consent of the government. That this act was such unqualified recognition has been abundantly established by the highest judicial authority.[3]

§ 57. **Title to lode claims.**—It may seem strange that the first mining law under which title to mining property could be absolutely acquired was limited in its operation in this direction to lode, or vein, claims. All mineral lands, whatever the forms in which the deposits therein occurred, were thrown open to exploration: but only lode claims could be patented. We are at a loss to understand the reason for this, unless it is accounted for by the state of the

[1] St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 650.

[2] Sparrow v. Strong, 3 Wall. 97, 104.

[3] Jennison v. Kirk, 98 U. S. 453, 459; Broder v. Natoma Water Co., 101 U. S. 274; Chambers v. Harrington, 111 U. S. 350, 352; Titcomb v. Kirk, 51 Cal. 288.

industry at the time the act was passed. Placer mining, which had occupied the attention exclusively of the early miners of California, was on the decline, and the quartz, or lode, mining was in the ascendency. The auriferous quartz veins of California were being developed to an important extent. Nevada, with its great Comstock lode, was attracting the attention of the civilized world. Much expensive litigation had arisen there,[1] and the necessity for some law giving a degree of certainty to mining titles was urgent. In addition to this, important quartz veins of great value had been discovered in other portions of Nevada, and in Colorado, Idaho, Montana, and other of the precious metal bearing states and territories. All these facts considered, it is safe to assume that the lode-mining industry was the one which was uppermost in the public mind, and which was most in need of national statutory regulation. At all events, until the passage of the placer law of 1870, no ultimate title to any mineral lands could be acquired, except to a "vein, or lode, of quartz or other rock in place, bearing "gold, silver, cinnabar, or copper."

The method of obtaining this title provided for in the act was simple; but the nature of the thing granted, the relationship of the surface and its boundaries to the lode, the extent of the dip or extralateral right, and some of the terms used in the act were, and still are, matters of serious contention and controversy.

The historical importance of the act of July 26, 1866, consists in the establishment of the three important principles enumerated in section fifty-four.

§ 58. **Relationship of surface to the lode.**—Under local rules, as well as under the act of 1866, the lode was the principal thing, and the surface was in reality an incident.[2]

[1] The surveyor-general for the state of Nevada, in his report for 1865, expressed the belief that one fifth of the output of the Comstock, estimated up to that date by Mr. J. Ross Browne at forty-five millions of dollars, was spent in litigation. (Mineral Resources of the West, 1867, p. 32.)

[2] Johnson v. Parks, 10 Cal. 447; Patterson v. Hitchcock, 3 Colo. 533, 544; Wolfley v. Lebanon, 4 Colo. 112; Walrath v. Champion M. Co., 63 Fed. 552.

While in some districts the precise quantity of surface allowed in connection with a lode was fixed by local rules, in many others no fixed quantity was mentioned. The lode only was located, the claims being staked, if at all, at the ends only. The notice of location usually called for so many feet on the vein, and a misdescription as to its course did not vitiate the location. The locator had a right prior to patent to follow it wherever it ran.[1]

Neither the form nor extent of the surface area claimed controlled the rights on the located lode. It did not measure the miner's right either to the linear feet upon its course or to follow the dips, angles, and variations of the vein.[2]

The local rules fixed no bounding planes across the course of the vein, and end lines were not in terms provided for, although they were, according to the decision in the Eureka case, implied. But there was no implication that they should be parallel.[3]

A locator could hold but one lode, or vein,[4] even if his claim had fixed surface boundaries. But the fact that two ledges existed within the bounds was required to be first established before the subsequent claimant had any lawful right to invade the surface boundaries of the senior locator.[5]

In all patents issued under the act, a recital was inserted, restricting the grant to the one vein, or lode, described therein, and providing that any other vein, or lode, discovered within the surface ground described should be excepted and excluded from the operation of the grant.

**§ 59. Construction of the act by the land department.** —Shortly after the passage of the act the commissioner of the general land office issued "circular instructions" for the guidance of the registers, receivers, and surveyors-

[1] Johnson *v.* Parks, 10 Cal. 447.
[2] Eureka Case, 4 Saw. 302, 323.
[3] Eureka Case, 4 Saw. 302, 319; Iron S. M. Co. *v.* Elgin, 118 U. S. 196, 208.
[4] Eureka Case, 4 Saw. 302, 323; Eclipse G. & S. M. Co. *v.* Spring, 59 Cal. 304; Walrath *v.* Champion M. Co., 63 Fed. 552.
[5] Atkins *v.* Hendree, 1 Idaho, 107.

general in carrying the law into effect.[1] These instructions provided for the establishment of end lines at right angles to the ascertained or apparent general course of the vein, and permitted the applicant to apply for patent to a vein without any inclosing surface, the estimated quantity of superficial area in such cases being equal to a horizontal plane, bounded by the given end lines and the walls on the sides of the vein. As was said by the commissioner of the general land office, an applicant for a patent under this act might include surface ground lying on either or both sides of the vein as part of his claim, or he might apply for a patent for the vein alone. His rights upon the vein and in working it were precisely the same, whatever might be the form of his surface ground, or whether he had any or none.[2]

As to the effect of such patent, when issued, the department took the view that the patentee was fully invested with the title to his lode for the linear extent specified in the grant, whatever course the vein might be found to pursue underground;[3] and that he might follow the particular lode named in the patent to the number of feet expressed in the grant, although the ledge in its course should leave the surface ground described in the patent.[4] In other words, the department inclined to the opinion that the right of a lode claimant to pursue the vein to the extent of the number of linear feet claimed, whatever might be its course, was the same after patent as before.

Under this construction of the law, patents were issued in several instances describing a small area of surface, upon which the improvements were erected, within which surface a few hundred linear feet of the lode only was included, the remainder of feet claimed being indicated by a line extending beyond the defined surface area in the direction and to the extent claimed. An example of a patent issued

[1] Jan. 14, 1867—Copp's Min. Dec., p. 239.
[2] Mt. Joy Lode—Copp's Min. Dec., p. 27.
[3] Flagstaff Case—Copp's Min. Dec., p. 61.
[4] Commissioner's Letter—Copp's Min. Dec., pp. 154, 201.

under this interpretation is found in the case of the famous Idaho mine in Grass Valley, California. We present for illustrative purposes a copy of the plat accompanying this patent:—

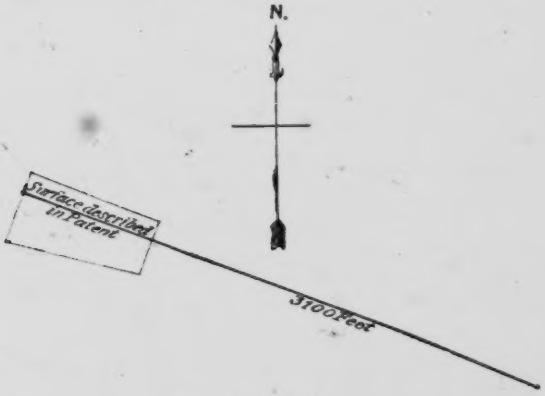



FIGURE 1.

This patent described the surface ground shown on the plat, and granted "the said mineral claim, or lot of land, "above described, with the right to follow said vein, or lode, "to the distance of thirty-one hundred linear feet, with its "dips, angles, and variations, although it may enter the land "adjoining." Just what was in fact granted by the patent to a line might be the cause for serious controversy, even if the line correctly followed the outcrop of the vein. But subsequent development proved that this outcrop, or top, was considerably north of the patented line. Litigation arose between the Idaho and the Maryland, adjoining on the east, as to where the right of the Idaho on the vein terminated and that of the Maryland began, and as to what was the bounding plane on the dip between the two companies. Under the interpretation followed by the land department, it would seem that the Idaho company could follow the vein in whatever direction it ran, after leaving the surface boundaries, to the extent of the thirty-one

hundred feet. The trial court ruled that the diagram fixed the position of the lode, and that the bounding plane on the lode between the two companies was to be drawn through the point at the eastern terminus of the lode line shown on the plat. The case was compromised during the trial. It is cited simply to show some of the embarrassments flowing from the early interpretation by the land department of the act, and the difficulties encountered in later years where coterminous proprietors are brought into controversy with these old locations or with patents granted under this act.

Frequently the land department went to another extreme on this subject of surface ground. Patents were issued covering a few hundred feet of a lode, embraced within irregular surface boundaries which covered an area of several hundred acres.

Figure 2 presents an illustration of this. It is taken from a patent issued by the department, based upon a claim to the lode, originating under the act of 1866 upon proceedings completed and entry made prior to the passage of the act of May 10, 1872.

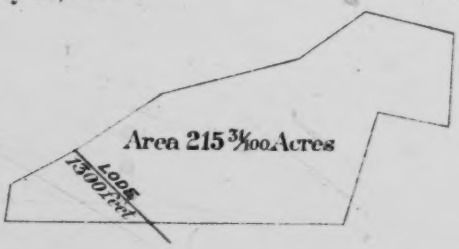



FIGURE 2.

So long as the act of 1866 was in force, which granted but the one lode, the legal controversies likely to arise over a proper construction of such a patent were not particularly serious. But when we consider that the act of 1872 purports to grant to the holder of such a patent all other lodes which have their tops, or apices, within the patented

surface area, it will be seen that many complications might arise as to end-line planes and dip rights between coterminous proprietors. All of this, however, will be reserved for future discussion. Our object has been simply to illustrate the rules of interpretation which prevailed in the land department.

§ 60. **Construction by the courts.**—The courts of last resort have uniformly overruled the interpretation of this act adopted by the land department, and have established the rule that surface lines, both side and end, were contemplated by the act of 1866, and that when a patent was once obtained the patentee was not permitted to follow the vein on its course beyond the surface boundaries.

The Flagstaff lode claim, in reference to which on application for patent the land department announced its interpretation[1] that the patentee might follow the lode to the linear extent claimed, whatever might be its course, came before the courts after the patent was issued, in two cases, one of which reached the supreme court of the United States. As the Flagstaff case is a noted one, and has served as a precedent in a number of controversies, we herewith present a diagram (figure 3)[2] illustrating the several controversies.

The Flagstaff patent granted a superficies one hundred feet wide by twenty-six hundred feet long, with the right to follow the vein to the extent of twenty-six hundred feet. It appeared that the lode crossed the side lines, as indicated on the diagram. Two controversies arose; one with the Nabob, on the west, and the other with the Titus, on the east. In each case the Flagstaff company contended that they had a right to the lode for the length thereof claimed, though it ran in a different direction from that in which it was supposed to run when the location was made.

[1] Copp's Min. Dec., p. 61.

[2] This diagram, so far as it relates to the case of Flagstaff M. Co. *v.* Tarbet, is taken from a certified copy of the map used at the trial. The Nabob claim is designated thereon from the description given in McCormick *v.* Varnes, 2 Utah, 355.

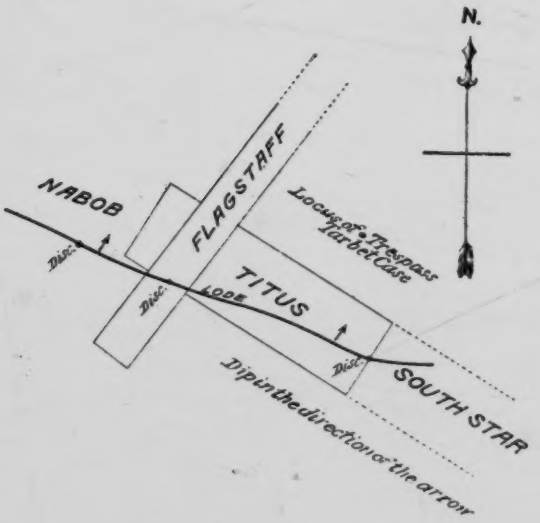



FIGURE 3.

The supreme court of Utah passed upon both cases, the Nabob case alone being reported, so far as that court was concerned.[1] It held in that case that the Flagstaff patented ground did not cover or embrace any part of the vein on its course, or strike outside of and beyond the side lines.

The Titus case was decided on parallel lines, and was appealed to the supreme court of the United States,[2] where the ruling was affirmed, and the doctrine firmly established that the right to the lode only extended to so much of the lode as is found within the surface boundaries. If the patentee located crosswise of the lode, and his claim was only one hundred feet wide, that one hundred feet is all he had a right to.

Prior to this decision of the supreme court of the United States, the supreme court of Colorado had announced the same doctrine as the supreme court of Utah,[3] but without

[1] McCormick v. Varnes, 2 Utah 355.
[2] Flagstaff M. Co. v. Tarbet, 98 U. S. 463.
[3] Wolfley v. Lebanon, 4 Colo. 112; Johnson v. Buell, 4 Colo. 557.

referring to the Utah cases. It is more than probable that the two courts reached the same conclusion without either having knowledge of the action of the other.

The doctrine of the Flagstaff case has recently been applied by Judge Hawley, sitting as circuit judge in the ninth circuit, to a case similar in principle.[1]

It will be thus seen that until a locator defined his claim for purposes of patent, under the act of 1866, he could follow the lode in any direction it might take to the length claimed; but after patent he was confined to the lines of his survey.

As to the extent of the dip or extralateral right under locations held and patents issued under the act of 1866, we reserve the discussion for a succeeding chapter. To a considerable extent this act and the titles issued under it are brought into connection, and are at least partly blended with the later, or present, legislative system and the titles held thereunder.

§ 61. **Local rules and customs after the passage of the act.**—It will be observed that the act left to local regulation all the details of location, limiting, however, the linear extent of an individual location to two hundred feet, with an additional claim to the discoverer, and providing that not more than three thousand feet should be taken in any one claim by any association of persons. The law also granted to the locators the right to follow the vein to any depth, with all its dips, angles, and variations. This was the rule in most mining districts before the passage of of the act, although in certain localities lode claims were required to be "square," with no right to follow the vein on the dip beyond vertical planes drawn through the surface boundaries. As the act did not apply to placers, this class of claims continued to be entirely governed by local rules until the passage of the placer law of July 9, 1870. Lode claims continued to be so governed within the limitation

[1] Walrath v. Champion M. Co., 63 Fed. 552; S. C. on appeal, 72 Fed. 978.

as to length of claim, and the extent which might be held by location on a given lode by any association.

**§ 62. The act of July 9, 1870.**—This is commonly known as the placer law, in contradistinction to the lode law of 1866, and was amendatory of and supplemental to that law. It provided, in terms, that claims usually called "placers," including all forms of deposit, excepting veins of quartz or other rock in place, should be subject to entry and patent under like circumstances and conditions and upon similar proceedings as were provided for vein or lode claims, with the exception that a survey was not necessary where the proposed entry conformed to legal subdivisions. It fixed the price for such lands at two dollars and fifty cents per acre, and authorized their subdivision into ten-acre tracts. It limited the extent of a placer location, whether by an individual or an association of persons, to one hundred and sixty acres. Hitherto no limitation had been imposed as to the area which might be included in a location.[1] It also provided, that where a person or association of persons shall have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the state or territory where the same may be situated, evidence of possession and working of the claims for such period should be sufficient, in the absence of adverse claims, to entitle the applicant to a patent.[2] In other words, possession and working for the statutory period, without location, ripened into an equitable title against the government itself.

As we have heretofore observed, placer claims were first patentable under this act.[3]

The historical importance of the act (the full text of which will be found in the appendix) lies in the extension of the right to patent to placers and other forms of deposit, not included within the lode law of 1866.

[1] St. Louis Smelting Co. v. Kemp, 104 U. S. 636.

[2] The land department construed this provision to apply to lode claims as well as placers. (Circ. Inst.—Copp's Min. Dec., p. 253.)

[3] Deffeback v. Hawke, 115 U. S. 392; Moxon v. Wilkinson, 2 Mont. 421.

§ 63. **Local rules and customs after the passage of the act.**—Under the placer law, placer locations were still to conform to local rules as to the extent of the claims, subject to the limitation that no more than one hundred and sixty acres could be located by an individual or an association of persons. In this respect individuals and associations seem to have been placed upon the same footing; that is, either might take up one hundred and sixty acres.[1]

With this limitation and the requirement that placer locations upon surveyed land should conform to the public surveys, the manner of locating, working, and conditions under which forfeiture arose were left to local regulation. The act remained in force less than two years, when it was superseded by the general mining act of May 10, 1872, which preserved its essential features.

§ 64. **Accession to the national domain during the third period.**—The purchase of Alaska from Russia, in March, 1867, was the last of the treaties of purchase of territory, and added to and completed our present national and public domain.[2] It was not until 1884, however, that the laws relating to mining claims and rights incident thereto became operative in this district. The act providing for a civil government for Alaska[3] made such laws applicable, subject to regulations to be prescribed by the secretary of the interior,[4] and also provided that parties who had previously located mines or mineral privileges therein should not be disturbed, but should be allowed to perfect their claims. Prior to the passage of this act, patents for mining claims in Alaska could not be obtained.[5]

[1] St. Louis Smelting Co. *v.* Kemp, 21 Fed. Cases, 205.
[2] Public Domain, p. 138.
[3] May 17, 1884,—23 Stats. at Large, p. 24.
[4] 4 Land Decisions, p. 128.
[5] Commissioner's Letter—Copp's Min. Dec., p. 215.

# CHAPTER V.

## FOURTH PERIOD: FROM THE ENACTMENT OF THE LAW OF MAY 10, 1872, TO THE PRESENT TIME.


§ 68. The act of May 10, 1872.
§ 69. Declaration of governmental policy.
§ 70. Changes made by the act—Division of the subject.
§ 71. Changes made with regard to lode claims.
§ 72. Changes made with regard to other claims.
§ 73. New provisions affecting both classes of claims.
§ 74. Tunnels and mill sites.
§ 75. Legislation subsequent to the act of 1872.
§ 76. Local rules and customs since the passage of the act.


**§ 68. The act of May 10, 1872.**—On May 10, 1872, congress passed a law entitled "An act to promote the de-"velopment of the mining resources of the United States," which, while re-affirming the policy of the government as to the exploration, development, and purchase of its mineral lands by its citizens, or those who had declared their intention to become such, yet, particularly with respect to lode claims, it made a radical departure. This act is practically embodied in the revised statutes of the United States, and, to all intents and purposes, constitutes the present system. It is printed in full in the appendix, where will also be found the various sections of the revision embodying its terms. It is not our purpose here to deal with it analytically. The entire treatise will practically be devoted to a discussion and exposition of it. It is our present purpose to simply outline its salient features, draw attention to the changes in the law made by the act, and give it its proper place in the history of mining legislation.

§ 69. **Declaration of governmental policy.** — With reference to the declaration of governmental policy, it embodies the spirit of the preceding enactments, making such changes in expression as was necessitated by substituting one enactment embracing all classes of mineral lands for two practically separate ones dealing with two distinct classes.

The act of 1866, declared that the mineral lands of the public domain should thenceforward be free and open to exploration and occupation by all citizens and those who had declared their intention to become such, and granted the privilege to the claimants of a vein, or lode, of obtaining title to the *mine*. The act of 1870 extended like privileges to the owners of placers and other forms of deposit.

The act of May 10, 1872, declares that all *mineral deposits* in land belonging to the United States are hereby open to exploration and purchase, and the *lands in which they are found to occupation and purchase*. The language in italics, particularly the last sentence, "the lands in which "they are found," seems to foreshadow the intent of the act in its radical departure from the method theretofore in vogue of locating lode claims. As a declaration of policy, however, we can see no essential difference in the spirit of the old and that of the new. The latter was, to all intents and purposes, a reaffirmance of the former. Let us briefly examine and discuss the changes made by the act in other respects, bearing in mind that it is not our present intention to critically discuss the latter law in all its aspects. We simply wish to invite attention to the principal modifications of the old system, and enumerate the salient features of the new.

§ 70. **Changes made by the act — Division of the subject.** — We can best deal with the subject by distributing it into three distinct heads:—

(1) Changes made with regard to lode claims;

(2) Changes made with regard to other claims;

(3) New provisions affecting both classes of claims.

We will discuss these in the order enumerated.

**§ 71. Changes made with regard to lode claims.**— The act of 1866 left the manner of locating these claims to local regulation, limiting the linear extent of each individual claim to two hundred feet, except in case of the discoverer, and to a maximum of three thousand feet to an association of persons.

We have seen that under the local rules locations were made of the *vein* and a given number of linear feet on its course was claimed; also, that prior to patent the locator could follow that vein, wheresoever it might run, to the extent claimed. His surface ground was for the convenient working of his lode, and its extent was regulated entirely by local custom. His right to the vein in length or depth was not dependent upon the form or extent of the surface ground. When he applied for and received a patent, he received title to but one lode, and could only follow that on its course to the extent which it was included within his surface lines. While end lines were implied, his right to pursue the vein in depth was not based upon their substantial parallelism.

The new law changed all this. As was said by Judge Beatty, "Disagreeable as the awakening may be, it is "time we are opening our eyes to the fact that a new sys- "tem has been introduced."[1]

Under the act of 1872, the miner locates a surface which must be so defined as to include the top, or apex, of his lode. Failing in this, he obtains nothing. If he mistakes the course of his vein, it is his loss. He can only hold the vein on its course to the extent that the top, or apex thereof, is found within his boundaries. He may thus acquire a superficies fifteen hundred feet in length by six hundred feet in width, if local regulations do not restrict these measurements.

In other words, under the old law he located the *lode*.

[1] Gleeson *v.* Martin White M. Co., 13 Nev. 442, 459.

Under the new, he must locate a piece of land containing the top, or apex, of the lode. While the vein is still the principal thing, in that it is for the sake of the vein that the location is made, the location must be of a piece of land including the top, or apex, of the vein. If he make such a location, containing the top, or apex, of his discovered lode, he will be entitled to all other lodes having their tops, or apices, within their surface boundaries. His end lines must be parallel and crosswise of the vein; otherwise, he cannot pursue his lode or lodes on their downward course beyond vertical planes drawn through his surface side lines.[1] The law, in terms, does not so state; but this is the interpretation reached by the courts.

The foregoing states the essential differences in theory between the two acts. By this act of 1872 there was also granted to the owners of "one-lode" patents, or locations, all lodes other than the one originally located, with the right to follow them in depth.

It may also be observed that the act of 1866 applied to claims upon lodes, or veins, of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper. With reference to claims located prior thereto, the act of 1872 added to the list of metallic substances named, lead, tin, and "other valuable deposits."

The act also contained rules for the determination of controversies between claimants of cross lodes and those uniting on the dip, and other minor details, all of which will be considered at the proper time.

**§ 72. Changes made with regard to other claims.**— No radical changes in the method of acquiring title to placers and other forms of deposit not in place were made by the act; but the quantity of ground which might be be acquired by an individual was limited to twenty acres. The act is silent as to the quantity which might be taken by an association of persons. Judge Hallett was of the

[1] And, perhaps, these side lines produced, as in such case the side lines perform the functions of end lines.

opinion that the one-hundred-and-sixty-acre limitation in this respect, contained in the act of 1870, remained unrepealed.[1] Be that as it may, the revised statutes re-enacted this provision of the act of 1870.[2]

Provisions were also made for obtaining title to lodes known to exist within placers, and reserving such lodes from the operation of the placer patents, where they were not claimed by the placer applicant, a subject upon which the act of 1870 was silent.

§ 73. **New provisions affecting both classes of claims.** —The act of 1872 went beyond the preceding legislation in many details. It fixed the amount of annual work to be performed in order to maintain the integrity of locations made both before and after the passage of the act. It provided for the marking of the boundaries of claims, prescribed the contents of records, where local rules required record, and the conditions under which forfeiture might be worked. The proceedings to obtain patent, and the method of asserting and determining adverse claims, were much more elaborate than in the preceding act, as well as much more satisfactory.

§ 74. **Tunnels and mill sites.**—The act also provided a method of acquiring title to non-mineral land for the purpose of a mill site, either in connection with a located lode, or where used by the owner of a mill or reduction works. It also incorporated a provision with reference to tunnels as a means of discovering blind lodes, and securing certain rights on the discovered lodes to the locator and projector of the tunnel. These subjects will be fully discussed in their appropriate place.

§ 75. **Legislation subsequent to the act of 1872.**— Several amendments were made to the original act and some supplemental legislation of a minor character is to be noted

[1] St. Louis Smelting Co. v. Kemp, 21 Fed. Cases, 205.
[2] Rev. Stats., § 2330.

before closing this historical review. A brief enumeration of these acts is all that will be here required.

The act of February 18, 1873,[1] excepted Michigan, Wisconsin, and Minnesota from the operation of the general mining laws.

The acts of March 1, 1873,[2] and June 6, 1874,[3] extended the time for the performance of annual labor on claims located prior to the act of 1872; and the act of January 22, 1880,[4] fixed a uniform time for the performance of labor upon all claims located subsequent to the act of 1872.[5]

The act of March 3, 1873,[6] excepted Missouri and Kansas, and that of March 3, 1883,[7] exempted Alabama from the operation of the general mining acts. The act of January 12, 1877,[8] in relation to salines; the act of June 3, 1878,[9] in relation to timber cutting; and an act passed on the same day,[10] commonly known as "the stone and timber act," and the amendment to the latter act, passed August 4, 1892,[11] are the only other enactments during the period that are worthy of note.

Some of these acts have performed a temporary purpose; others, to some extent, form a part of the existing system, and, as such, will be again referred to in treating of the different subjects to which they relate.

With reference to the revised statutes, approved June 22, 1874, it may be said that, in the main, they were a mere revision and consolidation of the general laws existing and in force on December 1, 1873. The existing system of mining law, with the exception of a few acts passed since December 1, 1873, is found codified or consolidated into the

[1] 17 Stats. at Large, p. 465; C. M. L. 23.
[2] 17 Stats. at Large, p. 483; C. M. L. 23.
[3] 18 Stats. at Large, p. 61; C. M. L. 23.
[4] 21 Stats. at Large, p. 61; C. M. L. 24.
[5] McGinnis v. Egbert, 8 Colo. 41; Slavonian M.Co. v. Vacavich, 7 Saw. 217.
[6] 19 Stats. at Large, p. 52.
[7] 1 Land Decisions, p. 656.
[8] 19 Stats. at Large, p. 221.
[9] 20 Stats. at Large, p. 88.
[10] *Id.*, p. 89.
[11] Sup. R. S., vol. ii, p. 65.

revised statutes. In treating of this system in the future we will simply refer to the sections of the revised statutes, unless the subject under discussion necessitates a reference to the original act.

**§ 76. Local rules and customs since the passage of the act.**—Subject to the limitations enumerated in the act the miners of each mining district may make regulations not in conflict with the laws of the United States or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, and amount of work necessary to hold possession. While this privilege is thus granted, it is not universally exercised. Generally, in California the district organizations are things of the past; and we believe it is the case in other states and territories. The mining laws themselves are, under ordinary conditions, sufficient for all practical purposes. Yet we do encounter districts which still possess a potential existence. Therefore, local rules must be dealt with as a part of the existing system, though much limited in their scope.

They have performed their part in the scheme of evolution, and have, for the most part, disappeared, to be replaced by higher forms of legislation.

As to the state and territorial legislation, the tendency in later years has been in the direction of individual mining codes, more or less comprehensive. While the existing federal laws largely dispense with the necessity for local regulation and circumscribe the field within which states may legitimately act, yet we find individual codes in some instances re-enacting many of the provisions of the federal laws and supplementing them with numerous provisions, some of which are subject to the criticism of being in conflict with the paramount law. The force and effect of this class of legislation will receive due attention when the subjects to which they relate are under discussion.

# CHAPTER VI.

## THE FEDERAL SYSTEM.

§ 80. Conclusions deduced from preceding chapters.

§ 81. Outline of the federal system —Scope of the treatise.

**§ 80. Conclusions deduced from preceding chapters.** —In the preceding chapters we have given a short synopsis of such foreign mining laws as might reasonably be supposed to have exerted an influence on our system. We have also traced the origin and gradual development of the body of substantive law which now governs the acquisition and enjoyment of mining rights upon the public domain of the United States, and have endeavored to show the relationship which the several states have occupied in the past, and now occupy, with reference to public mineral lands within their respective boundaries. From the general review, we are permitted to deduce the following general conclusions: —

Mines in the United States are not ranked as the property of society, the working of which is to be confided to the federal government. Mining with us is not a "public utility." It is simply a private industry, to be fostered and encouraged, as all other economic industries are fostered and encouraged; but the exploitation and development of mines are no more governmental functions than is the cultivation of the soil or the business of manufacturing. The United States is the paramount proprietor of the public mineral lands, holding them not as an attribute of sovereignty, but as property acquired by cession and purchase. As such paramount proprietor, it has the same

right of dominion and power of alienation as is incident to absolute ownership in individuals.[1] By the term "public lands," we mean such as are subject to sale or other disposal under general laws. Land to which any claims or rights of others have attached does not fall within the designation of "public land."[2]

Whenever a tract of land has once been legally appropriated for any purpose, from that moment it becomes severed from the mass of public lands.[3]

While in the various treaties of cession and purchase through which territory was acquired and added to the national domain the federal government recognized and obligated itself to protect the rights and equities of grantees of the ceding nation or state, and by virtue of its federated system of government held certain property in trust for future states,[4] the great mass of the acquired territory falls within the designation of "public lands," and passed to the United States untrammeled by either the tradition, laws, or policy of the ceding power, or by compact with the new states.[5]

As such absolute owner, the government might, at its pleasure, withhold its lands from occupation or purchase, lease them for limited periods,[6] donate them to states for educational or other purposes, and to individuals or corporations to aid in the construction of railways and other internal improvements, sell or otherwise dispose of them absolutely or conditionally, and prescribe the terms and conditions under which private individuals might acquire permanent ownership, or the right of temporary enjoyment.[7]

[1] Lux v. Haggin, 69 Cal. 255.

[2] Newhall v. Sanger, 92 U. S. 761; Barden v. N. P. R. R., 145 U. S. 535, 538; Mann v. Tacoma Land Co., 153 U. S. 273, 284.

[3] Wilcox v. McConnel, 13 Peters, 498.

[4] Tide lands — Shively v. Bowlby, 152 U. S. 1; Lands under navigable waters — Pollard's Lessee v. Hagan, 3 How. 212.

[5] Pollard's Lessee v. Hagan, 3 How. 212.

[6] U. S. v. Gratiot, 1 McLean, 454; S. C., 14 Peters, 526.

[7] Black v. Elkhorn M. Co., 163 U. S. 445.

The regalian doctrine of ownership in the crown of the royal metals, wheresoever found, based upon the theory that these metals were a prerogative of the crown, which prevailed in England, France, Spain, and Mexico, was never recognized in this country. A grant or conveyance by the United States carries all minerals, unless reserved expressly or by implication in the law or instrument purporting to pass the title.[1]

In countries from which the United States acquired its properties, the contrary doctrine prevailed, and minerals did not pass to the grantee unless specially named in the instrument.[2]

**§ 81. Outline of the federal system — Scope of the treatise.**— It follows as a corollary from what has been heretofore stated, that the system of rules which sanctions and regulates the acquisition and enjoyment of mining rights, and defines the conditions under which title may be obtained to mineral lands within the public domain of the United States, is composed of several elements, most of which find expression in positive legislative enactment. Others, while depending for their existence and force upon the sanction of the general government, either express or implied, are, in a measure, controlled by local environment, and are evidenced by the expressed will of local assemblages, embodied in written regulations, or rest in unwritten customs peculiar to the vicinage.

American mining law may therefore be said to be found expressed:—

(1) In the legislation of congress;

(2) In the legislation of the various states and territories supplementing congressional legislation and in harmony therewith;

(3) In local rules and customs, or regulations established in different localities not in conflict with federal legislation or that of the state or territory wherein they are operative.

[1] Fremont *v.* Flower, 17 Cal. 199; Barden *v.* N. P. R. R. 154 U. S. 288; Davis *v.* Weibbold, 139 U. S. 507.

[2] Fremont *v.* Flower, 17 Cal. 199; United States *v.* Castillero, 2 Black, 1; Halleck's Introduction to De Fooz on the Law of Mines, § 7.

This system does not seek to regulate or control mines or mining within lands held in private ownership, except such only as are acquired directly from the government under the mining laws, and then only forming a muniment of the locator's or purchaser's title. It does not require the payment of tribute or royalty as a condition upon which the public mineral lands may be explored or worked. As heretofore observed, it treats the government simply as a proprietor holding the paramount title to its public domain, with right of disposal upon such terms and conditions, and subject to such limitations, as the law-making power may prescribe. With the exception, perhaps, of lands containing deposits of coal and some of the baser substances, the system is practically confined in its operation to those states and territories lying wholly or in part west of the hundredth meridian, embracing the states of California, Colorado, Oregon, Washington, Nevada, Idaho, Montana, North Dakota, South Dakota, Wyoming, Utah, the territories of Arizona, New Mexico, and the district of Alaska.[1] These comprise the precious-metal-bearing states and territories of the public domain. This system, as thus defined and limited, is the subject of this treatise.

This system is by no means symmetrical or perfect. It is one of the most difficult branches of the law to even logically arrange for the purpose of treatment, and the embarrassments surrounding its philosophical exposition are almost insurmountable. It has received attention in a fragmentary way at the hands of eminent writers, who are most logical and instructive when discoursing upon its imperfections and apparent absurdities. The courts are not harmonious with regard to rules of interpretation. No one tribunal has exclusive jurisdiction to determine questions arising under it. Its proper interpretation does not always involve federal questions, conferring upon the federal courts jurisdiction. It has thus come to pass that the

[1] By act of congress all lands in Oklahoma are declared to be agricultural.

courts of last resort in several of the states and territories, in construing the same law, have reached diametrically opposite conclusions; and in many of its most important features we have conflicting theories enumerated by different courts of equal dignity and equal ability, until we are almost constrained to say that "chaos has come again."

It is not our purpose to condemn the system, but to endeavor to deal with it fairly as we find it. In the language of Judge Beatty,—

"Nobody can pretend that it is perfect; but to our minds "it is a great improvement on the system which it dis- "placed. We are willing to admit that cases may arise "to which it will be difficult to apply the law; but this "only proves that such cases escaped the foresight of con- "gress, or that, although they foresaw the possibility of "such cases occurring, they considered that possibility so "remote as not to afford a reason for departing from the "simplicity of the plan they chose to adopt. So far the "wisdom of the congressional plan has been sufficiently "vindicated by experience."[1]

[1] Gleeson v. Martin White M. Co., 13 Nev. 442.

# TITLE III.

## LANDS SUBJECT TO APPROPRIATION UNDER THE MINING LAWS, AND THE PERSONS WHO MAY ACQUIRE RIGHTS THEREIN.

CHAPTER

I. "MINERAL LANDS" AND KINDRED TERMS DEFINED.

II. THE PUBLIC SURVEYS AND THE RETURN OF THE SURVEYOR-GENERAL.

III. STATUS OF LAND AS TO TITLE AND POSSESSION.

IV. OF THE PERSONS WHO MAY ACQUIRE RIGHTS IN PUBLIC MINERAL LANDS.

# CHAPTER I.

## "MINERAL LANDS" AND KINDRED TERMS DEFINED.


§ 85. Necessity for definition of terms.
§ 86. Terms of reservation employed in various acts.
§ 87. "Mine" and "mineral" indefinite terms.
§ 88. English denotation—"Mine" and "mineral" in their primary sense.
§ 89. Enlarged meaning of "mine."
§ 90. "Mineral" as defined by the English and Scotch authorities.
§ 91. English rules of interpretation.
§ 92. Substances classified as mineral under the English decisions.
§ 93. American cases defining "mine" and "mineral."
§ 94. "Mineral lands" as defined by the American tribunals.
§ 95. Interpretation of terms by the land department.
§ 96. American rules of statutory interpretation.
§ 97. Substances held to be mineral by the land department.
§ 98. Rules for determining mineral character of land.


**§ 85. Necessity for definition of terms.**— It becomes necessary for us to determine precisely what character of lands fall within the purview of the mining laws, and to define, at least with reasonable certainty, what may be the subject of appropriation under them. To say that these laws apply to mineral lands only, and that mineral lands alone can be occupied and enjoyed under them, states the fact broadly. But what are *mineral lands?* What is the test of the character of a given tract, when its mineral quality is asserted by a claimant under the mining laws, and that assertion is denied by an agricultural claimant to the same tract? To enable us to intelligently answer these questions, we are called upon to consider the phrases employed in the various acts of congress, and sift them down to a generic or comprehensive term, from which we

may proceed to evolve a definition as accurate as the nature of the subject will permit. To accomplish this we may have to briefly retrace our steps.

**§ 86. Terms of reservation employed in various acts.** —As we have already observed,[1] in the earlier legislation of congress, establishing a system for the pre-emption and settlement of the public domain, as well as in most of the legislative grants to the states for universities and schools, for the construction of public buildings, and in aid of railroads and other works of internal improvement, mineral lands were uniformly reserved from the operation of the law, and were excepted from the grant. The terms employed in specifying what was reserved are not altogether uniform. A few examples will illustrate this.

The pre-emption act of 1841 (section ten) provided that no lands on which are situated any *known* salines or mines should be liable to entry under and by virtue of the provisions of the act.

The act of September 27, 1850, creating the office of surveyor-general of Oregon, and providing for surveys, and making donations to settlers, directs "that no mineral "lands, nor lands reserved for salines, shall be liable to "any claim under and by virtue of the provisions of this "act."

The act of March 3, 1853, for the survey of public lands in California, the granting of pre-emption rights therein, and for other purposes, directs that none other than township lines shall be surveyed where the lands are mineral or are deemed unfit for cultivation, excluding in express terms "mineral lands" from the operation of the pre-emption act of 1841, and further interdicting any person from obtaining the benefit of the act by a settlement or location on "mineral lands."[2]

By the fourth section of the act of July 22, 1854, to establish the offices of surveyors-general of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers

[1] See, *ante*, § 47. [2] Public Domain, p. 311.

therein, and for other purposes, it is directed that none of the provisions of the act shall extend to "mineral lands," salines, etc.

The act of July 4, 1866, giving authority for varying surveys from the rectangular system in Nevada, reserves from sale in all cases "lands valuable for mines of gold, "silver, quicksilver, or copper."

The acts of July 1, 1862,[1] and July 2, 1864,[2] commonly known as the "Pacific railroad acts," reserve "mineral "lands," excepting coal and iron from the designation.

Illustrations might be multiplied indefinitely, but the foregoing are sufficient for our present purpose.

No legislative interpretation or definition of the term "mineral lands," which were so reserved and excepted, was ever attempted. This was left for judicial or departmental construction.

As during the early periods of our legislative history the ownership of these reserved lands remained in the government, and were withheld from private ownership, conflicts of asserted title rarely, if ever, arose, and opportunity for judicial interpretation was not afforded.

When a change in the policy of the government took place, and that which had theretofore been uniformly reserved became subject to sale and appropriation as "min-"eral land," "lands valuable for mines," "lands containing "valuable mineral deposits," "lands claimed for valuable "deposits," and other designations, *ejusdem generis*, the necessity arose for a rule of interpretation sufficiently comprehensive to embrace the terms when used either as words of exception in a grant or act of congress, or as defining the subject of a grant under the mining laws.

While the land department, in passing upon the character of land sought to be entered as mineral under these laws, in the absence of protest or controversy as to its character, might be satisfied with a much less degree of proof than would be required to bring the same tract within the

[1] 12 Stats. at Large, p. 489. [2] 13 Stats. at Large, p. 356.

excepting clause of a prior grant, logically the term "mineral lands," and its equivalent terms, wherever used in the acts or grants of congress, either as words of reservation or in the mining laws authorizing their appropriation, has the same limit and breadth of signification. What had been reserved by one series of legislative enactments, and in the different legislative grants, is identically that the appropriation of which is encouraged and sanctioned by another series of laws.

The term "known mines," as used in the pre-emption act of 1841, is not the precise equivalent of the term "mineral lands," as used in the mining laws, and should undoubtedly receive a more limited interpretation. The discussion of this particular term may therefore remain in abeyance until we enter upon the subject of pre-emption claims in conflict with asserted mining rights.

Eliminating, therefore, from present consideration "known mines," as the words are used in the act above referred to, we are called upon to consider the following terms and phrases:—

(1) "Mineral lands," as used in statutes reserving them from sale, or other disposal, and in section one of the act of July 26, 1866;

(2) "All forms of deposit," in section twelve of the act of July 9, 1870, and section twenty-three hundred and twenty-nine of the Revised Statutes;

(3) "Lands containing valuable mineral deposits," in section one of the act of 1872, and section twenty-three hundred and nineteen, Revised Statutes;

(4) "Land claimed for valuable deposits," in section six, act of 1872, and section twenty-three hundred and twenty-five, Revised Statutes;

(5) "Lands valuable for minerals," in section twenty-three hundred and eighteen, Revised Statutes;

(6) "Lands valuable for mines," as used in the act of July 4, 1866, giving authority for varying surveys in Nevada.

While the supreme court of the United States[1] seems to intimate that the expression "lands containing valuable "mineral deposits," used for the first time in the act of 1872, and re-enacted in the Revised Statutes, is of broader import than the term "mineral lands" used in the previous acts, a careful study and analysis of all cases decided by that court, as well as all courts in the mining regions, fail to disclose any material distinction in the meaning of the two terms. "Mineral lands" are lands that contain "valuable "mineral deposits," and *vice versa*. The same may be said of the other terms.

From a well-considered examination of all the authorities on this subject, there is no room for any conclusion other than that the expressions "mineral lands," "all forms "of deposits," "lands containing valuable mineral deposits," "valuable deposits," "lands valuable for minerals," "lands "valuable for mines," are, generally speaking, legal equivalents, and may be, and frequently are, used interchangeably.

In this view our preliminary inquiry may be addressed to a consideration of the terms "mines" and "minerals."

§ 87. **"Mine" and "mineral" indefinite terms.**—Mr. Ross Stewart, in the opening chapter of his recent valuable work on mines, quarries, and minerals in Scotland,[2] says:—

"The terms 'mine' and 'mineral' are not definite "terms: they are susceptible of limitation according to "the intention with which they are used; and in construing "them regard must be had not only to the deed or statute "in which they occur, but also to the relative position of "the parties interested and the substance of the transaction "or arrangement which the deed or statute embodies. "Consequently, in themselves, these terms are incapable "of a definition which would be universally applicable."[3]

§ 88. **English denotation—"Mine" and "mineral" in their primary sense.**—An examination of the English authorities shows what may be appropriately termed an evolution of denotation, beginning in the earlier history of

[1] Deffeback *v.* Hawke, 115 U. S. 392.
[2] Edinburgh, 1894.
[3] Stewart on Mines, p. 1.

English jurisprudence with the primary or etymological significance of the words, and gradually enlarging their meanings until their original derivation and early judicial application became all but obsolete. In this primary sense, a "mine" denoted an underground excavation made for the purpose of getting minerals;[1] and, as a corollary, minerals primarily were the substances obtained through underground excavations.

The word "mine" was used in contradistinction to "quarry," and "minerals" meant substances of a mineral character which could only be worked by means of *mines* as distinguished from *quarries*.[2] In other words, regard was there had entirely to the *mode* in which the substance was obtained, and not to its chemical or geological character.[3]

William's law dictionary[4] defines "minerals" to be "anything that grows in mines and contains metals," and "mines" is defined as "quarries or places whereout any-"thing is dug; this term is likewise applied to hidden "treasure dug out of the earth." These same definitions recur in Tomlin's law dictionary.[5]

Lord Halsbury says: "I should think that there could "be no doubt that the word 'minerals' in old times meant "the substances got by mining; and I think 'mining' in "old times meant subterranean excavation."[6]

§ 89. **Enlarged meaning of "mine."**—These primary significations were soon enlarged, so that in time the word "mine" was construed to mean, also, the place where minerals were found, and soon came to be used as an equivalent of "vein," "seam," "lode," or to denote an aggregation of veins, and, under certain circumstances, to include quarries and minerals obtained by open workings.[7]

[1] Midland Ry. Co. *v.* Haunchwood B. & T. Co. (1882), L. R. 20 Ch. D. 552.
[2] Darvill *v.* Roper, 3 Drewry, 294.
[3] Bainbridge on Mines, 4th ed., p. 5.
[4] London, 1816.
[5] London, 1835.
[6] Magistrates of Glasgow *v.* Farie, L. R. 13 App. C. 657.
[7] Midland Ry. Co. *v.* Haunchwood B. & T. Co. (1882), L. R. 20 Ch. D. 558; Stewart on Mines, p. 2.

§ 90. **"Mineral" as defined by the English and Scotch authorities.**—In reference to the term "mineral," we quote the following from Bainbridge:—

"A mineral has been defined, in the narrow sense of "the word, to be a fossil or what is dug out of the earth, "and which is predominantly metalliferous in character. "The term may, however, in the most enlarged sense, be "described as comprising all the substances which now "form, or which once formed, part of the solid body of the "earth, both external and internal, and which are now "destitute of and incapable of supporting animal or vege-"table life. In this view, it will embrace as well the bare "granite of the high mountains as the deepest hidden "diamonds and metallic ores."[1]

Mr. Stewart says:—

"Both scientifically and popularly the term 'mineral' "has been applied to substances whose chemical and phys-"ical properties are sufficiently uniform to admit of iden-"tification and classification, whether they exist in a mine "or upon the surface of the ground."[2]

A few illustrations from comparatively recent authorities will enable us to understand the modern signification given to the term "mineral" by the English courts.

In Midland Railway *v.* Checkley,[3] Lord Romilly, master of the rolls, said:—

"Stone is, in my opinion, a mineral, and, in fact, every-"thing except the mere surface which is used for agricul-"tural purposes. Anything beyond that which is useful "for any purpose whatever, whether it is gravel, marble, "fire-clay, or the like, comes within the word 'mineral,' "when there is a reservation of the mines and minerals "from a grant of land."

In Midland Railway Co. *v.* Haunchwood B. & T. Co.,[4] Mr. Justice Kay expressed the view that "minerals" meant, primarily, all substances (other than the agricultural surface of the ground) "which may be got for manufacturing

[1] Bainbridge on Mines, 4th ed. p. 1. See, also, Stewart on Mines, p. 9.
[2] Stewart on Mines, p. 9.
[3] (1867), L. R. 4 Eq. C., 19.
[4] (1882), L. R. 20 Ch. D. 552.

"or mercantile purposes, whether from a mine, as the word "would seem to signify, or such as stone or clay, which are "gotten by open working."

In the leading case of Hext *v.* Gill,[1] the house of lords announced the rule that a reservation of "minerals" includes every substance which can be obtained from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the court to give it a more limited meaning.[2]

In Attorney-General *v.* Welsh Granite Co.,[3] Lord Esher, master of the rolls, said:—

"The many cases which have been cited go to establish "the definition, especially Attorney-General *v.* Mylchreest,[4] "and Hext *v.* Gill, where Mellish, L. J., states the result of "authorities. It is evident from these cases that 'min-"erals' means substances which can be got from beneath "the surface, not by mining only, but also by quarrying, "for the purpose of profit."

In Magistrates of Glasgow *v.* Farie, before the house of lords, involving the interpretation of a reservation in an act of parliament authorizing the construction of waterworks,[5] wherein it was provided that the undertakers of the project "shall not be entitled to any mines of coal, iron-"stone, slate, or other minerals under any land purchased "by them," Lord Herschell thus announced his view:—

"I think the reservation must be taken to extend to all "bodies of mineral substances lying together in seams, "beds, or strata, as are commonly worked for profit."[6]

In Loosemore *v.* Tiverton & North Devon Ry. Co.,[7] Mr. Justice Fry, following Hext *v.* Gill, says:—

[1] (1872), L. R. 7 Ch. App. 699.

[2] This doctrine was approved and followed in a later case (Attorney-General *v.* Tomline (1877), L. R. 5 Ch. D. 750.)

[3] (1887), 35 W. R. 617.

[4] (1879), 4 App. C. 294.

[5] Waterworks Clauses Act, (1847), 10 & 11 Vict. C. 17.

[6] L. R. 13 App. C., 685.

[7] (1882), L. R. 22 Ch. D. 25.

"There being no such restrictive context in the present "case, the inquiry is whether the clay which was got out "was clay which could be worked for a profit."

Lord Halsbury, in the Farie case (*supra*), criticises the doctrine of Hext *v.* Gill. He says:—

"In the first place, it introduces as one element the cir- "cumstances that the substance can be got at a profit. It "is obvious that if that is an essential part of the defini- "tion, the question whether a particular substance is or is "not a mineral may depend on the state of the market; "and it may be that a mineral one year is not a mineral "the next."

Lord Herschell, in the same case, thus expresses his views:—

"In its widest significance the word 'mineral' probably "means every organic substance forming a part of the crust "of the earth other than the layer of soil which sustains "vegetable life. In some of the reported cases it seems to "be laid down or assumed that to be a mineral a thing "must be of commercial value or workable at a profit. Be "that as it may, it has been laid down that the word 'min- "'erals' when used in a legal document, or in any act of "parliament, must be understood in its widest signification, "unless there be something in the context, or in the nature "of the case, to control its meaning."[1]

Of course, the element of profitable working is in no sense a part of the definition of the word in its primary or etymological sense.

While these criticisms of Lord Herschell are plausible when the primary or etymological signification of the word is considered, yet the doctrine of Hext *v.* Gill and the later cases following it may be fairly said to present a reasonable definition in the light of the progressiveness of the age and advancement in the natural sciences, with which the courts seem to have kept pace.

This element of commercial value, which to a large extent controls the acquisition of mining titles in the United States, is by no means new. The German codes contained

[1] Magistrates of Glasgow *v.* Farie, (1888), L. R. 13 App. C. 689-690.

a limitation prohibiting the prospector from claiming mineral or ore which did not offer the basis for practical and *lucrative* mining or metallurgical operations. Under the French and Belgian systems, before a mining concession could be obtained, it was necessary "to ascertain whether "the land contains a layer which is susceptible of a prof- "itable working."[1]

In Sweet's dictionary of English law,[2] we find the following definition:—

"In the most general sense of the term, minerals are "those parts of the earth which are capable of being got "from underneath the surface for the purpose of profit."[3]

§ 91. **English rules of interpretation.**—Mr. Stewart enunciates certain rules as being sanctioned by current authority in England and Scotland, governing the construction of the term "mineral." These are as follows:—

"*First*—The word 'mineral,' when used in a legal doc- "ument or in an act of parliament, must be understood in "its widest signification, unless there be something in the "context or nature of the case to control its meaning.

"*Second*—The meaning of the word 'mineral,' though "not easily restricted, yields to the context when the rela- "tive positions of the parties interested, their intention, or "the substance of the transaction so indicates.

"*Third*—In doubtful cases, the custom of the district, "or such usages without which a deed or statute would be "inconsistent may limit the word 'minerals.'

"*Fourth*—Where the terms 'mines' and 'minerals' are "both used in the same deed or statute, the word 'min- "'erals' is not on that account to suffer limitation of its "meaning."[4]

In treating of the rules governing the interpretation of American statutory law, we will have occasion to recur to the foregoing.

[1] Halleck's De Fooz on the Laws of Mines, p. 110.

[2] London, 1882.

[3] This definition was also adopted in Rapalje and Lawrence's law dictionary, published in America the following year.

[4] Stewart on Mines, pp. 10-13.

**§ 92. Substances classified as "mineral" under the English decisions.**—Before leaving the subject of the English law and decisions, it is not out of place to enumerate some of the substances which have been adjudicated to be within the term "mineral."

It is hardly necessary to mention gold, silver, the common metals, or coal, as they fall within the earlier definition of the term, and were usually obtained through underground excavations. In addition to these, the following substances have been successively held to be minerals:—

*Beds of stone*, obtained either by mining or quarrying;[1]

*Stone*, obtained by quarrying;[2]

*Stone*, for road-making and paving;[3]

*Freestone* (sandstone);[4]

*Limestone*;[5]

[1] Earl of Rosse *v.* Wainman (1845), 14 M. & W. 859; S. C., 10 Morr. Min. Rep. 398—construing act of parliament (55 Geo. III., c. 18—inclosure act); reserving to the lord "all mines and minerals."

[2] Micklethwait *v.* Winter, 6 Exch. 644.

[3] Midland Railway *v.* Checkley (1867), L. R. 4 Eq. C. 19.

Reservation in canal act (1796) of the mines and minerals within and under the lands through which the canal was to be made. In this case the master of the rolls said that every species of stone, whether marble, limestone, or ironstone, came within the category of "minerals."

In Bell *v.* Wilson (*post*), the vice-chancellor said that in strictness the term "mineral" comprises chalk, slate, and all kinds of stone, whether freestone, sandstone, or granite.

In Adjutant General *v.* Welsh Granite Co. (1887), 35 W. R. 617—construing inclosure act (1812), similar to that considered in Rosse *v.* Wainman (*supra*),—it was held that the term "mineral" included granite.

[4] Bell *v.* Wilson (1865), 2 Drew. & S. 395—S. C. on appeal, L. R. 1 Ch. App. 303.

Exception in a lease of "mines and seams of coal and other mines, metals, or minerals, as well opened as not opened."

Jamieson *v.* North British Ry. Co., 6 Scot. L. Rep. 188—construing Scotch railway clauses act, which is identical with English act. See, *post*, note 4, p. 100.

Glasgow & S. W. Ry. Co. *v.* Bain (1893), 21 R. 134; Mawson *v.* Fletcher (1870), L. R. 6 Ch. App. C. 91, 94.

[5] Fishbourne *v.* Hamilton (1890), L. R. 25 Ir. 483; Mid. Ry. *v.* Robinson (1889), L. R. 15 App. C. 19; Brown's Trust, 11 W. R. 19; Glasgow & S. W. Ry. Co. *v.* Bain (1893), 21 R. 134; Mawson *v.* Fletcher (1870), L. R. 6 Ch. App. C. 91; Dixon *v.* Caledonian & Glasgow Ry. Co., L. R. 5 App. C. 820.

*Flint stones*, turned up with the plow by the tenant in the course of husbandry;[1]

*Slate*;[2]

*Clay*;[3]

*Brick clay*;[4]

*China clay* (kaolin — sometimes called porcelain, or fire-clay);[5]

[1] Tucker *v.* Linger (1883), L. R. 8 App. C. 508.

Reservation in lease of "mines and minerals, quarries of stone, brick-earth, and gravel pits." But tenant held to be entitled to them by virtue of local custom.

[2] Duchess of Cleveland *v.* Meyrick, 16 W. R. 104; 37 L. J. Ch. 125.

[3] Ruabon Brick and Terra Cotta Co. *v.* Great Western Ry. Co. (1893), L. R. 1 Ch. 427. Within the meaning of the "railway clauses act."

Errington *v.* Met. Ry. Co. (1882), L. R. 19 Ch. D. 559, 571. Within the meaning of the "railway clauses act."

Attorney-General *v.* Mylchreest (1879), 4 App. C. 294.

Lord Herschell, in Magistrates of Glasgow *v.* Farie (1888), L. R. 13 App. C. 683.

[4] Midland Ry. Co. *v.* Haunchwood B. & T. Co. (1882), L. R. 20 Ch. D. 552.

In this case a controversy arose under acts of parliament known as the "railway clauses acts." These acts, among other things, prescribe the methods by which railway companies may obtain, by what is termed "compulsory purchase," land for their road-beds, stations, and other necessary adjuncts. Similar acts are in force in both England and Scotland, and appear to be a substitute for the condemnation proceedings used in this country. The following extracts from one of these acts will serve to show the context under consideration in this case, as well as in a number of others which may be referred to:—

"And, with respect to mines lying under or near the railway, be it "enacted,—

"SEC. 77. The company shall not be entitled to any mines of coal, "ironstone, slate, or other minerals under any land purchased by them, "except only such parts thereof as shall be dug or carried away, or used "in the construction of the works, unless the same shall have been "expressly purchased; and all such mines shall be deemed excepted out "of the conveyance of such lands, unless they shall have been expressly "named therein and conveyed thereby."

Subsequent sections provide that the owner of the minerals desiring to work within forty yards of the railway or under the same must give the company notice. Thereupon the company may exercise the option of purchasing the minerals, the value thereof to be ascertained by appraisement. If the company does not give notice within thirty days of the exercise of that option, the owner of the minerals may work under the railway.

[5] Exception in grant of freehold in copyhold tenement, by Duke of Cornwall (1799), reserving "all mines and minerals within and under the

THE LAW ASSOCIATION
PHILADELPHIA



*Coprolites* (phosphatic nodules).[1]

The foregoing illustrations will serve to demonstrate the evolution of denotation referred to in a preceding paragraph, and give a fair outline of the meaning given to the terms "mines" and "minerals" by the courts of last resort in England and Scotland. Considering the scope of this treatise, a more critical review of the English authorities would serve no useful purpose.

§ 93. **The American cases defining "mine" and "mineral."** — In America, until a comparatively recent period, controversies over the construction of the terms "mines" and "minerals" have been limited to cases arising, as in many of the English cases, out of the use of these terms in conveyances, leases, and the like, where the context, or the peculiar situation of the parties, or the subject of the litigation, to some extent at least, controlled. A brief review of some of these authorities will be of interest.

In Gibson *v.* Tyson,[2] the supreme court of Pennsylvania had under consideration a grant reserving to the grantee "all minerals or magnesia of any kind." This was held to include chromate of iron: but the court intimated that had it not been for the parol evidence concerning the supposed character of the land, and the situation of the parties at the time the instrument was executed, it would have excluded the substance afterwards found and designated as chromate of iron, because it was non-metallic, and the "great mass of mankind do not consider anything mineral "that is not metallic."

"premises, with full and free liberty of ingress, egress, and regress, to "dig, search for, and to take, use, and work, for the said excepted mines "and minerals." Hext *v.* Gill (1872), L. R. 7 Ch. App. 699.

Working for china clay in this case was by stripping the soil from the bed and turning a stream of water over the clay, similar to the tin "streaming" practiced in some portions of Cornwall, and to the hydraulic process in vogue in this country.

Loosemore *v.* Tiverton & N. Devon Ry. Co. (1882), L. R. 22 Ch. D. 25 — construing section 77, "railway clauses act" of 1845. See, *ante*, note 4, p. 100.

[1] Attorney Gen. *v.* Tomline (1877), L. R. 5 Ch. Div. 750. [2] 5 Watts, 35.

In Hartwell *v.* Camman,[1] the New Jersey court of chancery, in construing the terms of a conveyance granting "all "mines, minerals, opened or to be opened," thus states its views:—

"By the use of the terms 'mines' and 'minerals,' it is "clear that the grantor did not intend to include every- "thing embraced in the mineral kingdom, as distinguished "from what belongs to the animal and vegetable kingdom. "If he did, he parted with the soil itself. . . . Nor can I "see any more propriety in confining the meaning of the "terms used to any one of the subordinate divisions into "which the mineral kingdom has been subdivided by chem- "ists, either earthy, metallic, saline, or bituminous. . . . "I do not think the term should be confined to the metals, "or metallic ores. I cannot doubt if a stratum of salt, or "even a bed of coal, had been found, they would have "passed under the grant."

The court holds that "paint-stone" falls within the term "minerals," as the substance was valuable for its mineral properties, could be converted into a merchantable article adapted to the mechanical and ornamental arts, and was embraced in the definition given by men of science.

In Funk *v.* Haldeman,[2] the supreme court of Pennsylvania treated petroleum oil as a mineral, saying that "until "our scientific knowledge on the subject is increased, that "is the light in which the courts will be likely to regard "this valuable production of the earth."

Under a statute of Pennsylvania, passed April 25, 1850, it was provided that suit in the county where the lands were situated might be brought by a tenant in common of "minerals." Under this act the court of common pleas of Erie county[3] held that petroleum was a mineral, and the fact that it was unknown as a product from land at the time the act was passed did not prevent its application.

In Griffin *v.* Fellows,[4] a question arose as to the construction of an instrument, executed in 1796, leasing a

[1] 10 N. J. Eq. 128; 3 Morr. Min. Rep. 229; 64 Am. Dec. 448.
[2] (1866), 53 Pa. St. 229.
[3] Thompson *v.* Noble (1870), 3 Pittsb. 201.
[4] (1873), 32 P. F. Smith, 114; 8 Morr. Min. Rep. 657.

tract of public land, "together with the mines or min-"erals of whatever description." There were no opened mines or quarries on the premises at the date of the lease. Mining of coal was first commenced by the tenant in 1810, and quarrying stone in 1855. It was held by the supreme court of Pennsylvania, adopting the views of the trial court, that "the term 'minerals' embraces everything not "of the mere surface, which is used for agricultural pur-"poses; the granite of the mountains, as well as metallic "ores and fossils, are comprehended within it,"[1] and consequently that, "by the terms of the lease, the lessee and "his assigns have the right to mine coal and quarry "stone."

In Dunham *v.* Kirkpatrick,[2] in construing a deed conveying a reservation of "all minerals," the supreme court of Pennsylvania held that while it was true that petroleum was a mineral, yet in popular estimation it was not so regarded; and following the rule of construction invoked in Gibson *v.* Tyson, the court concluded, that in contemplation of the parties to the instrument petroleum did not pass by the deed.

The same court, however, in a more recent case,[3] seems to have ignored the doctrine of Dunham *v.* Kirkpatrick.

The legislature of Pennsylvania had passed an act providing, among other things, for the mortgaging of a "leasehold of any colliery, *mining land*, manufacturing, or "other premises." In passing upon the act, the court held that petroleum was a mineral substance obtained from the earth by a process of mining, and lands from which it is obtained may, with propriety, be called mining lands. Therefore, the act applied to and authorized a mortgage of a leasehold of oil land, although the act was passed *before petroleum was discovered*, substantially following the doctrine announced in Thompson *v.* Noble (*supra*).

[1] Citing the English case of Earl of Rosse *v.* Wainman, heretofore referred to.

[2] (1882), 101 Pa. St. 36; 47 Am. Rep. 696.

[3] Gill *v.* Weston (1885), 110 Pa. St. 316.

The same court, in a still later case,[1] holds that natural gas is a mineral, although it possesses peculiar attributes, which require the application of precedents arising out of ordinary mineral rights with much more careful consideration, and terms it a mineral *fera naturæ*.

A recent case, decided by the New York court of appeals,[2] involved the construction of two deeds executed by the owner of a tract of land. The first deed conveyed all the "mineral ores" in the tract, "reserving all other rights "and interests in said lands, save said mineral ores and "the right to raise and remove the same." By the second deed, which made no reference to the first, there was conveyed to the same grantees all the mineral *and* ores on the same tract, with the right to mine and remove the same; also, the right to sink shafts, and sufficient surface to erect suitable buildings necessary and usual in mining and raising ores; also, the right of ingress and egress for mining purposes, and to make exploration for minerals and ores.

The plaintiff was the owner of whatever passed by these two conveyances. The defendant was the owner of what remained of the tract. The controversy arose over the right of the defendant to quarry granite on the tract. The granite was discovered on the premises after the first two deeds were executed, but prior to the acquisition of title by defendant. The court, after reviewing several of the English cases hereinbefore cited and the New Jersey case of Hartwell *v.* Camman (*supra*), reached the conclusion that the term "mineral ores" used in the first deed did not include granite; that the words "minerals and ores" used in the second deed, standing alone, would include granite; that it would be an unwarrantable limitation to exclude from the operation of the grant beds of coal or other nonmetallic mineral deposits of commercial value, or to confine it to such minerals as were known or supposed to be on the premises at the time. But the court held that the

[1] Westmoreland & Cambria Nat. Gas Co. *v.* De Witt, 130 Pa. 235.
[2] Armstrong *v.* Lake Champlain Granite Co., 42 N. E. Rep. 186.

context of the second deed conveying the "mineral and "ores" limited the grant to such minerals as could be obtained by underground workings; and as granite is not so obtained, it did not pass under the conveyance.

The court also held that the meaning of the words "minerals and ores" in a deed could not be limited or explained by declaration of the parties thereto as to what was intended to be covered by the deed, reformation thereof not being sought.

The foregoing line of authorities serves to illustrate the views of the various courts of the United States in dealing with the terms "mines" and "minerals" in cases having no connection with the various acts of congress which we are called upon to construe. In interpreting these acts it cannot be demonstrated that either the English or American cases have been an appreciable factor, or have been either cited or relied upon as precedents; yet it is manifest that they have exerted some influence, and that we shall observe their earmarks as we progress.

**§ 94. "Mineral lands," as defined by the American tribunals.**—In a preceding section[1] it has been assumed that the term "mineral lands" is sufficiently comprehensive to embrace the various kindred designations found in the various acts of congress, and that these various terms may be, and frequently are, used interchangeably. Upon this assumption, let us consider what is meant by the term "mineral lands" and its legal equivalents.

On this subject there has been great uniformity of decision by those courts of the states and of the United States which have had the most frequent occasion to consider the subject, and by the land department.[2]

The supreme court of California as early as 1864 gave its views upon the question in a well-considered case,[3] the earmarks of which may be plainly observed in many, if

[1] See, *ante*, § 86.

[2] Davis *v.* Weibbold, 139 U. S. 507.

[3] Ah Yew *v.* Choate, 24 Cal. 562.

not all, the subsequent decisions bearing upon the subject. It thus presented its views: —

"It is not easy in all cases to determine whether any "given piece of land should be classed as mineral land or "otherwise. The question may depend upon many cir- "cumstances: such as whether it is located in those regions "generally recognized as mineral lands or in a locality "ordinarily regarded as agricultural in its character. "Lands may contain the precious metals, but not in suffi- "cient quantities to justify working them as mines or "make the locality generally valuable for mining purposes, "while they are well adapted to agricultural pursuits; or "they may be poorly adapted to agricultural or grazing "pursuits, but rich in minerals, and there may be every gra- "dation between the two extremes. There is, however, no "certain, well-defined, obvious boundary between the min- "eral lands and those that cannot be classed in that cate- "gory. Perhaps the true criterion would be to consider "whether, upon the whole, the lands appear to be better "adapted to mining or other purposes. However that "may be, in order to determine the question, it would, at "all events, be necessary to know the condition and circum- "stances of the land itself, and of the immediate locality "in which it is situated. It is the duty of the officers of "the government having the matter in charge, before mak- "ing a grant, to ascertain these facts and to determine the "problem whether the lands are mineral or not."

In a later case,[1] construing the mineral reservation in the Pacific railroad acts, the same court determined as follows:—

"The mere fact that portions of the land contained par- "ticles of gold or veins of gold-bearing quartz rock would "not necessarily impress it with the character of mineral "land, within the meaning of the acts referred to. It "must, at least, be shown that the land contains metals[2] in "quantities sufficient to render it available and valuable "for mining purposes. Any narrower construction would "operate to reserve from the uses of agriculture large tracts "of land which are practically useless for any other purpose, "and we cannot think this was the intention of congress."

[1] Alford *v.* Barnum, 45 Cal. 482.

[2] The use of the term "metals" in this connection is of no controlling importance. It was undoubtedly used without any design to restrict the meaning of the word "mineral" to metallic substances.

This case was cited approvingly by the supreme court of the United States, and the general rule of interpretation thus enunciated:—

"The exceptions of minerals from pre-emption and set-"tlement, and from grants to states for universities and "schools, for the construction of public buildings, and in "aid of railroads and other works of internal improve-"ment, are not held to exclude all lands in which minerals "may be found, but only those where the mineral is in "sufficient quantity to add to their richness, and to justify "expenditure for its extraction, and known to be so at the "date of the grant. There are vast tracts of country in "the mining states which contain precious metals in small "quantities, but not to a sufficient extent to justify the "the expense of their exploitation. It is not to such lands "that the term 'mineral,' in the sense of this statute, is "applicable."[1]

The mere fact that the land contains "copper, gold and "silver-bearing quartz" does not impress it with the character of mineral land within the meaning of the act of congress excluding mineral lands from the grant to the Central Pacific railroad. Only lands valuable for mining purposes are reserved from sale.[2]

In United States *v.* Reed,[3] before the circuit court for the district of Oregon, a bill was filed by the United States to set aside a patent issued upon a homestead entry, on the ground that the land was mineral, and not agricultural, and was at the date of entry more valuable for mining than for agricultural purposes, and was so to the knowledge of the patentee. Judge Deady, in disposing of the question, said:—

"The nature and extent of the deposit of precious "metals, which will make a tract of land mineral, or con-"stitute a mine thereon within the meaning of the statute, "has not been judicially determined. Attention is called "to the question in McLaughlin *v.* United States, 107 U. S. "526, but no opinion is expressed. The land department "appears to have adopted a rule that if the land is worth

[1] Davis *v.* Weibbold, 139 U. S. 507.
[2] Merrill *v.* Dixon, 15 Nev. 401.
[3] 12 Saw. 99-104.

"more for agriculture than mining, it is not mineral land, "although it may contain some measure of gold or silver, "and the bill in this case is drawn on that theory of the "law. In my judgment, that is the only practical rule "of decision that can be applied to the subject. Nor can "account be taken in the application of this rule of profits "that would or might result from mining under other and "more favorable conditions and circumstances than those "which actually exist, or may be produced or expected in "the ordinary course of such pursuit or adventure on the "land in question."

In Dughi *v.* Harkins,[1] which was before the interior department in November, 1883, there was a contest between mineral and agricultural claimants, the land having been returned as agricultural by the surveyor-general. In disposing of it, Secretary Teller, in a communication to the commissioner of the general land office, said:—

"The burden of proof is therefore upon the mineral "claimant, and he must show, not that neighboring or "adjoining lands are mineral in character, or that that in "dispute may hereafter, by possibility, develop minerals "in such quantity as will establish its mineral rather than "its agricultural character, but that as a present fact it is "mineral in character; and this must appear from actual "production of mineral, and not from any theory that it "may produce it; in other words, it is fact, and not theory, "which must control your office in deciding upon the char- "acter of this class of land. Nor is it sufficient that the "mineral claimant shows that the land is of little agricul- "tural value. He must show affirmatively, in order to "establish his claim, that the mineral value of the land is "greater than its agricultural value."[2]

Rulings to the same effect upon applications for mineral patents are found in decisions of the department for many years. They are that such applications should not be granted unless the existence of mineral in such quantities as would justify expenditure in the effort to obtain it is established as a present fact. If mineral patents will not be issued unless the mineral exist in sufficient quantity to

[1] 2 Land Decisions, p. 721.

[2] Quoted in Davis *v.* Weibbold, 139 U. S. 507.

render the land more valuable for mining than for other purposes, which can only be known by developments or exploration, it should follow that the land may be patented for other purposes, if that fact does not appear.[1]

The leading case of Davis *v.* Weibbold (*supra*), reviews these rulings, and so clearly affirms their doctrine that nothing more is required than to freely quote this case. Says the court:—

"It would seem from this uniform construction of that "department of the government specially intrusted with "supervision of proceedings required for the alienation of "the public lands, including those that embrace minerals, "and also of the courts of the mining states, federal and "state, whose attention has been called to the subject, that "the exception of mineral lands from grant in the acts of "congress should be considered to apply only to such lands "as were at the time of the grant known to be so valuable "for their minerals as to justify expenditure for their ex-"traction. The grant or patent, where issued, would thus "be held to carry with it the determination of the proper "authorities that the land patented was not subject to the "exception stated. There has been no direct adjudication "on this point by this court, but this conclusion is a legiti-"mate inference from several of its decisions. It was im-"plied in the opinion in Deffeback *v.* Hawke, 115 U. S. 392; "and in the cases of Colorado C. & I. Co., 123 U. S. 307; "United States *v.* Iron S. M. Co., 128 U. S. 673."

**§ 95. Interpretation of terms by the land department.**— As in all contests between agricultural and mineral claimants prior to final entry, in all applications to enter lands under the mining laws, and in administering the various grants to railroads, as to lands remaining unpatented, the land department is the sole judge of the character of the land and the final arbiter upon this subject, it is deemed important to supplement the foregoing selection of authorities by presenting the rulings of that department on the subject. They enter somewhat more

[1] Magalia G. M. Co. *v.* Ferguson, 6 L. D. 218; Nicholas Abercrombie, *Id.* 393; John Downs, 7 L. D. 71; Cutting *v.* Reininghaus, *Id.* 265; Creswell M. Co. *v.* Johnson, 8 L. D. 440; Thomas J. Laney, 9 L. D. 83.

into detail, and will furnish a reliable guide to those who may have occasion to deal with that special tribunal upon the subject of mineral lands.

Commissioner Drummond[1] thus enunciates the rule which has since governed the land department:—

"In the sense in which the term 'mineral' was used by "congress, it seems difficult to find a definition that will "embrace what mineralogists agree should be included. " . . . From a careful examination of the matter, the con- "clusion I reach as to what constitutes a valuable mineral "deposit is this: That whatever is recognized as a mineral "by the standard authorities on the subject, where the "same is found in quantities and quality to render the "land sought to be patented more valuable on this account "than for the purpose of agriculture, should be treated by "the office as coming within the purview of the mining "act of May 10, 1872.[2]

"The only safe rule for the department to follow is that "already laid down and adhered to in many cases — that "the coal or mineral character of the land must be deter- "mined by the actual production from mining on the tract "in dispute, or by satisfactory evidence that mineral (coal) "exists on the land in question in sufficient quantities to "make the same more valuable for mining than for agri- "culture. . . .

"It has been repeatedly held by this department that "the proof of the mineral character of the land must be "specific, and show actual production of mineral there- "from; that it is not enough to show that land in the "neighborhood, or adjoining lands, are mineral in charac- "ter, or that the lands in question may hereafter be found "to be mineral. (Kings County *v.* Alexander, 5 L. D. 126; "and Dughi *v.* Harkins, 2 L. D. 721.) The proof must show "satisfactorily the mineral (coal) character, and not be "based upon a theory.[3]

"It is contended that the mining statutes provide that "in an *ex parte* case, 'land containing gold *in any quantity* "'is mineral land, and that they contemplate inquiry into "'the value of the deposit only when the application of "'the mineral locator conflicts with that of some other "'locator or claimant.' . . .

[1] Circ. of Instructions, July 15, 1873.

[2] Copp's Min. Dec., p. 317; W. H. Hooper, 1 L. D. 561.

[3] Savage *v.* Boynton, 12 L. D. 612.

"It must be apparent that, for the purpose of issuing "patent, there is lodged somewhere the authority and duty "to ascertain whether a claim contains 'valuable deposits,' "for no other land can be so acquired. It is equally clear "that for the same purpose such authority is vested in this "department, charged, as it is, with the determination of "the facts prior to the issuance of patent. Should the "question of the character of the land be properly pre-"sented at any time before patent, it would manifestly be "the duty of the department to ascertain whether or not the "land contains 'valuable deposits,' in an *ex parte* case or a "contest. The fact that a claim is contested would not "change the character of the land to be taken under this "law. In any event, it must contain 'valuable deposits.'"[1]

"The proof of the mineral character of the land must "be specific, and based upon the actual production of min-"eral; that it is not enough to show that neighboring or "adjoining lands are mineral in character, and that the "lands in controversy may hereafter develop minerals to "such an extent as to show its mineral character, but it "must appear from actual production of mineral, and not "from a theory that the lands may hereafter produce it."[2]

The present existence of mineral in such quantity as to render the land more valuable for mining than agriculture must be shown, to defeat an agricultural entry.[3]

"It is not necessary that, to meet the requirements, there "should be upon the land a mine in working order, from "which gold is being actually produced. It is sufficient if "it be shown by satisfactory proof that mineral exists in "paying quantities, and such proof will usually be based "on mining operations or explorations. In the present "case it has not been shown that any mining has been "carried on on this land. The evidence consists of the "testimony of persons, most of them claiming to be expert "miners, who went upon this land and panned out small "quantities of earth. The preponderance thereof shows "that the land bears gold, and taking the testimony of the "witnesses for the mineral claimants alone, it sustains the "conclusion that it is there in paying quantities."[4]

[1] Royal K. Placer, 13 L. D. 86.

[2] Warren *v.* State of Colorado, 14 L. D. 681.

[3] Winters *v.* Bliss, 14 L. D. 59; Walton *v.* Batten, *Id.* 54; Peirano *v.* Pendola, 10 L. D. 536.

[4] Johns *v.* Marsh (1892), 15 L. D. 196.

"When the development, and its results, display such "promise that the prudent, reasonable man would be jus- "tified in expending money and labor in legitimate min- "ing operations, untainted by an appearance of speculation, "the land must be held mineral within the meaning of that "term as used in the granting act. (Pacific railroad acts.) "If it was held otherwise, the mining industry, so far as it "pertained to odd sections within the grant, would be par- "alyzed. The rule is that paying mines are only shown to "exist after years of labor and much money expended in the "development. Prospectors do not find riches on the sur- "face. Profit is not received from the grass-roots down. "They must have an opportunity given them to open the "mine as their means permit."[1]

"After a careful consideration of the subject, it is my "opinion that where minerals have been found, and the "evidence is of such a character that a person of ordinary "prudence would be justified in the further expenditure of "his labor and means, with a reasonable prospect of suc- "cess, in developing a valuable mine, the requirements of "the statute have been met. To hold otherwise would "tend to make of little avail, if not entirely nugatory, that "provision of the law whereby 'all valuable mineral "'deposits in lands belonging to the United States . . . "'are . . . declared to be free and open to exploration and "'purchase' For, if as soon as minerals are shown to "exist, and at any time during exploration, before the "returns become remunerative, the lands are to be subject to "other disposition, few would be willing to risk time and "capital in the attempt to bring to light and make avail- "able the mineral wealth which lies concealed in the bowels "of the earth, as congress obviously must have intended "the explorers should have proper opportunity to do."[2]

In determining what constitutes mineral land within the meaning of the acts of congress, we have treated the subject generally, without regard to the form in which the mineral deposits occur—*i. e.* whether "in place," as in quartz veins, or not "in place," as in case of auriferous gravels, clays, and other substances usually encountered in horizontal beds or isolated deposits. What constitutes a vein, or lode, or whether a given character of deposit may

[1] Casey *v.* N. P. R. R., 15 L. D. 439.

[2] Castle *v.* Womble, 19 L. D. 455; Goldstein *v.* Juneau Townsite, 23 L. D. 353.

be located and acquired as "in place," or not "in place," will be discussed under appropriate heads in other portions of this work. The rulings cited and definitions quoted apply equally to all forms of deposit.

**§ 96. American rules of statutory interpretation.**—In addition to the ordinary canons of statutory interpretation, there are certain recognized rules applicable to the acts of congress which are within the scope of this treatise. These may be briefly enumerated as follows:—

(1) The mining laws are to be read in the light of matters of public history, relating to the mineral lands of the United States;[1]

(2) Where a statute operates as a grant of public property to an individual, or the relinquishment of a public interest, that construction should be adopted which will support the claim of the government rather than that of the individual;[2]

(3) In the case of a doubtful or ambiguous law, the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect, and ought not to be overruled without cogent reasons.[3]

We might add a fourth rule, deducible from the foregoing, and from the current of American authority and decisions of the land department, and that is, that the word "mineral," as used in these various acts, should be understood in its widest signification. We do not conceive that there is anything in the context of the several acts, or in their nature, to restrict its meaning. This is practically the English rule announced by Mr. Ross Stewart, which has heretofore been referred to, and which is amply supported by the highest English authority.[4]

[1] Jennison Exr. *v.* Kirk, 98 U. S. 453.

[2] Slidell *v.* Grandjean, 111 U. S. 412; Leavenworth L. & G. R. Co. *v.* United States, 92 U. S. 733; Barden *v.* N. P. R. R., 154 U. S. 228.

[3] United States *v.* Moore, 95 U. S. 760; Brown *v.* United States, 113 U. S. 568; Barden *v.* N. P. R. R., 154 U. S. 228.

[4] See, *ante*, § 91.

We regret that this last suggested rule is in conflict with the decision of the supreme court of the state of Washington (in the case of Wheeler *v.* Smith),[1] wherein that court seeks to limit the meaning of the term "mineral," as used in the congressional mining laws, to *metallic* substances. In so doing the court treats the rulings of the land department as possessing no force or virtue, and refuses to adopt the reasoning and conclusions reached in a parallel case by the supreme court of Montana,[2] a court noted for its experience and ability in dealing specially with mining questions and controversies arising out of the mining laws. This decision of the supreme court of Washington also conflicts with a number of carefully considered American cases, which will be noted when we come to enumerate the various substances which have been held to be within the reasonable definition of the term "mineral."

**§ 97. Substances held to be mineral by the land department.**—Lands containing the following substances have been held by the land department to fall within the designation of mineral lands, and as such to be subject to entry under the mining laws:—

*Asphaltum;*[3]
*Petroleum and the mineral hydrocarbons;*[4]
*Borax;*[5]
*Nitrate and carbonate of soda, sulphur, and alum;*[6]
*Kaolin, or china clay;*[7]
*Mica;*[8]

[1] 32 Pac. 784.

[2] Freezer *v.* Sweeney, 21 Pac. 20; 8 Mont. 508.

[3] Copp's Min. Lands, 50. See, also, Gesner *v.* Gas Co., 1 James, N. S. 72; Gesner *v.* Cairus, 2 Allen, N. B. 595.

[4] Copp's Min. Lands, 160; Com'rs' Letter, 1 Copp's L. O. 179; A. A. Dewey, 9 Copp's L. O. 51. See, also, Thompson *v.* Noble, 3 Pittsb. 201; Gill *v.* Weston, 110 Pa. St. 313; Gird *v.* California Oil Co., 60 Fed. 531. *Contra: Ex parte* Union Oil Co., 23 L. D. 222; Chandler *v.* State of California, *Id.*, October 27, 1896.

[5] Copp's Min. Lands, 50, 100; 2 Land Decisions, 707.

[6] Copp's Min. Lands, 50; 2 Land Decisions, 707.

[7] Copp's Min. Lands, 121; *Id.* 176; 1 Land Decisions, 578.

[8] Copp's Min. Lands, 182.

*Umber;*[1]
*Gypsum;*[2]
*Limestone;*[3]
*Marble;*[4]
*Diamonds;*[5]
*Clay;*[6]
*Phosphates;*[7]
*Building stone, and stone of special commercial value;*[8]
*Coal;*[9]
*Slate for roofing purposes.*[10]

Salt lands are classified as mineral, and held to be reserved from railroad grants:[11] and originally the department permitted them to be acquired under the mining laws;[12] but this was subsequently overruled.[13]

Other than the decisions and rulings of the land department, we encounter a limited number of cases involving specific substances. This is easily accounted for. The

[1] Copp's Min. Lands, 161.

[2] *Id.* 309.

[3] 10 Copp's L. O. 50; 12 Land Decisions, 1; Shepherd *v.* Bird, 17 L. D. 82; Copp's Min. Lands, 176; *Id.* 309. See, also, Freezer *v.* Sweeney, 21 Pac. 20; 8 Mont. 508. *Contra:* Wheeler *v.* Smith, 32 Pac. 784.

[4] Copp's Min. Lands, 176.

[5] *Id.* 88.

[6] Montague *v.* Dobbs, 9 Copp's L. O. 165.

[7] Gary *v.* Todd, 18 L. D. 58. But see S. C. on review—19 L. D. 475. And held not to be mineral within the meaning of reservation in railroad grants: Tucker *v.* Florida Ry. & N. Co., 19 L. D. 414.

[8] Conlin *v.* Kelly, 12 L. D. 1, overruling *In re* Bennet, 3 L. D. 116; McGlenn *v.* Weinbroeer, 15 L. D. 370; Vandoren *v.* Plested, 16 L. D. 508; Delaney, 17 L. D. 120.

But held not to be excepted as mineral from grant to a state: South Dakota *v.* Vermont S. Co., 16 L. D. 263.

The passage of the act of 1892 (Sup. to Rev. Stats., vol. ii., p. 65) removes all future controversy on the subject, and permits lands containing these substances to be entered as mineral lands.

[9] McKean *v.* Buell, Copp's Min. Lands, 343; Townsite of Coalville, 4 Copp's L. O. 46; *In re* Norager, 10 Copp's L. O. 54.

Coal, however, is disposed of under special laws, and will be separately considered in another portion of this treatise.

[10] Copp's Min. Lands, 143.

[11] Eagle Salt Works, Copp's Min. Lands, 336.

[12] Copp's Min. Lands, 333.

[13] 7 Land Decisions, 549.

Salines are not subject to disposal under the mining laws. The policy of the government with reference to this character of lands and the laws regulating their disposal will be separately considered in another portion of this treatise.

land department is the tribunal specially charged with the determination of the character of lands falling within the purview of the laws considered in this treatise. This question being one of fact, the determination by the department culminating in the issuance of a patent is conclusive, and not open to collateral attack. Such controversies therefore rarely find their way into the courts. In a succeeding chapter, treating of placers and other deposits, will be found cited the few cases which we have been able to discover upon the subject.

**§ 98. Rules for determining mineral character of land.** —While it is difficult to formulate a definition sufficiently comprehensive in itself to cover all possible exigencies, we think that a conservative application of the rules governing statutory construction, heretofore enumerated in connection with the adjudicated cases and rulings of the land department, permits us to deduce the following:—

The mineral character of the land is established when it is shown to have upon or within it such a substance as—

(*a*) Is recognized as mineral, according to its chemical composition, by the standard authorities on the subject; or—

(*b*) Is classified as a mineral product in trade or commerce; or—

(*c*) Such a substance (other than the mere surface which may be used for agricultural purposes) as possesses economic value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts;—

And it is demonstrated that such substance exists therein or thereon in such quantities as render the land more valuable for the purpose of removing and marketing the substance than for any other purpose, and the removing and marketing of which will yield a profit; or, it is established that such substance exists in the lands in such quantities as would justify a prudent man in expending labor and capital in the effort to obtain it.

# CHAPTER II.

## THE PUBLIC SURVEYS AND THE RETURN OF THE SURVEYOR-GENERAL.


§ 102. No general classification of lands as to their character.
§ 103. Geological surveys.
§ 104. General system of land surveys.
§ 105. What constitutes the surveyor-general's return.
§ 106. *Prima facie* character of land established by the return.
§ 107. Character of land, when and how established.


**§ 102. No general classification of lands as to their character.** — No general systematic classification of the public lands, according to their mineral or non-mineral character, for the purpose of sale or other disposal, has ever been attempted.

Geological examination and survey of lands in the Lake Superior district, and in the Chippewa land district, in Wisconsin, were provided for by acts of congress, passed in 1847.[1]

These acts conferred authority on the president to sell at public auction such land as contained copper, lead, or other valuable ores, at the minimum price of five dollars per acre. And such examination and survey were for the purpose of establishing the character of the lands in these regions, for the express purpose of sale as mineral lands.

But three years later (September 26, 1850), this policy was abandoned, and this class of lands in these districts was directed to be sold in the same manner, at the minimum price, and with the same rights of pre-emption as other public lands.[2]

[1] March 1, 1847, 9 Stats. at Large, 146; March 3, 1847, *Id.* 179.
[2] Public Domain, 308–309.

§ 103. **Geological surveys.**—Since then extensive geological surveys have been and are now being made in various parts of the United States; but although these surveys are conducted under the supervision of the department of the interior, and are of great economic as well as scientific value, the results obtained perform no function in the public land system, are not noted in the tract-books in the different land offices, and are not necessarily considered in determining the mineral or non-mineral character of the land embraced within the limits of the geological survey.

§ 104. **General system of land surveys.**—It is a matter of common knowledge that the public lands are ordinarily surveyed into rectangular tracts, bounded by lines conforming to the cardinal points. These surveys are made under the immediate supervision of the United States surveyors-general in their respective surveying districts. The actual surveys in the field are conducted by deputies appointed by the surveyors-general, to whom all reports are primarily made.

In prosecuting work in the field, the deputies are charged with the duty of noting at the end of their notes of survey coal banks or beds, peat or turf grounds, minerals, and ores, with particular description of the same as to quality and extent, and all "diggings" therefor; also, salt springs and licks, together with a general description of the township in the aggregate, as respects the face of the country, its soil and geological features, timber, minerals, water, and the like.[1]

§ 105. **What constitutes the surveyor-general's return.**—The original field-notes and accompanying data, with a topographical sketch of the country surveyed, are returned to the surveyor-general, who examines them, and, if found correct, approves them, whereupon the draughtsman protracts the same on township plats in triplicate.

[1] Instructions to surveyors-general, Public Domain, 575 *et seq.*

After approving the plats, the surveyor-general files the orignal in his office, the duplicate is sent to the local land office, to enable the register and receiver to dispose of the lands embraced in the several townships, and the triplicate is transmitted to the commissioner of the general land office. These approved field-notes, taken in connection with the township plats protracted in the office, constitute what is known as the surveyor-general's return.

§ 106. **Prima facie character of land established by the return.**—The lands embraced in the survey are treated *prima facie* as being of the character shown by this return, and are said thenceforward to be borne on the official records as agricultural, timber, or mineral land, according to the facts developed by the return. If lands are noted on the plat as mineral, they are *prima facie* mineral lands, and no entry thereof will be permitted, except under the mining laws, until the presumption arising from the return is overcome by satisfactory proofs.[1]

A return by the surveyor that sixteenth and thirty-sixth sections granted to the states for school purposes are mineral, and the approval of his field-notes and plats, and the filing thereof in the general land office, are a sufficient determination that the lands are mineral to authorize a selection of indemnity school lands by the state.[2]

If the lands are not returned as mineral, the presumption obtains that they are agricultural in character, and therefore cannot be entered under the mining laws until the return is contradicted. At all inquiries held for the purpose of investigating the character of surveyed lands, this return has been said to rank as a deposition.[3]

It is unnecessary to say that this return is open to

[1] Gold Hill Q. M. Co. v. Ish, 5 Ore. 104; Cowell v. Lammers, 10 Saw. 246; Johnston v. Morris, 72 Fed. 890; Dobbs' Placer, 1 L. D. 567; Dughi v. Harkins, 2 L. D. 721; Cole v. Markley, *Id.* 847; Hooper v. Ferguson, *Id.* 712; Roberts v. Jepson, 4 L. D. 60.

[2] Johnston v. Morris, 72 Fed. 890; *In re* State of California, 23 L. D. 423.

[3] Kirby v. Lewis, 39 Fed. 66; United States v. Breward, 16 Peters, 147; United States v. Hanson, *Id.* 196.

contradiction.[1] It concludes no one.[2] When a legal mineral location (which, of course, must be based upon a discovery) has been made, the slight presumption in favor of the return is overcome, and the burden of proof shifts to the party attacking the mineral claim.[3] But evidence of an actual discovery is necessary. A mere location certificate will not be sufficient.[4] The allowance of a mineral entry of a tract, as a matter of course, overcomes a return as agricultural.[5]

While the rule which treats the surveyor-general's return as establishing *prima facie* the character of the land is a convenient one in controversies arising between individuals over an asserted right to enter public lands, as determining upon whom rests the burden of proof, it has been productive of iniquitous results in administering the colossal land grants to railroad companies; and we are justified in asserting that its force as a universal rule has been materially weakened, if not absolutely destroyed, by the recent decisions of both the land department and the courts of last resort.

When it is considered that sections of one mile square are the smallest tracts the outboundaries of which the law requires to be actually surveyed; that the minor subdivisions are not surveyed in the field, but are defined by law, and protracted in the surveyor-general's office on the township plats, the lines being imaginary;[6] that surveyors, as a rule, are neither practical miners nor geologists; that they are compensated not for the volume of information furnished as to the character of the lands, but for the number of linear miles surveyed in the field; that their investigation as to the character of the land is wholly superficial,—

[1] Caledonia M. Co. *v.* Rowen, 2 L. D. 714.

[2] Winscott *v.* N. P. R. R., 17 L. D. 274.

[3] State of Washington *v.* McBride, 18 L. D. 199; N. P. R. R. *v.* Marshall, 17 L. D. 545; Sweeney *v.* N. P. R. R., 20 L. D. 394; Rhodes *v.* Treas, 21 L. D. 502.

[4] Etling *v.* Potter, 17 L. D. 424; Berry *v.* C. P. R. R., 15 L. D. 463.

[5] Johns *v.* Marsh, 15 L. D. 196; Walton *v.* Batten, 14 L. D. 54.

[6] Public Domain, 184.

it would seem that but little weight should be given to these returns. If the surveyor, in subdividing a township into sections, encounters a mine in active operation, we may find some mention of that fact in his field-notes; but usually he does not go beyond this. A fair illustration of the unreliability of these returns in this respect may be found in almost all the mineral districts over which the public surveys have been extended. We note the following caustic criticism of the land department itself on this subject. In an official communication (March 11, 1872) from Mr. Drummond, commissioner of the general land office, to Mr. Delano, secretary of the interior, the commissioner says:—

"To illustrate the unreliability of the surveyors' returns as to the character of these lands, and the absolute necessity for the rule which, with your advice and consent, I have adopted, it may be proper to refer in this connection to some of the applications for patents for mines in California, the lands embracing which were returned on the official township plats as agricultural in character, the existence of mines therein not becoming known to this office until after the receipt of such applications for mining title."

(Here follows a list of thirty-five mines.)

"The foregoing claims are all within the Sacramento district, and many more could be enumerated were it necessary to illustrate the want of reliability of the surveyor's returns as to the character of these lands. . . . But with the kind of returns furnished it is totally impossible to determine whether any given tract in the mineral district is properly agricultural land within the meaning of the law or not, or whether this office could, with a due regard for the execution of the law, proceed to patent such as agricultural land, without further investigation."[1]

And in an earlier communication the same commissioner uses the following apt language:—

"I am impressed with the conviction that it is neither in harmony with the spirit or intent of the laws of

[1] Copp's Min. Decisions, 308.

"congress, nor with the true public policy, to sanction the "indiscriminate absorption of the lands in what has here- "tofore been known as the reserved mineral belt in the "public domain under laws only applicable to lands clearly "non-mineral, simply because the deputy surveyors failed "to return the same as mineral in character. This view is "strengthened by the fact that very many, in fact the "majority, of the applications for mineral patents, are found "upon consulting our official township plats to be within "subdivisions not reported as mineral in character."[1]

In a circular letter issued in December, 1871, to the registers and receivers of land offices in the mining regions of California, instructing them to withhold from agricultural entry a large number of townships, the same commissioner thus expresses his views: —

"Experience having shown that this office can not with "any degree of safety judge of the character of these lands, "whether mineral or agricultural, from the data furnished "by such returns, and there being no authority of law for "the employment of a competent geologist to investigate "the matter, the head of the department has, in consid- "eration of the public interests and to prevent the indis- "criminate absorption of the mineral lands of the public "domain through the instrumentality of insufficient returns, "found it imperatively necessary to adopt the course herein "announced, both for the protection of those who have "already expended time, capital, and labor in opening and "developing these mines, and those of the citizens of the "United States who may hereafter desire to exercise their "legal right to do so."[2]

In the light of these conceded facts, it is a marvel that either the land department or the courts ever announced the doctrine that such returns were *prima facie* evidence of anything save their own inherent weakness and insufficiency for this purpose.

The question as to the effect of these returns was before the supreme court of the United States in a recent case,[3] in which Justice Field, delivering the opinion of the court, said: —

[1] Copp's Min. Decisions, 297.
[2] *Id.* 302.
[3] Barden *v.* N. P. R. R., 154 U. S. 288.

"Some weight is sought to be given by counsel of the "plaintiff to the allegation that the lands in controversy "are included in the section which was surveyed in 1868, "and a plat thereof filed by the surveyor in the local land "office in September of that year, from which it is asserted "that the character of the land was ascertained and deter- "mined, and reported to be agricultural, and not mineral. "But the conclusive answer to such alleged determination "and report is that the matters to which they relate were "not left to the surveyor-general. Neither he nor any of "his subordinates was authorized to determine finally the "character of any lands granted, or make any binding "report thereon.

"Information of the character of all lands surveyed is "required of surveying officers, so far as knowledge respect- "ing them is obtained in the course of their duties, but "they are not clothed with authority to especially examine "as to these matters outside of their other duties, or to "determine them, nor does their report have any binding "force. It is simply an addition made to the general infor- "mation obtained from different sources on the subject."

§ 107. **Character of land, when and how established.** —The character of a given tract of land is always a question of fact, to be determined, generally speaking, by the land department, on hearings ordered for that purpose, or at the time patent is applied for, and the decision of the department, culminating in the issuance of a patent, is final.[1]

The precise point of time when the character of a given tract of land is to be determined will depend somewhat upon the nature of the right asserted, and the date to which it is supposed to relate. This subject will be fully discussed under appropriate heads, when considering the various congressional grants out of which mineral lands are reserved, and the various methods of acquiring public lands other than mineral, and in the chapter treating of the land department and its functions.

[1] Pac. M. & M. Co. v. Spargo, 8 Saw. 647; Cowell v. Lammers, 10 Saw. 255; Barden v. N. P. R. R., 154 U. S. 288; Gale v. Best, 78 Cal. 235; Dahl v. Mont. C. Co., 132 U. S. 264; Dahl v. Raunheim, *Id.* 260; Carter v. Thompson, 65 Fed. 329.

# CHAPTER III.

## STATUS OF LAND AS TO TITLE AND POSSESSION.


ARTICLE I. INTRODUCTORY.
II. MEXICAN GRANTS.
III. GRANTS TO STATES FOR EDUCATIONAL AND INTERNAL IMPROVEMENT PURPOSES.
IV. RAILROAD GRANTS.
V. TOWNSITES.
VI. INDIAN RESERVATIONS.
VII. MILITARY RESERVATIONS.
VIII. NATIONAL PARK AND FOREST RESERVATIONS.
IX. HOMESTEAD AND OTHER AGRICULTURAL CLAIMS.
X. OCCUPANCY WITHOUT COLOR OF TITLE.


### ARTICLE I. INTRODUCTORY.


§ 112. Only public lands subject to appropriation under the mining laws.


**§ 112. Only public lands subject to appropriation under the mining laws.**—The mineral character of a given tract of land having been ascertained as a present fact, according to the rules enunciated in a preceding chapter, it becomes necessary to determine the status of the land as to title and possession before any legal right of appropriation under the mining laws can be asserted and maintained by the mineral claimant. Only public mineral lands can be entered under the mining laws. Land to which any claim or right of others has legally attached does not fall within the definition of "public land."

While under the system in vogue on the continent of Europe, in Mexico, and the South American republics, mining privileges may be acquired in lands of private

proprietors under certain restrictions and governmental regulations, no such right exists in this country, and lands held in private ownership can not be invaded.[1] The land sought to be entered upon as mineral land must be free, open, public land, and not legally reserved, appropriated, dedicated to any other use or purpose, or otherwise legally disposed of. As to whether a given tract of land sought to be entered as mineral is free and open to acquisition under the mining laws, is sometimes a difficult question to solve. To enable us to intelligently deal with this subject, it will be necessary to examine the various methods by which the government parts with its title to its lands, its obligation under treaties of cession, the nature and extent of grants previously made, and the reservations of certain parts of its territory made for public purposes, pursuant to special laws.

## Article II. Mexican Grants.

§ 114. Ownership of mines under Mexican law.
§ 115. Nature of title conveyed to the United States by the treaty.
§ 116. Obligation of the United States to protect rights accrued prior to the cession.
§ 117. Adjustment of claims to Mexican grants in California.
§ 118. Adjustment of claims to Mexican grants in other states and territories.
§ 119. Claims to mines asserted under the Mexican mining ordinances.
§ 120. Status of grants considered with reference to condition of title.
§ 121. Grants *sub judice*.
§ 122. Different classes of grants.
§ 123. Grants of the first and third classes.
§ 124. Grants of the second class — commonly called "floats."
§ 125. Grants confirmed under the California act.
§ 126. Grants confirmed by direct action of congress.
§ 127. Grants which have been, or may be, finally confirmed under the act of March 3, 1891, situated in Colorado, Wyoming, Utah, Nevada, New Mexico, or Arizona.
§ 128. Conclusions.

**§ 114. Ownership of mines under Mexican law.**— Under the laws in force in Mexico at the date of the

[1] Biddle Boggs *v.* Merced M. Co., 14 Cal. 376.

treaty of Guadalupe Hidalgo, mines, whether in public or private property, belonged to the supreme government.[1]

No interest in the minerals of gold and silver passed by a grant from the government of the land in which they were contained, without express words designating them. Such grant only passed an interest in the soil distinct from that of the minerals.[2]

The interest in minerals was conveyed through the operation of the mining ordinances, or by proceedings upon denouncement, when a mine, once discovered and registered, had been abandoned and forfeited.[3]

Mining rights under the Mexican laws were held upon conditions not affecting the title to the land as derived under the ordinary conveyances; and such rights might be acquired and held by others besides the owner of the land under the ordinary grants, and were terminable when, by their use, the minerals contained in the soil were wholly removed.[4]

In other words; there was a severance of the title to the minerals from the title to the land. The minerals, particularly gold, silver, and quicksilver, were *jura regalia*, and were considered to belong to the supreme government in virtue of its sovereignty.

This was substantially the law of the ceding country at the date of the ratification and exchange of the treaty.

**§ 115. Nature of title conveyed to the United States by the treaty.**— By the treaty of cession, all of the property theretofore belonging to Mexico within the limits defined by the compact between the two nations passed to the United States.[5]

The government of the United States was based upon different theories from that of the ceding country. By the

[1] Castillero *v.* United States, 2 Black, 17.

[2] Fremont *v.* Flower, 17 Cal. 199.

[3] Fremont *v.* Flower, 17 Cal. 199; United States *v.* San Pedro *etc.* Co. 17 Pac. 407; United States *v.* Castillero, 2 Black, 17.

[4] Castillero *v.* United States, 2 Black, 17.

[5] Fremont *v.* Flower, 17 Cal. 199.

operation of the treaty, none of the Mexican theories of government were ingrafted upon the American system. The ownership conferred by the cession was not an incident of sovereignty, and the United States hold the minerals and the lands in which they are found just as they hold any other public property which they acquired from Mexico.[1]

No foreign government could, by treaty or otherwise, impart to the United States any of its sovereign prerogatives; nor have the United States the capacity to receive or power to exercise them. Every nation acquiring territory by treaty or otherwise must hold it subject to the constitution and laws of its own government, and not according to those of the government ceding it.[2]

§ 116. **Obligation of the United States to protect rights accrued prior to the cession.**— It is a matter of political history that within the territory ceded, particularly within the area now comprising the states of California and Colorado and the territories of New Mexico and Arizona, and to a limited extent, perhaps, in other states, rights were asserted to a large number of tracts of land by title derived from the ceding nation. These tracts varied in area from comparatively few acres to immense bodies of land, in some instances embracing principalities within their claimed boundaries. Most of these claimed grants were either grants for colonization or for the purposes of stock-raising and agriculture. A very few were for mines claimed to have been acquired under the mining ordinances. Most of them were inchoate— that is to say, something remained to be done to either perfect and establish the title or to fix the boundaries. Many were spurious and fraudulent. As to all these asserted rights, the treaty of Guadalupe Hidalgo imposed upon the government of the United States the obligation to protect titles acquired under Mexi-

[1] Fremont v. Flower, 17 Cal. 199.
[2] Pollard v. Hagan, 3 How. 212.

can rule.[1] This obligation was imposed upon our government by international law independent of treaty stipulation.[2]

These rights were consecrated by the law of nations.[3] A right of any validity before the cession was equally valid afterwards.[4] The duty of providing the mode of securing these rights and of fulfilling the obligations imposed upon the United States belonged to the political department of the government. Congress might either itself discharge that duty or delegate it to the judicial department.[5]

**§ 117. Adjustment of claims to Mexican grants in California.**— With reference to Mexican grants in California, congress provided for the appointment of a board of land commissioners,[6] to whom all persons claiming lands by virtue of any right or title derived from the Spanish or Mexican government were required to present their claims. The action of the commissioners was subject to review by the United States district court, and the right to appeal to the supreme court of the United States was given. Under this act most of the Mexican land grants in California were adjudicated, and patents issued for such as were ultimately confirmed. A similar method had been pursued with reference to grants claimed in the territory ceded by Spain and France.[7]

The government of the United States, when it came to consider this statute, was not without large experience in a somewhat similar class of cases arising under the treaties for the purchase of Florida from Spain and the territory

[1] Peralta *v.* United States, 3 Wall. 434; Knight *v.* U. S. Land Assn., 142 U. S. 161.

[2] Strother *v.* Lucas, 12 Peters, 410.

[3] United States *v.* Moreno, 1 Wall. 400; 1 Wharton's Internat. Dig., § 4.

[4] United States *v.* Moreno, 1 Wall. 400; Interstate L. Co. *v.* Maxwell L. G. Co., 139 U. S. 569.

[5] Astiazaran *v.* Santa Rita L. & M. Co., 148 U. S. 80; De la Croix *v.* Chamberlain, 12 Wheat. 599; Chouteau *v.* Eckhart, 2 How. 344; Tameling *v.* U. S. Freehold Co., 93 U. S. 644.

[6] Act of March 3, 1851, 9 Stats. at Large, 631.

[7] Public Domain, 375.

of Louisiana from France. In the latter case, particularly, a very much larger number of claims by private individuals existed to the soil acquired by the treaty, some of whom resided on the lands which they claimed, while others did not, and the titles asserted were as diverse in their nature as those arising under the cession from Mexico.[1]

**§ 118. Adjustment of claims to Mexican grants in other states and territories.**—As to claimed Mexican grants situated within the territory of New Mexico, congress, on July 22, 1854, passed an act[2] providing, among other things, that the surveyor-general for that territory should examine into and report to the interior department upon the status of private land claims within his jurisdiction. The provisions of this act were extended to Colorado by the act of February 28, 1861,[3] and to Arizona by the act of February 24, 1863.[4]

Some of the grants so reported upon under these acts were presented to congress, and were confirmed. But by far the greater proportion awaited the passage of some general law providing a uniform method of adjustment. Such a law was passed March 3, 1891.[5]

This act created a court of private land claims, consisting of a chief justice and four associate justices, to which tribunal all persons claiming lands within the limits of the territory derived by the United States from the republic of Mexico, and now embraced within the territories of New Mexico and Arizona, and the states of Nevada, Colorado, Wyoming, and Utah, are called upon to submit their claims.[6] This court has had submitted to it a large number of claimed grants. It has confirmed some, and rejected

[1] Botiller *v.* Dominguez, 130 U. S. 238.

[2] 10 Stats. at Large, 308.

[3] 12 Stats. at Large, 172.

[4] *Id.* 664.

[5] 26 Stats. at Large, 854.

[6] The California act required all classes of claimed grants to be presented, whether perfect or inchoate. The act of 1891 leaves it optional with the owner of a perfect grant to present it or not, as he sees fit.

others. Many are still being litigated. This act may be said to be drawn on lines parallel to the one passed for California, but, in one respect at least, it makes a radical innovation. The California act made no mention of or reference to mineral lands distinctively. The law under which the court of private land claims has been and is now acting contains the following provision: —

"No allowance or confirmation of any claim shall con-
"fer any right or title to any gold, or silver, or quicksilver
"mines, or minerals of the same, unless the grant claimed
"effected the donation or sale of such mines or minerals to
"the grantee, or unless the grantee has become otherwise
"entitled thereto in law or equity; but all such mines
"and minerals shall remain the property of the United
"States, with the right of working the same, which fact
"shall be stated in all patents issued under this act. But
"no such mine shall be worked on any property confirmed
"by this act without the consent of the owner of such
"property, until specially authorized thereto by an act of
"congress hereafter passed."

This is a radical departure from the previous policy of the government. All reservations heretofore made or authorized by congress, with the exception of "known "mines," in the pre-emption act of 1841, and "veins," or "lodes," in the townsite act of 1865, have been of the *lands* containing mineral, not the mineral within the lands. The effect of these new provisions and the construction of the patents to be issued under them will be duly considered at the proper time.

§ 119. **Claims to mines asserted under the Mexican mining ordinances.**—It may be conceded on the threshold that where a valid claim to a mine or a mining right existed prior to the cession within the territory ceded, such right must be respected, and may be determined in the same manner as claims to other land are determined.[1] We are not aware of any such claim ever having been thus far successfully established.

[1] Castillero v. United States, 2 Black, 17.

But few were ever asserted in California; and, of course, the time for such assertion has long since elapsed. From what we know of the history of mining in the remaining portion of the ceded territory, it is not likely that many such claims will be presented to the present court of private land claims. If such should be the case, and they are confirmed, the title to the minerals will, of course, pass. If they should not be confirmed, the tract claimed will be restored to the public domain, and, if mineral in character, will become public mineral lands, and subject to the mining laws. Therefore, we have no further concern with this hypothetical class of claims. We are to deal only with rights asserted to lands claimed either under the colonization laws of Mexico or for agricultural, pastoral, and kindred purposes.

§ 120. **Status of grants considered with reference to condition of title.**—So far as the inquiry is pertinent to the questions considered in this treatise, Mexican grants may be considered in four different aspects:—

(1) Grants *sub judice*—that is to say, awaiting final confirmation and determination of boundaries;

(2) Grants confirmed finally by action of the judicial tribunals under the California act, and the boundaries fixed;

(3) Grants confirmed by direct action of congress;

(4) Grants which have been, or may be, finally confirmed under the act of March 3, 1891, situated in Colorado, Wyoming, Utah, Nevada, New Mexico, or Arizona.

Let us consider these in the order named.

§ 121. **Grants sub judice.**—With respect to all classes of Mexican grants, it may be said that they are *sub judice* until the title has been established and the boundaries finally defined by the tribunals charged with these functions, or the right is finally declared invalid and without foundation, or until the period fixed by the various acts

requiring presentation to the respective tribunals is passed, and no such presentation has been made.[1]

§ 122. **Different classes of grants.** — Mexican grants were of three kinds:—

(1) Grants by specific boundaries where the donee is entitled to the entire tract;

(2) Grants of quantity, as of one or more leagues within a larger tract, described by what are called outside boundaries, where the donee is entitled to the quantity specified, and no more;

(3) Grants of a place or rancho by name, where the donee is entitled to the whole tract, according to the boundaries given, or, if not given, according to the extent as shown by previous possession.[2]

§ 123. **Grants of first and third classes.** — With respect to lands containing mines or mineral deposits within the claimed exterior boundaries of any grant, falling within the first and third classes, it may be stated that no right to any such lands can be acquired under the general mining laws so long as the grant remains *sub judice*. Such lands are not "public lands" within the meaning of that term as used in the acts of congress respecting the disposition of the public domain.[3]

And it is immaterial whether the claim is *lawfully* made or not. As was said by the supreme court of the United States,—

[1] Under the California act all classes of grants, whether perfect or imperfect, were required to be presented. Under the act of March 3, 1891, the owners of *perfect* grants may present their claims or not, as they see fit. As to when such class of grants cease to be *sub judice* is a question. Even after the present court of private land claims goes out of existence, the status of these grants claimed as perfect and their extent may be the subject of controversy; and it may be said that they will perpetually remain *sub judice*, so far as the government is concerned. We do not think, considering the general scope of this treatise, that we are called upon to elaborate this question.

[2] United States *v.* McLaughlin, 127 U. S. 428; Higueras *v.* United States, 5 Wall. 827; Hornsby *v.* United States, 10 Wall. 224.

[3] Cameron *v.* United States, 148 U. S. 301; Doolan *v.* Carr, 125 U. S. 618.

"Claims, whether grounded upon an inchoate or perfected "title, were to be ascertained and adequately protected. "This duty, enjoined by a sense of natural justice and by "treaty obligations, could only be discharged by prohibit- "ing intrusion upon the claimed lands until an opportunity "was afforded the parties in interest for a judicial hearing "and determination. It was to be expected that unfounded "and fraudulent claims would be presented for confirmation. "There was, in the opinion of congress, no mode of sepa- "rating them from those which were valid without investi- "gation by a competent tribunal; and our legislation was so "shaped that no title could be initiated under the laws of the "United States to lands covered by a Spanish or Mexican "claim, until it was barred by lapse of time or rejected."[1]

The theory by which grants of the two classes under consideration were while *sub judice* withheld from appropriation under the general land laws of congress is thus stated by the same tribunal:—

"The right to make the segregation rested exclusively "with the government, and could only be exercised by its "officers. Until they acted and effected the segregation, "the confirmees were interested in preserving the entire "tract from waste and injury and in improving it; for until "then they could not know what part might be assigned to "them. Until then no third person could interfere with "their right to the possession of the whole. No third person "could be permitted to determine in advance of such segre- "gation that any particular locality would fall within the "surplus, and thereby justify his intrusion upon it and its "detention from them. . . . If the law were otherwise "than as stated, the confirmees would find their possessions "limited, first in one direction, and then in another, each "intruder asserting that the parcel occupied by him fell "within the surplus, until in the end they would be ex- "cluded from the entire tract."[2]

This was the doctrine early announced by the supreme court of the state of California, and maintained through a long line of decisions.[3]

[1] Newhall *v.* Sanger, 92 U. S. 761, 764.

[2] Van Reynegan *v.* Bolton, 95 U. S. 33-36, (citing Cornwall *v.* Culver, 16 Cal. 429; Mahoney *v.* Van Winkle, 21 Cal. 552; Riley *v.* Heisch, 18 Cal. 198).

[3] Ferris *v.* Coover, 10 Cal. 589; Mahoney *v.* Van Winkle, 21 Cal. 552; Thornton *v.* Mahoney, 24 Cal. 569; Rich *v.* Maples, 33 Cal. 102; Mott *v.* Reyes, 45 Cal. 379; Shanklin *v.* McNamara, 87 Cal. 371.

It has been said that the primary object of the act of March 3, 1851, to ascertain and settle the private land claims in the state of California, was to distinguish the vacant public lands from those that were private property.[1]

Until a confirmation of a grant, no valid title as against the United States is vested to any specific land. Nor does a confirmation locate the claim and sever the land from the public domain without a survey.[2]

Until such confirmation and final survey, lands within the claimed limits were reserved from the operation of the general land laws, and no title to any portion could be obtained under the pre-emption or other laws.

When the limits have been definitely fixed the surplus for the first time becomes open to settlement and purchase.[3] A like result follows in cases where the grant is finally rejected, or where the claimant fails to present his claim within the time specified in the act.[4]

**§ 124. Grants of the second class, commonly called "floats."**—Do the foregoing rules apply to cases falling within the second class of grants, commonly called "floats"? —for example, a grant of ten square leagues within claimed exterior boundaries of one hundred square leagues. This was the case of the Mariposa grant in California, claimed and ultimately confirmed to General John C. Fremont.

The decisions heretofore quoted and the rules enunciated applied to conditions antedating the enactment of general mining laws. Prior to July 26, 1866, no mineral lands, even on the unquestioned public domain, could be acquired in absolute private ownership. The various acts passed from 1851 to 1891 regulating the settlement of private land claims made no mention of minerals or mineral lands.

The California act, in terms, reserved these claimed lands from pre-emption and homestead settlement.

[1] Castro v. Hendricks, 23 How. 438.

[2] Ledoux v. Black, 18 How. 473.

[3] United States v. McLaughlin, 127 U. S. 428; Quinn v. Chapman, 111 U. S. 445.

[4] Botiller v. Dominguez, 130 U. S. 238; United States v. Fossat, 21 How. 446.

The acts conferring authority upon surveyors-general in the territories to examine and report upon Mexican grants contained a provision to the effect that "until final action "of congress on such claims, all lands covered thereby "shall be reserved from sale or other disposition by the "government."

Would these inhibitions imply that lands lying within the claimed exterior boundaries of a float were not open to exploration and purchase, as lands containing gold and silver? Confessedly, titles to these minerals could not have been obtained under the Mexican government by proceedings other than under the mining ordinances; and it can be plausibly asserted that the United States are under no legal or equitable obligation to confer upon these grantees something more than they could have acquired had there been no change in the paramount proprietorship.

And yet we fail to see anything in the adjudicated cases which would not reserve the entire claimed tract from occupation and purchase under the mining laws until such time as the boundaries are finally fixed and the surplus becomes public domain.

The supreme court of the United States thus distinguishes this class of grants:—

"It is in the option of the government, not of the grantee, "to locate the quantity granted: and, of course, a grant by "the government of any part of the territory contained "within the outside limits of the grant only reduces by so "much the area within which the original grantee's proper "quantity may be located. If the government has the "right to say where it shall be located, it certainly has the "right to say where it shall not be located; and if it sells "land to a third person at a place within the general territory of the original grant, it is equivalent to saying that "the quantity due to the original grantee is not to be located "there. In other words, if the territory comprehended in "the outside limits and bounds of a Mexican grant contains eighty leagues, and the quantity granted is only ten "leagues, the government may dispose of seventy leagues "without doing any wrong to the original grantee."[1]

[1] United States v. McLaughlin, 127 U. S. 428.

The case was that of a railroad grant evidenced by patent for a section of land within a float. Suit was brought to vacate the patent on the ground that the land patented was at the time of the patent embraced within the exterior boundaries of a claimed Mexican grant, then *sub judice*, and that therefore the patent was void, relying upon the case of Newhall *v.* Sanger,[1] which involved precisely the same grant, although, as presented for the consideration of the supreme court in that case, it appeared to be a grant by specific boundaries, and not a float.

The case of United States *v.* McLaughlin established the doctrine that the government might, by *direct congressional grant*, dispose of lands within a float so long as sufficient remained to satisfy the call of the grant for quantity. This rule was subsequently reannounced, and followed in later cases.[2]

But, as we understand the McLaughlin case, the court did not intend to infer that any such lands were subject to appropriation *under general laws*. In fact, the court says:—

"It may be that the land office might properly suspend "ordinary operations in the disposal of lands within the "territory indicated; and in that sense they might not be "considered as public lands."

We think a review of the authorities justifies the conclusion that floats are not exceptions to the general doctrine that Mexican grants while *sub judice* are to the extent of their claimed exterior boundaries, as defined in the *expediente*, withdrawn from exploration and purchase under the general mining laws; and this is true wheresoever within the ceded territory these grants are found.

**§ 125. Grants confirmed under the California act.**— As to grants confirmed finally, with boundaries fixed by action of the judicial tribunals, under the California act, such grants occupy the status of patented lands, and will

[1] 92 U. S. 761.

[2] Carr *v.* Quigley, 149 U. S. 652; Wis. Cent. R. R. *v.* Forsythe, 159 U. S. 48; United States *v.* Curtner, 38 Fed. 1; Grant *v.* Oliver, 91 Cal. 158.

be so considered. A right to a patent is equivalent to a patent issued.

The question as to whether mines of the precious metals passed by confirmation to a grantee of a Mexican grant has never been in terms judicially determined by the supreme court of the United States.

In the case of the Mariposa grant,[1] General Fremont's right to confirmation was assailed upon the ground that the grant embraced mines of gold or silver. The supreme court of the United States confirmed the grant, holding that the only question before it was the validity of the title; that, under the mining laws of Spain and Mexico, the discovery of a mine did not destroy the title of the individual to the land granted; that whether there were any mines on the grant in question, and, if there were, what were the rights of sovereignty in them, were questions which must be decided in another form of proceeding, and were not subjected to the jurisdiction of the commissioners or the court by the act of 1851. But in the later case of the New Almaden quicksilver mine,[2] a direct application for confirmation of a mining title was made; and the same court, while denying the validity of the asserted right, held that rights to mines acquired from Spain and Mexico prior to the cession were interests in land, and as such were subject to the jurisdiction of the commissioners. The Fremont case was not mentioned by the court, although in the court below (Judge Hoffman), sustaining the jurisdiction, held that the rule announced by him was not in conflict with the Fremont case, the only question there being the validity of the grant.

After the patent was issued to Fremont, the question arose in the California courts as to whether the minerals of gold and silver discovered within the grant passed to the confirmee under the patent, and the supreme court of that state thus announced its conclusions:—

[1] Fremont *v.* United States, 17 How. 442, 476.
[2] Castillero *v.* United States, 2 Black, 17.

"The United States occupy, with reference to their real "property within the limits of the state, only the position "of a private proprietor, with the exception of exemption "from state taxation, and their patent of such property "is subject to the same general rules of construction which "apply to conveyances of individuals. From the opera- "tion of conveyances of this nature—that is, of individ- "uals,—the minerals of gold and silver are not reserved, "unless by express terms. They pass with the transfer "of the soil in which they are contained. And the same "is true of the operation of the patent, the instrument of "transfer of the governmental proprietor, the United States; "no interest in the minerals remains in them without a "similar reservation.

"The United States have uniformly regarded the patent "as transferring all interests which they could possess in "the soil, and everything imbedded in or connected there- "with. Wherever they have claimed mines, it has been "as part of the *lands* in which they were contained; and "whenever they have reserved the minerals from sale "or other disposition, it has only been by reserving the "lands themselves. It has never been the policy of the "United States to possess interests in land in connection "with individuals."[1]

This doctrine seems logical. We are not aware of its ever having been seriously questioned. It was commented on and distinguished by the supreme court of New Mexico in a case involving a patent issued under a special act of congress, confirming a grant,[2] to be hereafter discussed; but we do not think its force has been destroyed or weakened.

Unquestionably, the United States might have said to these claimants: "The title asserted by you as the grantee "of the Mexican government did not convey to you the "right to the minerals of gold, silver, or quicksilver which "are within your claimed grant. It is not our purpose to "convey to you lands containing these metals; and before "any title is bestowed upon you by this government, you "must demonstrate that the lands are non-mineral in char-

[1] Fremont *v.* Flower, 17 Cal. 199; Moore *v.* Smaw, *Id.* See, also, Ah Hee *v.* Crippen, 19 Cal. 492; Biddle Boggs *v.* Merced M. Co., 14 Cal. 279; Manning *v.* San Jacinto Tin Co., 7 Saw. 419.

[2] United States *v.* San Pedro, 17 Pac. 337.

"acter. If mineral lands are found within your boundaries, "they must be segregated out, as in the case of pre-emption, "homestead, and other classes of grant, and you will be "given a title to the remainder."

Or it might have gone farther, and offered a title reserving all minerals, as it has attempted to do in the later act applicable to Colorado, New Mexico, and Arizona. But the government imposed no such conditions as to grants in California. Its patent passed everything it had acquired from the Mexican government, and the United States ceased to have any further concern with the land or its constituent elements.

A patent issued upon a confirmed Mexican grant passes whatever interest the United States may have had in the premises.[1] It operates, in consequence, as an absolute bar to all claims under the United States having their origin subsequent to the petition for confirmation. It is, in effect, a declaration that the rightful ownership never had been in the United States, but at the time of the cession it had passed to the claimant or those under whom he claimed.[2]

If the grantee received more than he could have acquired from the Mexican government, it is not a matter concerning which outsiders may lawfully complain. The United States might confirm and patent a Mexican grant for a much larger quantity of land than it was possible to be obtained under the Mexican law.[3]

Why did it not possess the same power with reference to the minerals? Possessing that power, it exercised it by issuing a patent containing no reservation. As a matter of fact, the California act did not authorize the insertion of a reservation; and if a patent issued under that law contained such, it would have been to that extent void, as being unauthorized.[4]

[1] Beard *v.* Federy, 3 Wall. 478; Adam *v.* Norris, 103 U. S. 591; More *v.* Steinbach, 127 U. S. 70; Henshaw *v.* Bissel, 18 Wall. 255.

[2] Adam *v.* Norris, 103 U. S. 591, and cases therein cited.

[3] United States *v.* Maxwell L. G. Co., 121 U. S. 325.

[4] Deffeback *v.* Hawke, 115 U. S. 392; Amador-Medean G. M. Co. *v.* S. Spring Hill, 13 Saw. 523; Smokehouse Lode Cases, 6 Mont. 397; Clary *v.*

**§ 126. Grants confirmed by direct action of congress.** —We are aware of no principle of law which permits us to draw distinctions between the legal effect of a patent issued under an act of congress, directly confirming a grant, and one issued as a result of an investigation by tribunals created by congress for that purpose. We should not have divided the question, and placed direct congressional confirmation in a separate category, were we not confronted by a very able and thoughtful opinion promulgated by the supreme court of New Mexico,[1] wherein that court announces the doctrine that an act of congress confirming to a claimant his title to a tract of land granted to him by the Mexican government under the colonization laws of Mexico and Spain, and a patent issued in accordance therewith, conveys no title to the mineral lands included in such grant.

The record in this case is very voluminous, and the opinion of the court lengthy. An epitome of the facts, the issues raised, and conclusions reached by the court are essential to a proper consideration of the force and value of the decision as a precedent. The confirmatory act in question is very short, and for convenience' sake we quote it:—

"Be it enacted, . . . That the grant to José Serafin "Ramirez, of the Cañon del Agua, as approved by the "surveyor-general of New Mexico, January 20, 1860, and "designated as number seventy in the transcript of private "land claims in New Mexico, transmitted to congress by "the secretary of the interior, January 11, 1861, is hereby "confirmed; *provided*, that this confirmation shall only be "construed as a relinquishment on the part of the United "States, and shall not affect the adverse rights of any per-"sons whomsoever."[2]

A patent was issued pursuant to this confirmation, describing the grant by metes and bounds, as shown in the

Hazlitt, 67 Cal. 286; Silver Bow M. & M. Co. *v.* Clarke, 5 Mont. 378; Wolfley *v.* Lebanon M. Co., 4 Colo. 112.

[1] United States *v.* San Pedro and Cañon del Agua Co., 4 N. M. 225.

[2] (June 12, 1860), 14 U. S. Stats. at Large, 588.

field-notes of the approved survey, containing no reserving or excepting clauses other than the one provided for in the act.

The grant, as patented, included within its exterior boundaries rich and valuable mines of gold, silver, iron, copper, and lead, some of which were worked prior to the treaty of cession by Mexican citizens. Others were thereafter discovered, occupied, and developed by American citizens, it being generally understood that they were situated upon the public domain, and not upon private property.

Suit was brought by the government to vacate and annul the patent, on the ground that the claimant had, by a fraudulent conspiracy with the surveyor-general, his clerk, the deputy surveyor, and other persons, secured a survey of said claimed grant which included land not covered nor intended to be conveyed by the Mexican government; that this fraudulent survey, upon which the patent was based, embraced the mines, whereas a proper construction of the terms of the grant, as presented for confirmation, would have excluded them.

There was an abundance of evidence to substantiate the fraudulent character of the survey, and to sustain the ruling of the supreme court of New Mexico setting aside and annulling the patent.

But a supplemental bill had been filed in the trial court without objection which raised another legal issue. It was therein alleged as follows:—

"That said defendant is now, and has been, in possession of large portions of said tract of land mentioned and described in said original bill of complaint as being the property of the United States, and by said fraudulent survey now included and embraced within the boundaries mentioned and described in the patent of the United States, as set forth in said bill of complaint; and that said defendant is now in possession of many mines, leads, lodes, and veins of mineral-bearing quartz or rock belonging to the United States, and situated upon said tract of land, the property of the United States. The said mines, leads, lodes, and veins are very rich and valuable for gold,

"silver, copper, and other ores. That said defendant claims "said land, with its mines, leads, lodes, and veins of min- "eral-bearing rock and mineral deposits, by and under "said patent of the United States."

This was followed by a prayer for an injunction prohibiting the defendant from mining or appropriating the ores.

Upon this issue, although the supreme court of New Mexico had determined that the patent, having been fraudulently obtained, was null and void, and therefore conveyed nothing, felt constrained to go farther, and enunciate the doctrine that, even if valid, the patent did not convey the minerals, and granted an injunction.

If the conclusion of the court was correct, and it undoubtedly was, that a proper survey made under the grant would exclude the mines, it was quite evident that the United States had a right to prevent the claimant from wasting the substance of its property by extracting and removing the metal-bearing ores, and an injunction was very properly sought, evidently upon this theory. It was quite unnecessary, in order to support the judgment awarding the injunction, to hold that the minerals did not pass by the patent. Therefore, all that the court said with reference to minerals not passing by the patent, which they had declared to be void, and to have passed nothing, was *obiter*, and wholly unnecessary.

The reasoning of the court on this branch of the case rests upon the assumption that as the claimant under the grant could not have obtained from the Mexican government the right to the minerals, therefore he could not *demand* them from the United States. But this is not the question at issue. The question is, What did the patent, assuming it to have been valid, convey?

In speaking of the California cases of Moore *v.* Smaw and Fremont *v.* Flower, heretofore cited, the court says that a careful study of these cases will prove that there were circumstances in the grant confirmation indicating an intent not disclosed in the Cañon del Agua case. A thorough knowledge of the Mariposa grant, its history, and the

various judicial controversies arising out of it between the mineral claimants and the grantees under the Mexican government, enables us to assert that there are no differences in essential characteristics between the two grants. Neither asserted title under the mining ordinances. One was for colonization purposes, and the other for pastoral. The patent in one case was issued on a confirmation made by special act of congress, and in the other on a confirmation made by tribunals especially created by congress for that purpose.

The Cañon del Agua case was appealed to the supreme court of the United States, where the judgment of the supreme court of New Mexico was affirmed;[1] but the question as to whether the patent, if valid, carried the right to the mines was neither discussed nor decided.

With all due deference to the supreme court of New Mexico, we think we are justified in the conclusion that its decision in the Cañon del Agua case does not militate against the doctrine of the California cases, nor weaken the force of the line of decisions on the subject of patents to confirmed Mexican grants reviewed in the preceding paragraphs.

The decision in Fremont *v.* Flower was written by Judge Field. It has always stood unquestioned. As was said by Dr. Raymond in a recent monograph,—

"That a United States patent for land passes to the "patentee (in the absence of explicit reservations author- "ized by law) all the interest of the United States, what- "ever it may be, in everything connected with the soil, or "forming any portion of its bed, or fixed to its surface— "in short, everything embraced within the term 'land,'— "was declared long ago in the cases arising out of the "Mexican land grants in California. (See Fremont *v.* "Flower, 17 Cal. 199, and other cases.) The very acute "and sound decisions of the supreme court of California "in these cases (the chief credit for which is due to Stephen "J. Field, now on the bench of the United States supreme "court) may be said to have placed upon indestructible "foundations the public land system of the United States,

[1] 146 U. S. 120.

"the corner-stone of which is the completeness and invul-
"nerability of the title of the patentee. It is worthy of
"notice, that in these cases the land in question had been
"granted by the Mexican government, with reservation of
"the precious metals, the deposits of which that govern-
"ment has always claimed to own, and the ownership of
"which therefore passed, under treaty, unimpaired by the
"agricultural grants, to the United States. Nevertheless,
"it was held that, in confirming the Mexican grants and
"issuing its patents for the territory, the United States
"actually conveyed to the patentees rights which they had
"never obtained from Mexico, on the broad principle that
"the unqualified grant of a patent for 'land' *gives all.* In
"other words, though the United States might have reserved
"the mineral right, it could only have done so in explicit
"terms, failing which, all its interests passed with its pat-
"ent. The wisdom of this timely decision is universally
"admitted. Unquestionably it saved us from an intoler-
"able chaos and confusion."[1]

Before leaving this subject, it may be well to invite attention to another class of grants made by congress, in satisfaction of rights asserted, having their origin under the Mexican rule. In several instances, in recognition of equities, congress has authorized claimants to select certain lands in lieu of those originally claimed. This authorization is generally accompanied with a restrictive clause prohibiting the selection of mineral lands. Under these conditions, the land department administers the grant, and necessarily in doing so passes upon the character of the land. The duty devolves upon the claimant to establish the non-mineral character of the lands selected.[2]

Should any lands be included within the selection which are determined, *as a present fact*, to be mineral in character, as that term is defined and understood by the land department and the courts, a segregation would be required as to such lands, and patent would issue for the remainder.

Such patent when issued would be conclusive that the

[1] The Force of the United States Mineral Land Patent, Mineral Industry, vol. iv., p. 781.

[2] Baca Float No. 3, 13 L. D. 624.

land was non-mineral and it could not be thereafter collaterally assailed.[1]

**§ 127. Grants which have been, or may be, finally confirmed under the act of March 3, 1891, situated in Colorado, Wyoming, Utah, Nevada, New Mexico, or Arizona.**—As we have heretofore said with reference to this class of grants, the government has made a radical departure from its established policy. It proposes to absolutely reserve not only mines of gold, silver, and quicksilver, which might be held to apply to known or opened mines, but the reservation extends to the minerals of this class. In effect, with reference to lands falling within this category, the government establishes the rules of law in force in Mexico at the time of the treaty of cession, and adopts the regalian doctrine prevalent under the civil and common law and in the different countries of Europe.

It is so opposed to the antecedent policy of the government, so inconsistent with all its legislation during the last half-century, at least, and so thoroughly inconsistent with the land system which prevails in other portions of the public land states and territories, that we hardly know how to deal with it. These provisions of the law looking to the the reservation of the minerals of gold, silver, and quicksilver fairly bristle with legal interrogation marks.

What are mines of gold and silver?

In the great case of mines (the Queen *v.* the Earl of Northumberland), it was held that mines of the baser metals, such as copper and lead, which contained gold or silver, were royal mines, and were reserved to the crown; and it required acts of parliament in the reign of William and Mary to change this rule.

To what extent may the government utilize this privilege, and enjoy the reserved estate? Certainly it can not

[1] Carter *v.* Thompson, 65 Fed. 329; Dahl *v.* Raunheim, 132 U. S. 260; Steel *v.* Smelting Co., 106 U. S. 447; Cowell *v.* Lammers, 10 Saw. 247; Manning *v.* San Jacinto Tin Co., 7 Saw. 419; St. Louis Smelting Co. *v.* Kemp, 104 U. S. 636; Butte & B. M. Co. *v.* Sloan, 40 Pac. 217; *Id.*, 16 Mont. 97; Gale *v.* Best, 78 Cal. 235.

extend the operation of the general mining laws over the patented grants. The act does not sanction the carving out of any defined quantity of surface area to be used in connection with mining operations. If we are left to the rule applicable in cases of individuals, it could occupy only so much of the surface as was necessary in the usual and reasonable course of working;[1] and this would necessarily vary in each particular instance, dependent upon the character of the ore and its mode of occurrence. Neither the government nor its licensees could condemn rights of way or surface ground for mining purposes under the law of eminent domain; for mining is not a governmental function, nor is it a public use. Besides, the right of eminent domain is a right of municipal sovereignty, to be exercised in accordance with the rules prescribed by the individual states. It is true that the act contains the saving grace which inhibits any one without the consent of the owner of the grant from working the mines "until "specially authorized thereto by an act of congress, to be "hereafter passed," thus preventing a general invasion by enterprising explorers of the possession of the grant-owner, and giving congress an opportunity to readjust its legislation in this behalf, to harmonize with the established policy of the government.

We do not see why a preliminary investigation as to the character of the land embraced within a claimed grant should not be authorized, and the mineral lands segregated, as in the case of railroad grants, homestead entries, and donations to states for educational purposes. If it is objected that a surface examination might not disclose the mineral possibilities, the answer is that such is often the case with other classes of titles on the public domain. A discovery of mineral upon lands after they have been patented under the homestead, townsite, railroad, school, or other grants, would not defeat the patent or enable the government, or any one else, to abridge the right of the

[1] MacSwinney on Mines, 282; Stewart on Mines, 33.

patentee to the land granted, or sanction an intrusion upon his possession.[1]

We cannot see the propriety of adopting one policy with reference to by far the greater portion of the public domain, and another one, based on different theories, applicable to the remainder. While it may not be fairly within the author's privilege to speculate as to what troubles may arise, or what difficulties may be encountered in executing the act in question, we are very much inclined to believe that the reservation, in the form as now contemplated, will be a serious annoyance to both the government and the grant-owner, without any compensating features.

§ 128. **Conclusions.**—From the foregoing exposition of the law, we are authorized to deduce the following conclusions:—

(1) No right can be acquired under the general mining laws to any mineral lands lying within the claimed boundaries of any Mexican grant, so long as the grant remains *sub judice*.

(2) Lands lying within the exterior boundaries of a claimed grant are restored to the public domain, and become open to exploration and purchase under the mining laws, either (*a*) when the grant is finally rejected, or (*b*) where the claimant fails to present his claim for confirmation within the time fixed by law.

(3) In case of floats, the surplus remaining after satisfaction of the grant becomes public domain when the action of the tribunals fixing the boundaries becomes final.

(4) Final confirmation of a grant, and the patent issued pursuant thereto, convey to the grantee all the minerals, except as to grants falling within the jurisdiction of the court of private land claims created by the act of March 3,

[1] Cowell *v.* Lammers, 10 Saw. 246; Colo. C. & I. Co. *v.* United States, 123 U. S. 307; Pac. Coast M. & M. Co. *v.* Spargo, 8 Saw. 645; Richards *v.* Dower, 81 Cal. 44; Cooper *v.* Roberts, 18 How. 173; Davis *v.* Weibbold, 139 U. S. 507; McCormick *v.* Sutton, 97 Cal. 373; Smith *v.* Hill, 89 Cal. 122.

1891. As to the latter class of grants, the reserved minerals within the confirmed boundaries are preserved in *statu quo* until congress devises some means of disposing of them. Under the present state of the law, none of this last class of confirmed grants can be invaded for the purposes of mineral exploration, nor can any rights be initiated within their boundaries, under the general mining laws. A locator on such lands would be a naked trespasser, and could be ejected by the owner of the grant.

## ARTICLE III. GRANTS TO THE STATES FOR EDUCATIONAL AND INTERNAL IMPROVEMENT PURPOSES.


§ 132. Grant of sixteenth and thirty-sixth sections.

§ 133. Indemnity grant in lieu of sixteenth and thirty-sixth sections lost to the states.

§ 134. Other grants for schools and internal improvements.

§ 135. Conflicts between mineral claimants and purchasers from the states.

§ 136. Mineral lands excepted from the operation of grants to the states.

§ 137. Restrictions upon the definition of "mineral lands," when considered with reference to school land grants.

§ 138. Petroleum lands.

§ 139. Lands chiefly valuable for building-stone.

§ 140. In construing the term "mineral lands," as applied to administration of school land grants, the time to which the inquiry is addressed is the date when the asserted right to a particular tract accrued, and not the date upon which the law was passed authorizing the grant.

§ 141. Test of mineral character applied to school land grants.

§ 142. When grants to the sixteenth and thirty-sixth sections take effect.

§ 143. Selections by the state in lieu of sixteenth and thirty-sixth sections, and under general grants.

§ 144. Effect of surveyor-general's return as to character of land within sixteenth and thirty-sixth sections, or lands sought to be selected in lieu thereof, or under floating grants.

§ 145. Conclusions.


**§ 132. Grant of sixteenth and thirty-sixth sections.** —The ordinance of May 20, 1785, "for ascertaining the

"mode of disposing of the lands in the western territory," contained the following provision:—

"There shall be reserved the lot number sixteen of every "township for the maintenance of public schools within "said township."

This was an endowment of six hundred and forty acres of land in each township, equivalent to one thirty-sixth of the entire public domain.[1]

This reservation was thereafter specially provided for in the organization of each new state up to the time of the formation of Oregon territory. In the act creating this territory,[2] an additional grant of the thirty-sixth section in each township was provided for, for the use of the future state, and ever since that date every new state, upon its admission to the union, has received a donation of the sixteenth and thirty-sixth sections, or twelve hundred and eighty acres, in each township. Reservations of these sections have likewise been made in all the territories, to be granted and confirmed to such new states as may be carved out of them.[3]

**§ 133. Indemnity grant in lieu of sixteenth and thirty-sixth sections lost to the states.**—Upon extending the surveys over the public lands in the various states, it was discovered that in many instances a sixteenth or thirty-sixth section, and sometimes both, in numerous townships were lost to the state; that is, by reason of a prior legal occupancy or settlement, or an antecedent grant, appropriation, or reservation, it was impossible for the grant as to these sections to take effect. In such cases the sections were said not to be *in place*. To remedy this, and compensate the state for the loss thus occurring, congress enacted laws granting indemnity; that is, the state was authorized to select other unoccupied and unreserved public lands within its boundaries *in lieu* of the sixteenth or thirty-sixth sections so lost to the state.

[1] Public Domain, 224.
[2] August 14, 1848, 9 Stats. at Large, 323.
[3] Public Domain, 226.

**§ 134. Other grants for schools and internal improvements.**— In addition to the grant of sixteenth and thirty-sixth sections, and lands in lieu thereof, where they are lost to the state, congress has from time to time made other grants to the several states, not of any designated sections or townships, but of a given quantity of land, to be selected from the body of the public domain.

On September 4, 1841,[1] congress granted to each of the public land states then admitted, and to each new state to be thereafter admitted, five hundred thousand acres of public lands for internal improvements, to be selected from the body of the public lands within the respective states. This is commonly called "the five-hundred-thousand-acre "grant."

A grant was also made to each of the public land states of two townships, or forty-six thousand and eighty acres, for university purposes, the grant to be satisfied by selection of unoccupied and unappropriated public lands within the respective states.

A further grant was made to the various states of the union, to those containing no public lands as well as to those which were essentially public land states.[2] This grant, commonly called "the agricultural college grant," was of thirty thousand acres for each senator and representative to which the state was entitled under the apportionment of 1860.[3] In the public land states, the grant was to be satisfied by selection of public lands within their respective boundaries. To the states wherein there was no public land, scrip was issued, commonly known as "agricultural college scrip." This scrip could be located anywhere on the unreserved and unappropriated public domain in any state, and could be used in the payment of pre-emption or commuted homestead entries. It was sold to speculators and individuals, who subsequently utilized it by locating it on lands subject to private entry.

[1] 5 Stats. at Large, 453.
[2] Public Domain, 229.
[3] July 2, 1862, 12 Stats. at Large, 503.

Congress also made other donations of a similar character, but we have here given a sufficient outline of grants to states to enable us to discuss their operation and effect with reference to mineral lands on the public domain.

**§ 135. Conflicts between mineral claimants and purchasers from the states.**—In administering grants of such extensive character, it is quite natural that conflicts should arise between the miner and the purchaser of state lands, particularly in the mineral regions of the west. These controversies found their way into the courts and the land department, and, as a result, certain principles of law have been announced which may be best presented by first considering the character of the lands which could pass by the grant, and at what time the respective grants take effect and become operative as to particular tracts.

**§ 136. Mineral lands excepted from the operation of grants to the states.**—Some of the grants to the states in terms reserved mineral lands from their operation. This was the case with the agricultural college grant, which contained the reservation "that no mineral lands shall be "selected or purchased under the provisions of this act." And the grant of seventy-two sections to the state of California for seminary purposes[1] contained a similar clause. Kindred exceptions were inserted in all the more recent grants; but in some of the earlier ones, notably those donating sixteenth and thirty-sixth sections, and the five-hundred-thousand-acre grant, the law was silent as to mineral lands. But, as we have already seen, the uniform policy of the government prior to the enactment of the general mining laws was to reserve mineral lands from sale, pre-emption, and all classes of grants.[2] Of course, since the passage of the mining laws, title to mineral lands can be obtained only under these laws.

In California, the supreme court of that state early

[1] 10 Stats. at Large, 244. [2] See, *ante*, § 47, and cases there cited.

announced the doctrine in reference to the grant of sixteenth and thirty-sixth sections, that, as there was no statement in the act of any condition, exception, reservation, or limitation, mineral lands were not withdrawn from the operation of the act, but passed to the state.[1] But this case was subsequently overruled.[2]

The supreme court of Nevada, in construing a similar grant to that state, held that mineral lands within sections sixteen or thirty-six did not pass; but the decision was based upon an estoppel upon the part of the state by reason of the passage by congress of an act concerning certain lands granted to the state, which act provided that in all cases lands valuable for mines of gold, silver, quicksilver, or copper should be reserved from sale.[3] The legislature of the state accepted the grants subject to this clause.[4] And the court very properly held that by reason of this acceptance the state was estopped from asserting title to mineral lands found within the sixteenth and thirty-sixth sections.[5]

The land department, in recent years at least, by a uniform line of decisions, has held that mineral lands did not pass to the state under the school grants.[6]

The supreme court of the United States had this question under consideration in reference to the grant of sixteenth and thirty-sixth sections to the state of Michigan, in Cooper *v.* Roberts,[7] where it was held that mineral lands passed by the grant, even as against a license from the government to search for and extract lead and other ores. The grant in question became operative at a period

[1] Higgins *v.* Houghton, 25 Cal. 252. See, also, Wedekind *v.* Craig, 56 Cal. 642.

[2] Hermocilla *v.* Hubbell, 89 Cal. 8.

[3] 14 Stats. at Large, p. 85, § 5.

[4] Nev. Stats. (1867), 57; Comp. Laws Nevada, vol. ii., §§ 3835, 3836, 3837.

[5] Heydenfeldt *v.* Daney G. & S. M. Co., 10 Nev. 290.

[6] *In re* Hogden *et al.*, 1 Copp's L. O. 135; Copp's Min. Decisions, 30; The Keystone Case, *Id.*, 105, 109, 125; *In re* Le Franchi, 3 L. D. 229; Keystone Lode *v.* State of Nevada, 15 L. D. 259; State of California *v.* Poley, 4 Copp's L. O. 18; *In re* Chas. Norager, 10 Copp's L. O. 54.

[7] 18 How. 173.

prior to the discovery of gold in California, and at a time when the policy of leasing lead mines by the government was in force.[1]

But at a later period the question was again brought before the supreme court of the United States in the case of the Ivanhoe M. Co. *v.* Keystone M. Co.,[2] and the doctrine was finally established that congress in making these grants to the states did not intend to depart from the uniform policy theretofore adopted in reserving mineral lands from sale, and that mineral lands found within a sixteenth or thirty-sixth section, known to be such at the time the grant took effect, did not pass to the state.

It may be observed that in the Ivanhoe-Keystone case no mention is made of the Michigan case.

The rule having been thus announced, it follows as a corollary that no lands can be selected or located in satisfaction of *any* of the grants to the states which at the time of the proposed selection are known to be mineral lands.[3]

**§ 137. Restrictions upon the definition of "mineral "lands," when considered with reference to school land grants.**—In a preceding chapter, we have endeavored to establish a general definition of the term "mineral lands," as that term is used in the various mining acts of congress; and we have also attempted to formulate definite rules of statutory construction to be applied to such acts and these terms when found therein.[4]

Thus, we have heretofore said[5] that the word "min- "eral," as used in these various acts, should be understood in its widest signification, and that all substances which are classified as a mineral product in trade or commerce, or possess economic value for use in trade, manufacture, the sciences, or the arts, fall within the designation of the term "mineral." That this is true as a general rule, we have no doubt. We are firmly convinced that it should

[1] See, *ante*, § 33.
[2] 102 U. S. 167.
[3] United States *v.* Mullan, 7 Saw. 466, 470; S. C. on appeal, 118 U. S. 271.
[4] Tit. III., ch. i., §§ 85-96.
[5] See, *ante*, § 96.

be accepted as a universal rule in dealing with the public lands. But when we are confronted with the administration of the school land grants, railroad grants, and other grants of a like character, we find the land department disposed to discriminate in some instances between those substances which are obviously mineral and those which, owing to the advancement in science and the industrial arts, become classified commercially or scientifically as mineral products.

§ 138. **Petroleum lands.**—Thus the land department, in a very recent case decided by Secretary Hoke Smith,[1] has held that petroleum is not a mineral within the meaning of the mining acts, and that lands containing it, though in sufficient quantities to render them more valuable for that purpose than for any other, are not mineral lands, and may be selected by the state in lieu of lost sixteenth and thirty-sixth sections.

The same secretary had in a previous instance ruled that petroleum lands could not be appropriated under the mining laws;[2] and, of course, his ruling as to state selections logically followed.

Secretary Smith in his first decision makes the statement that the first mention of petroleum in connection with the mineral laws was in the case of Maxwell *v.* Brierly,[3] wherein Secretary Teller classifies petroleum as a mineral product, not in a case involving petroleum lands, but by way of a general recital as to what substances in his judgment should be classified as mineral.

Mr. Smith evidently overlooked the fact that General Burdett, while commissioner of the general land office (1875), had established a rule, which succeeding administrations followed—that petroleum claims might be entered under the mining act of 1872.[4]

[1] Chandler *v.* State of California, Oct. 27, 1896.
[2] *Ex parte* Union Oil Co., 23 L. D. 222.
[3] (1883), 10 Copp's L. O. 50.
[4] Copp's Min. Lands, 160.

In 1882, Commissioner McFarland announced that, according to the practice of the department, lands containing petroleum had theretofore been entered as placers and patented as such, and that such lands were subject to entry and disposal according to the law and regulations relating to placer claims.[1] This was also overlooked by Secretary Smith.

The cases of Downey *v.* Rogers,[2] Samuel E. Rogers,[3] Roberts *v.* Jepson,[4] and Piru Oil Company[5] followed, and read in the light of the antecedent practice of the land department, recognize petroleum as a mineral product, and lands containing it in sufficient quantities to make them more valuable for oil purposes than for any other as being mineral lands. Secretary Smith comments on these four cases, and declines to accept them as tending to establish the doctrine for which we are contending.

The secretary cites the Pennsylvania case of Dunham *v.* Kirkpatrick,[6] to the effect that a reservation of "mineral" in a deed does not include petroleum, although it is admitted petroleum is technically a mineral.

This decision is in conflict with prior cases decided in Pennsylvania,[7] and has been practically overruled or its doctrine ignored by the same court in a later case.[8]

The ruling of Secretary Smith as to the mineral character of petroleum is in direct opposition to a decision in the United States circuit court (ninth circuit), wherein Judge Ross, sitting as circuit judge, says:—

"The premises in controversy are oil-bearing lands, the "government title to which, under existing laws, *can alone* "*be acquired pursuant to the provisions of the mining laws* "*relating to placer claims.*"[9]

[1] *In re* A. A. Dewey, 9 Copp's L. O. 51.
[2] 2 Land Decisions, 707.
[3] 4 Land Decisions, 284.
[4] *Id.* 60.
[5] 16 Land Decisions, 117.
[6] 101 Pa. St. 36.
[7] Stoughton's Appeal, 88 Pa. St. 198; Thompson *v.* Noble, 3 Pittsb. 201. See, also, 10 Morr. Min. Rep., 421, note 8.
[8] Gill *v.* Weston, 110 Pa. St. 313.
[9] Gird *v.* Cal. Oil Co., 60 Fed. 531, 532.

We think, considering the previous practice of the land department and its construction of the mining laws as applied to oil lands, as well as the weight of judicial decisions, Secretary Smith was in error in deciding that lands containing petroleum could not be acquired under the mining laws, but were open to selection under grants to the states.

**§ 139. Lands chiefly valuable for building-stone.**— While on the subject of a restricted meaning applied to the term "mineral lands" in administering the school land grants we might note, in passing, that the land department at one time held that lands chiefly valuable for building-stone were not excepted from the grant to the state for school purposes,[1] although under the act of congress of August 4, 1892,[2] such lands might be entered under the placer mining laws, and although by numerous decisions prior to the passage of that act the department held that they were subject to entry under the mining laws.[3]

Whatever may have been the rule as to this class of lands prior to the passage of the act of August 4, 1892, as then applied to the administration of land grants for school purposes, it is quite manifest that under the rule announced by the supreme court of the United States in Mullan *v.* United States, hereafter cited,[4] that act was a legislative interpretation which for all future purposes classified lands containing valuable deposits of building-stone as mineral lands, and they can not now be selected under the school land grants. We think the weight of authority sustains us in the view that they never could be so selected, subsequent to the passage of the placer laws of 1870 at least.

[1] *In re* Joseph H. Harper, 16 L. D. 110; South Dakota *v.* Vermont S. Co., 16 L. D. 263.

The department in the later case of Paris Gibson (21 L. D. 327) declined to give its approval of the doctrine of the South Dakota case.

[2] 27 Stats. at Large, 264.

[3] Bennett's Placer, 3. L. D. 116; McGlenn *v.* Wienbroeer, 15 L. D. 370; Maxwell *v.* Brierly, 10 Copp's L. O. 50.

[4] See, *post*, § 140.

**§ 140. In construing the term "mineral lands," as applied to administration of school land grants, the time to which the inquiry is addressed is the date when the asserted right to a particular tract accrued, and not the date upon which the law was passed authorizing the grant.**—We have digressed for the moment to discuss a question which might be more appropriately presented when dealing with the character of lands subject to appropriation under the so-called placer laws; but it seems necessary for us here to present the matter as introductory to the main subject presently under consideration.

There is nothing in the context of the school land-grant laws where the reservation of "mineral lands" appears which restricts the meaning of the term. If a restricted meaning is to be applied, it must be by reason of the relative position of the parties or the substance of the transaction.[1]

In considering this "relative situation of the parties, "and the substance of the transaction," to what point of time must we direct our attention in dealing with school land grants and rights asserted under them? To the date of the passage of the act making the grant or authorizing the selection, or the time when the state or its grantees become first entitled to assert a claim to a particular tract of land?

Fortunately, this question has been satisfactorily settled for us; so that lengthy discussion will be avoided.

Prior to the passage of the coal land act of July 1, 1864,[2] the land department did not regard or treat coal lands or coal mines as mineral lands, within the meaning of the prior acts of congress.[3] This act provided:—

"That when any tracts embracing coal-beds or coal-
"fields constituting portions of the public domain, and
"which, as mines, are excluded from the pre-emption act
"of 1841, and which, under past legislation, are not liable
"to ordinary entry, it shall and may be lawful for the
"president to cause such tracts in suitable legal subdivis-
"ions to be offered at public sale to the highest bidder."

[1] Stewart on Mines, 10-13. See, *ante*, § 91.

[2] 13 Stats. at Large, 343.

[3] *In re* Yoakum, 1 Copp's L. O. 3.

Assuming that the above ruling of the land department was correct, prior to the passage of that act coal lands might be selected under previously enacted school land-grant laws.

In 1868, one Mullan applied to the state surveyor-general of California to purchase a half-section of land selected by the state under the act of March 3, 1853, in lieu of the corresponding half of a sixteenth section theretofore lost to the state. His application was favorably considered, and in due process of time the secretary of the interior listed the land to the state, and Mullan or his grantee received a state patent. At the time Mullan instituted the proceedings culminating in the listing and issuance of the state patent the land was notoriously coal land, and was being actually worked for its coal deposits by the Black Diamond coal company. These facts were brought to the attention of the government, and suit was instituted in its behalf to vacate the listing. The case was tried before the late Judge Sawyer, in the circuit court of the United States (ninth circuit),[1] who held that whatever might have been originally the proper construction of the word "mines," as used in the pre-emption act of 1841, the act of July 1, 1864, gave a legislative construction to the term which thenceforth attached to all known "coal-beds or coal-fields" *in which no interest had before become vested*, and withdrew such coal lands from the operation of all other acts of congress; that thereafter known coal lands were not subject to selection by the state as lieu lands; and that the state had no indefeasible rights to select such lieu lands from any particular class of lands.

The supreme court of the United States affirmed this decision,[2] thus summing up its views:—

"At the time the selection was actually made therefor, "it cannot be doubted that the land was mineral land, both "in law and in fact, within the meaning of the act under "which the state, and those who purchased from the state,

[1] United States v. Mullan, 7 Saw. 466.
[2] Mullan v. United States, 118 U. S. 271.

"undertook to acquire title, and we agree with the circuit "court in the opinion that the *rights of the parties are to be* "*determined by the law as it stood then.*"

The enactment of the general mining laws by congress incorporated into the land system a new element, announced new principles and a new policy, in the light of which all pre-existing land-grant laws to the extent that they remain unsatisfied are to be administered. All land-grant acts passed subsequent to the enactment of the mining laws operative in any of the precious-metal-bearing states or territories, contain the usual clauses of reservation as to mineral lands.

**§ 141. Test of mineral character applied to school land grants.**—As conclusions logically flowing from what has been heretofore said, the question as to whether a given tract of land is mineral, and its selection under school land-grant laws for that reason inhibited, or is non-mineral, and subject to selection, is one to be determined according to the state of the law as it exists at the time the right to select is asserted.

If the mineral character of such tract is established according to the rules announced in section ninety-eight, then it cannot pass under the grants to states for educational or other purposes.

It is, of course, conceded that after a right has once vested to a tract of land which, at the time it became segregated from the body of the public domain and passed to states or individuals, was non-mineral, according to the state of the law and the facts then existing, no subsequent change in commercial conditions nor advancement in the industrial arts can effect those rights.[1] But tracts still open to selection are, in turn, to be governed by the new condition of things, and controlled by such enlarged definitions as may be then applied by the current of judicial authority. This rule injures no one. It is consistent with the progressiveness of the age and the spirit of our laws.

[1] *In re* Paris Gibson, 21 L. D. 327.

**§ 142. When grants to the sixteenth and thirty-sixth sections take effect.**— Until the survey of the township and the designation of the specific sections, the right of the state rests in compact, binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be the subject of the grant. But when the political authorities have performed this duty, the compact has an object upon which it can attach; and if there is no legal impediment, the title of the state becomes a legal title.[1]

While the grant of these sections is one *in præsenti*, it is, before the lands are surveyed, essentially a float, a grant of a quantity of lands equal in amount to twelve hundred and eighty acres in each township.

Until the status of the lands is fixed by a survey, and they are capable of identification, congress reserves absolute power over them, compensating the state for such loss as might accrue to it to the extent that legal impediments prevent the title from passing.[2]

Until the survey is finally approved, the state has no title which it can convey to a purchaser.[3]

Therefore, in determining whether or not the lands embraced within these sections are mineral lands, and exempted from the operation of the grant, the inquiry is addressed to their known character at the time of the final approval of the survey. If at the time of such approval they are known to be mineral, within the meaning of that term as heretofore defined, title does not pass to the state,[4]

[1] Cooper v. Roberts, 18 How. 173. See, also, Sherman v. Buick, 45 Cal. 656; Higgins v. Houghton, 25 Cal. 252; Finney v. Berger, 50 Cal. 248; Medley v. Robertson, 55 Cal. 397, 399.

[2] Heydenfeldt v. Daney G. M. Co., 93 U. S. 634.

Under act of February 28, 1891 (26 Stats. at Large, 796), states are awarded indemnity by reason of losses accruing to them on account of mineral character of sixteenth and thirty-sixth sections.

[3] Finney v. Berger, 50 Cal. 248; Medley v. Robertson, 55 Cal. 397.

[4] Ivanhoe M. Co. v. Keystone Cons. M. Co., 102 U. S. 167; Heydenfeldt v. Daney, 93 U. S. 634; Hermocilla v. Hubbell, 89 Cal. 5.

but remains in the general government and subject to its disposal under the mining laws.[1]

If they were not known to be mineral at the date of the approval of the survey, they pass to the state, and discovery of minerals on such lands subsequent to such approval does not defeat the title of the state.[2]

As was said by the supreme court of the United States,[3] a change in the conditions occurring subsequently to the taking effect of the grant, whereby new discoveries are made, or by means whereof it may become profitable to work the mineral deposits, cannot affect the title as it passed at the time of the grant. This is a general rule, applicable to all classes of grants.[4]

It is also true that if at the time the grant would have taken effect, in the absence of legal impediments, the land was known to be mineral in character, the subsequent exhaustion of the mineral and its abandonment for mining purposes would not operate to vest title in the state.[5]

What we have heretofore said as to the time when grants to sixteenth and thirty-sixth sections take effect, applies to surveys made subsequent to the admission of the state into the union. Where lands have been surveyed prior to the admission of the state, the grant takes effect as of the date of admission; and in such cases the inquiry as to the character of the land is directed to that point of time.[6]

[1] Hermocilla *v.* Hubbell, 89 Cal. 5.

[2] Wheeler *v.* Smith, 32 Pac. 784; Townsite of Silver Cliff, 6 Copp's L. O. 152; Keystone Case, Copp's Min. Dec. 105, 109, 125; State of California *v.* Poley, 4 Copp's L. O. 18; *In re* J. Dartt, 5 Copp's L. O. 178; *In re* State of Colorado, 6 L. D. 412; Virginia Lode, 7 L. D. 459; *In re* Abraham L. Miner, 9 L. D. 408; Pereira *v.* Jacks, 15 L. D. 273.

[3] Colo. C. & I. Co. *v.* United States, 123 U. S. 307.

[4] Deffeback *v.* Hawke, 115 U. S. 404; Davis *v.* Weibbold, 139 U. S. 507; Hunt *v.* Steese, 75 Cal. 620; Cowell *v.* Lammers, 10 Saw. 247; Manning *v.* San Jacinto Tin Co., 7 Saw. 419; Richards *v.* Dower, 81 Cal. 51; S. C. on writ of error, 151 U. S. 658; McCormick *v.* Sutton, 97 Cal. 373; Smith *v.* Hill, 89 Cal. 122.

[5] Hermocilla *v.* Hubbell, 89 Cal. 5.

[6] Townsite of Silver Cliff, 6 Copp's L. O. 152; Boulder & Buffalo M. Co., 7 L. D. 54; Fleetwood Lode, 12 L. D. 604; Warren *v.* State of Colorado, 14 L. D. 681.

**§ 143. Selections by the state in lieu of sixteenth and thirty-sixth sections, and under general grants.**— It follows, as a corollary from what has heretofore been said, that the states can not select lands of known mineral character in satisfaction of any of their land grants.[1]

The point of time when the character of a given tract sought to be selected by the state in satisfaction of any of its floating grants is to be determined, is the time when application to select is made. In making this investigation, the land department is governed by the same rules of law and practice as control the administration of homestead, railroad, and other classes of grants. While the investigation is directed to the time when application to select is made, the land department retains jurisdiction until the selection has been finally approved, and the lands are finally certified or listed to the state, such listing being the equivalent of a patent.[2]

A discovery of mineral at any time prior to this listing, in sufficient quantities to render the land more valuable for mining purposes than for any other, would authorize the department to reject the selection.[3]

Until the selection is finally approved by the officers of the government charged with this duty, and the land is certified or listed to the state, the state has no title which it can convey to the purchaser.[4]

Without such approval, neither the state nor its grantee can question any future disposition which the United States may make of the land embraced in the attempted selection.[5]

**§ 144. Effect of surveyor-general's return as to character of land within sixteenth and thirty-sixth sections,**

[1] United States *v.* Mullan, 7 Saw. 470; Mullan *v.* United States, 118 U. S. 271.

[2] Howell *v.* Slauson, 83 Cal. 539.

[3] This subject will be more generally dealt with when treating of the jurisdiction and functions of the land department, in a subsequent chapter.

[4] Churchill *v.* Anderson, 53 Cal. 212; Buhne *v.* Chism, 48 Cal. 467; Wisconsin Cent. R. R. *v.* Price, 133 U. S. 496.

[5] Roberts *v.* Gebhart, 104 Cal. 67.

**or lands sought to be selected in lieu thereof, or under floating grants.**—We have already had occasion to comment on the general unreliability of that class of returns of surveyors-general[1] from which an inference or presumption is said to arise that the lands are non-mineral in character. Where the lands, however, are returned as mineral, it suggests direct knowledge brought to the attention of the surveyor of the notorious mineral character of the land. And in such cases, perhaps, more weight should be given to the returns. Be that as it may, where a given sixteenth or thirty-sixth section is returned as mineral by the surveyor, and his field-notes and plat are filed in the general land office, this is a sufficient determination that the lands are mineral to authorize the state to select indemnity lands in lieu thereof.[2]

Of course, the state having selected lieu lands in such a case, it would be estopped from ever after claiming that the surveyor-general's return upon which it based its right to select lieu land was false. A like estoppel rests upon the government. It will not be permitted to assert that the lands are not mineral in character, as it is only by reason of this character that the government retains dominion and control over the lands.

Where, however, no application is made to select land in lieu of sixteenth and thirty-sixth sections, returned as mineral, the state has a right to be heard upon the question of the character of the land, in whatever tribunal the question is raised. If a mining location is made upon such a section, and application is made for a mineral patent, the state is a necessary party to the investigation touching the character of the land and the time when it became known as such.[3]

It cannot be deprived of this right by any proceeding to which it is not a party. In cases of railroad grants, where lands have been applied for by the company, the

[1] See, *ante*, § 106.

[2] Johnson v. Morris, 72 Fed. 890; *In re* State of California, 23 L. D. 423.

[3] Boulder & Buffalo M. Co., 7 L. D. 54; Fleetwood Lode, 12 L. D. 604.

published notice of application for a mineral patent to the lands applied for has been held to be sufficient notice to *all* claimants, and we do not see why the same rule should not be applicable to school grants.[1] On the other hand, a mineral claimant may attack the right of a state or its vendee to the tract, although returned as agricultural, in the ordinary tribunals, by showing that at the date of the survey or admission of the state, as the case may be, the land was known to be mineral, and did not pass to the state.[2]

As sixteenth and thirty-sixth sections pass to the state in the absence of legal impediment, without certification, by the survey *proprio vigore*, or by the admission of the state, there is no preliminary adjudication, actual or presumed, by the land department as to the character of the land, as there is in the administraton of floating grants, or even in railroad grants of particular sections. There is no antecedent judgment, as there is in pre-emption or homestead cases, which is final and conclusive upon collateral attack. It follows that the question may be raised at any time by any one in privity with the government of the United States. The holder of a valid subsisting mining location is in such privity.[3]

With reference to the state selecting lieu lands, or lands in satisfaction of its floating grants, it is not precluded from applying for lands returned as mineral. It has a right to contest this return, and establish upon hearings ordered for that purpose the non-mineral character of the land, the same as any other applicant to purchase or make private entry of public lands.

But before such selection can be preliminarily accepted, the state must "prove the mineral off," upon notice given of a hearing for that purpose.[4]

[1] N. P. R. R. *v.* Cannon, 54 Fed. 252.

[2] Hermocilla *v.* Hubbell, 89 Cal. 5.

[3] *Id.*

[4] Am. rule 110, regulations of the department, 19 L. D. 5; State of California, 22 L. D. 294; *Id.*, on review, 22 L. D. 402; Com'rs' Letter, Copp's Min. Dec. 40.

§ 145. **Conclusions.** — From the foregoing exposition of the law, we deduce the following conclusions: —

(1) That lands embraced within sixteenth or thirty-sixth sections, known to be mineral in character at the date of the final approval of the survey, where such approval becomes effectual subsequent to the admission of the state, do not pass to the state, but remain a part of the public mineral domain, subject to exploration and purchase, the same as other public mineral lands. Where the surveys have been approved prior to the admission of the state, and at the date of such admission the lands are known to be mineral, a like result follows. The lands do not pass to the state, but remain subject to disposal by the government under the mining laws.

(2) The state may not select as lieu lands, or lands in satisfaction of its floating grants, any tract whose mineral character is known or established prior to the final approval of the selection and listing to the state.

(3) Where sixteenth and thirty-sixth sections are returned by the surveyor as mineral, and the state accepts this return and selects other lands in lieu thereof, both the state and general government are estopped from thereafter asserting that the lands are non-mineral.

(4) Where such sections are returned as mineral, and the state does not accept the return as establishing the character of the land, it has a right to its "day in court" for the purpose of impeaching the return. Where it desires to select lands, either in lieu of sixteenth and thirty-sixth sections or under its floating grants, which lands are returned by the surveyor-general as mineral, it has a right to "prove the mineral off," and, if successful, to have such lands listed to it.

(5) Whether or not a given tract is of a known mineral character at the time the grant or selection would take effect, in the absence of legal impediments, must be determined by the facts as they exist at that time, and the then state of the law, as recognized by the current of judicial authority.

## Article IV. Railroad Grants.

§ 149. Area of grants in aid of railroads, and congressional legislation donating lands for such purposes.
§ 150. Types of land grants in aid of the construction of railroads, selected for the purpose of discussion.
§ 151. Character of the grants.
§ 152. Reservation of mineral lands from the operation of railroad grants.
§ 153. Grants of rights of way.
§ 154. Grants of particular sections as construed by the courts.
§ 155. Construction of railroad grants by the land department.
§ 156. Distinctions between grants of sixteenth and thirty-sixth sections to states and grants of particular sections to railroads.
§ 157. Indemnity lands.
§ 158. Restrictions upon the definition of "mineral lands," when considered with reference to railroad grants.
§ 159. Test of mineral character of land applied to railroad grants.
§ 160. Classification of railroad lands under special laws in Idaho and Montana.
§ 161. Effect of patents issued to railroad companies.
§ 162. Conclusions.

**§ 149. Area of grants in aid of railroads, and congressional legislation donating lands for such purposes.** —From the year 1850 to June 30, 1880, congress granted to states, territories, and railroad corporations, in aid of the construction of railways, upwards of one hundred and fifty million acres of the public domain. Of these, more than one hundred million acres were within the precious-metal-bearing states and territories.[1]

Prior to 1862, grants of this character were generally made to states as trustees and agents of transfer for the benefit of companies projecting the railways; but with the passage of the Pacific railroad act, July 1, 1862,[2] was inaugurated a complete change in the system of land bounties to aid in the construction of railroads. The grants were thenceforward direct to the corporation.[3] As to grants made prior to 1862, we have no particular concern. Most, if not all, of the roads extending into the mineral regions

[1] Public Domain, 273-287.
[2] 12 Stats. at Large, 489.
[3] Public Domain, 267.

of the west received their donations either under the Pacific railroad acts of 1862 and 1864 or under acts subsequently passed.

It is not within the purview of this treatise to deal with railroad grants in any respect, other than as the operation of such grants within the precious-metal-bearing states and territories requires us to analyze the general character of the grants, and to determine the nature and extent of the things granted, the time when such grants take effect as to particular tracts, and such collateral questions as may be incidentally necessary to elucidate or explain the reasons for the rules established by the courts and the land department in administering the various grants.

For this purpose it will not be necessary to enumerate or discuss all the acts of congress granting lands in aid of the construction of railroads, but it will be sufficient for us to take as a basis certain pronounced types. So far as the scope of this treatise is concerned, these types represent features common to all grants. While there may be limitations in some of the later acts which do not appear in the selected types, and perhaps larger privileges and immunities are conferred by some than by others, yet in so far as the administration of the grants within the mineral regions and their application and effect with reference to mineral lands is concerned, we do not understand that there is any opportunity for differentiation.

**§ 150. Types of land grants in aid of the construction of railroads, selected for the purpose of discussion.** —We select for the purpose of discussion the following acts and resolutions of congress:—

(1) An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes (approved July 1, 1862),[1] and the act amendatory thereof (approved July 2, 1864).[2]

[1] 12 Stats. at Large, 489. [2] 13 Stats. at Large, 356.

(2) An act granting lands in aid of the construction of a rail road and telegraph line from Lake Superior to Puget's Sound on the Pacific coast by the northern route (approved July 2, 1864).[1]

(3) Joint resolution reserving mineral lands from the operation of all acts passed at the first session of the thirty-eighth congress granting lands or extending the time of former grants.[2]

A consideration of the grants provided for by these acts, taken in connection with the joint resolution of congress, will enable us to present the subject under discussion fairly, to note the adjudicated cases, and from them formulate what we understand to be the rules to be applied in construing and administering grants of this character according to the existing state of the law.

§ 151. **Character of the grants.**—The act of July 1, 1862, granted to the corporations therein named, commonly called the "Pacific railroad companies," rights of way over the public lands to the extent of two hundred feet in width on each side of the road, together with all necessary grounds for stations, buildings, workshops, and depots, machine-shops, turn-tables, switches, side-tracks, and water-stations. In addition, there was also granted every alternate section of public land not sold, reserved, or otherwise disposed of, designated by odd numbers, to the amount of five alternate sections per mile on each side of the respective roads, on the line thereof, and within the limits of ten miles on each side of said roads.

The amendatory act of July 2, 1864, enlarged this grant from five to ten alternate sections, and the lateral limits from ten to twenty miles. Neither of these acts contained any provision authorizing the selection of indemnity lands in lieu of odd-numbered sections, which might be subsequently ascertained to be lost to the companies by reason of their prior sale, reservation, or other disposition.

[1] 13 Stats. at Large, 365. [2] *Id.* 567.

The act of July 2, 1864, incorporating the Northern Pacific railroad company, made a like grant to that company of rights of way and lands for necessary depot and other purposes. In the territories through which the projected roads might pass a land grant was given of every alternate odd-numbered section to the amount of twenty alternate sections per mile, and in the states ten alternate sections per mile.

There was also granted indemnity lands for odd-numbered sections which might be ascertained to be lost to the company, by reason either of their mineral character or their prior sale, reservation, or disposal, such indemnity lands to be selected within certain limits specified in the act.

We therefore have to deal with practically three classes of grants:—

(1) Grants of rights of way and lands for depots, side-tracks, and kindred purposes;

(2) Grants of particular sections within certain defined limits, generally called "primary," or "place," limits;

(3) A right to select lands in lieu of and as indemnity for losses accruing to the respective companies by reason of the odd-numbered sections having been previously sold, reserved, or otherwise disposed of, this right of selection to be exercised within certain defined limits, generally called "indemnity limits."

We will presently consider these different classes of grants and their attributes.

**§ 152. Reservation of mineral lands from the operation of railroad grants.**—At the time the Pacific railroad land-grant acts were passed there was no congressional law authorizing the acquisition of title to mineral lands. They were passed during what we have denominated, in a previous chapter,[1] as the second period of our national history,

[1] Tit. II., ch. iii., §§ 40-49.

during which rights and privileges upon the public mineral lands were regulated by local rules and customs, with the passive acquiescence of the government. As was said by the circuit court of appeals (ninth circuit), in dealing with mining locations within the limits of railroad grants, claims to mineral lands could be lawfully initiated by discovery, possession, and development, according to the customs of miners and local regulations at and previous to the date of the railroad grant (1864).[1]

When these railroad acts became laws, the policy of the government of reserving the mines and mineral lands for the use of the United States was fixed; and if there had been no special clauses of reservation in the acts, the courts would have been forced to the conclusion that such lands were reserved by implication from the donations to railroads, following the doctrine announced with reference to grants of sixteenth and thirty-sixth sections to the states for school purposes.[2]

However, in framing the railroad acts, congress deemed it prudent to leave no room for dispute or discussion on this score, and inserted in each one of the acts clauses of reservation. The act of July 1, 1862,[3] contained the proviso "that all mineral lands shall be excepted from the "operation of this act." The amendatory act of July 2, 1864, provided that "any lands granted by this act or the "act to which this is an amendment . . . shall not include ". . . mineral lands, . . . or any lands returned and "denominated as mineral lands." It also provided "that "the term 'mineral land,' wherever the same occurs in this "act and the act to which this is an amendment, shall not "be construed to include coal and iron land." The act of July 2, 1864, incorporating the Northern Pacific railroad company, contained reservations and limitations of similar import.[4]

[1] N. P. R. R. v. Sanders, 49 Fed. 129, 134.
[2] Ivanhoe M. Co. v. Keystone M. Co., 102 U. S. 167. See, *ante*, § 136.
[3] 12 Stats. at Large, p. 492, § 3.
[4] 13 Stats. at Large, p. 367, § 3.

At the second session of the same congress (thirty-eighth) which passed the act amendatory of the original Pacific railroad act and the Northern Pacific act, a joint resolution was adopted by the senate and house of representatives which provided,—

"That no act passed at the first session of the thirty-"eighth congress granting lands to states or corporations "to aid in the construction of roads or for other purposes " . . . shall be so construed as to embrace mineral lands, "which in all cases shall be and are reserved exclusively "to the United States, unless otherwise specially provided "in the act making the grant."[1]

The mining act of July 26, 1866, followed.

The circuit court of appeals for the ninth circuit has held that these reservations in railroad grants were made in contemplation of future legislation as well as the existing laws.[2]

In the light of this legislation, it is difficult to understand how any serious controversy could arise over the administration of these land grants in the mineral regions. But such conflicts did arise, generally between purchasers of the railroad title and mineral claimants, and the battle was fiercely waged in all the tribunals, both state and federal. These controversies involved a discussion as to the character of the grants and the time when they took effect as to particular tracts. We have observed that there are found in this class of legislation grants of three different kinds: (1) the grant of the right of way and for side-tracks, stations, and kindred purposes; (2) grants of particular sections; (3) indemnity lands. We will consider each class with reference to the mineral reservations found in the several acts.

§ 153. **Grants of rights of way.**—The grants of rights of way found in the various railroad acts contain no reservations or exceptions. They are present, absolute grants, subject to no conditions, except those necessarily implied,

[1] 13 Stats. at Large, 567. [2] N. P. R. R. v. Sanders, 49 Fed. 129.

such as that the road shall be constructed and used for the purposes designated. All persons acquiring any portion of the public lands, after the passage of such acts, take the same subject to the right of way conferred by them for the proposed road.[1]

The grants are floats until the line of the road is "definitely fixed" by filing the map of definite location. When so filed, and approved by the secretary of the interior, title vests to the lands within the limits of the right of way, as fixed by the act, as of the date of the passage of the act.[2]

The reservation of "mineral lands," found in these acts, does not apply to the lands embraced within the right of way limits. This right of way extends to and covers all public lands, whether mineral or not.[3]

If, at the time the right of way attaches, mineral lands over which the road is to pass are unoccupied, a subsequent location thereof, followed by a patent to the locators, is inferior to the right of way to the company, and must yield to the superior legal title, without resort to a court of equity to set the patent aside.

As was said by the supreme court of Montana,—

"The mineral lands excluded from the operation of this "act are evidently not those covered by the right of way. " . . . And it would be destructive of the rights of the "railroad company if mining claims could at any time be "located and worked upon the track and land covered by "the right of way. . . . The operations of mining and "the business of railroads cannot be conducted at the same "time upon the same ground: and a reservation of such a "character would beget a conflict of rights and a confusion

[1] St. Joseph and Denver City R. R. Co. *v.* Baldwin, 103 U. S. 426.

It is probable that the government would be considered as the proprietor of the minerals underneath the surface dedicated to the right of way, and that this grant did not pass the fee. But as under the mining laws all locations involve delineation of surface limits, and there is no law authorizing a specific grant of the minerals underlying the right of way, the estate of the railroad company is practically absolute.

[2] St. Joseph and Denver City R. R. Co. *v.* Baldwin, 103 U. S. 426; Smith *v.* N. P. R. R., 58 Fed. 513; W. P. R. R. *v.* Tevis, 41 Cal. 489.

[3] Doran *v.* C. P. R. R., 24 Cal. 246; Wilkinson *v.* N. P. R. R., 5 Mont. 538, 548.

"of interests not in contemplation of intelligent legisla-
"tive action."[1]

The limits of the grant of the right of way once fixed by the filing and approval of the map of definite location cannot thereafter be changed to the detriment of any other party.[2]

It will be remembered that these decisions are under acts passed prior to the mining act of July 26, 1866. We do not concede that a right of way granted to a railroad company subsequent to the passage of that act would take precedence over a prior valid subsisting mining location. As we understand the law, since the passage of the mining acts the location of a valid mining claim operates to withdraw the land embraced within it from the public domain. It is a grant from the government. A railroad corporation claiming a right of way under a subsequent grant by congress could not cross the located mining claim without condemning the land and paying the miner compensation. In this respect, as we will hereafter endeavor to show, mining claims differ from inchoate homestead and pre-emption claims. As to lands for depot, side-track, and other kindred purposes, no controversies are likely to arise. For the most part, these adjuncts are necessarily within the right of way limits, if in fact the laws do not contemplate they should be. If other lands necessary to be used for these collateral purposes may be selected outside of the right of way limits, then their selection would necessarily be under the supervision of the land department, and rights thereto would not attach until final approval of the selection.

**§ 154. Grants of particular sections, as construed by the courts.**— The grants of the alternate sections are said to be of lands "in place," and the limits within which they are granted are called, "primary," or "place," limits, contradistinguished from "indemnity" limits, in cases of

[1] Wilkinson v. N. P. R. R., 5 Mont. 538, 548.
[2] Smith v. N. P. R. R., 58 Fed. 513, and cases cited.

grants which provide for indemnity or lieu selections, as well as for lands "in place."

Grants of particular sections or of lands "in place" do not acquire precision until the lands are surveyed and the line of the road is definitely fixed. Until such time the grant is said to be a float. Such grants are, however, grants *in præsenti*. They attach to particular tracts as soon after the filing of the map of definite location of the road as these tracts become identified by survey; and when so identified, title vests in the company, in the absence of legal impediments, by relation as of the date of the passage of the act. This is too well settled to require argument. The authorities in support of it are numerous and uniform.[1]

While this is true as to such lands as are within the purview of the grant, it is not to be inferred that the mineral or non-mineral character of the land is to be determined as of the date of either the survey or filing the map of definite location.

This question came before the circuit court of the United States for the ninth circuit, northern district of California, upon the demurrer to the complaint in the case of Francœur *v.* Newhouse,[2] wherein the late Judge Sawyer announced the rule that the exception of mineral lands from the grant to the Pacific railroads only extended to lands *known* to be mineral and apparently mineral at the time *when the grant attached;* and a discovery of a gold mine in the lands after the title has vested in the company by full performance of the conditions did not defeat the title of the railroad company, although at the time of the discovery no patent had been issued to the railroad.

[1] Van Wyck *v.* Knevals, 106 U. S. 360; Kan. P. Ry. Co. *v.* Dunmeyer, 113 U. S. 629; St. Paul & Pacific R. R. Co. *v.* N. P. R. R. Co., 139 U. S. 1-5; Sioux City & L. F. T. L. & L. Co. *v.* Griffey, 143 U. S. 32; Smith *v.* N. P. R. R., 58 Fed. 513; United States *v.* S. P. R. R., 146 U. S. 570; Schulenberg *v.* Harriman, 21 Wall. 44, 60; Missouri, K. & T. R. Co. *v.* Kansas Pac. R. R. Co., 97 U. S. 491; St. Joseph & Denver C. R. Co. *v.* Baldwin, 103 U. S. 426; N. P. R. R. *v.* Wright, 54 Fed. 67; S. P. R. R. *v.* Whitaker, 109 Cal. 288; McLaughlin *v.* Menotti, 89 Cal. 354.

[2] 40 Fed. 618.

Subsequently, at the trial of this cause, the same judge charged the jury to the same effect; that the words "mineral land," as used in the act of congress, meant land known to be mineral at the time the grant took effect and attached to the specific land in question, or lands which there was satisfactory reason to believe were such at said time; that only such land as was known to be mineral, or which there was satisfactory reason to believe was mineral, at the time the grant attached to the land is excepted from the grant.[1] The doctrine thus announced was maintained or accepted in several later cases in the same circuit.[2]

The case of Northern Pacific Railroad v. Barden,[3] arose in the same circuit in the district of Montana, the hearing being had before Judges Sawyer and Knowles. Judge Sawyer reiterated his views as expressed in the Francœur-Newhouse case; but Judge Knowles dissented, holding that the mineral character of the land might be established at any time prior to the issuance of the patent to the railroad company, and when so established such land was not within the purview of the grant, and the title thereto never vested in the company.

This case went to the supreme court of the United States on writ of error,[4] and that tribunal settled the controversy. The grant there under consideration was to the Northern Pacific railroad, under the act of July 2, 1864, heretofore referred to. It appeared that the line of the road opposite and past the lands in controversy became definitely fixed on July 6, 1882, by filing with the commissioner of the general land office the required plat. The quartz-mining claims were on an odd-numbered section of the railroad grant, within the "place," or "primary," limits, and were discovered in 1888. Prior to such discovery, the railroad company had applied to the government to have the section in question certified to it under its grant, and such

[1] Francœur v. Newhouse, 43 Fed. 238.

[2] Valentine v. Valentine, 47 Fed. 507; N. P. R. R. v. Barden, 46 Fed. 502; N. P. R. R. v. Sanders, 49 Fed. 129; N. P. R. R. v. Cannon, 54 Fed. 252.

[3] 46 Fed. 502.

[4] Barden v. N. P. R. R., 154 U. S. 288.

application had been approved by the commissioner of the general land office: but no action had been taken thereon by the secretary of the interior. The land in question had been returned by the surveyor-general as agricultural land.

Upon this state of facts the supreme court of the United States enunciated the following rules of law:—

(1) The Northern Pacific railroad company cannot recover under the grant to it by the act of congress of July 2, 1864, mineral lands from persons in possession thereof who have made locations, although the mineral character of the land was not discovered until the year 1888, no patent having been issued to said company therefor;

(2) It was the intention of congress to exclude from the grant of lands to the Northern Pacific railroad company actual mineral lands, whether known or unknown, and not merely such as were at the time known to be mineral;

(3) The reservation in the grant of mineral lands was intended to keep them under government control for the public good, in the development of the mineral resources of the country, and for the benefit and protection of the miner and explorer, instead of compelling him to litigate or capitulate with a stupendous corporation and ultimately succumb to such terms, subject to such conditions, and amendable to such servitudes as it might see proper to impose;

(4) The government has exhibited its beneficence in reference to its mineral lands, as it has in the disposition of its agricultural lands, where the claims and rights of the settlers are fully protected. The privilege of exploring for mineral lands was in full force at the time of the location of the definite line of the road, and was a right reserved and excepted out of the grant at that time.

This is the law of the land; and in the light of these rules all grants to railroads are to be construed and administered. A discovery of mineral on lands falling within the primary, or place, limits of any railroad grant, at any

time prior to the issuance of the patent, if it be demonstrated that such lands are in fact mineral, within the meaning of that term as defined by the current of judicial authority, establishes the fact that the lands are not within the grant, and title thereto never vested in the railroad company.

It will be observed that the grant in question in the Barden case was one which in addition to the grant of alternate sections also granted indemnity to the Northern Pacific railroad, in lieu of such lands as might be lost to it by reason of their mineral character. In the decision of the court this fact is noted. But we do not apprehend that this element was of controlling force. The same principles of law as applied to grants which contain indemnity provisions apply with equal force to grants which do not contain them, such as the original Pacific railroad act of July 1, 1862. In the former class of grants, congress has simply declared that the grant as to quantity should not suffer diminution. In the latter, congress has simply granted the lands to the railroad company to the extent that they are of the class which are properly patentable under the act. To the extent that the lands within the limits are within the reservation clauses, then, and to that extent, the grant as to quantity is diminished.

§ 155. **Construction of railroad grants by the land department.**—The rule announced by the supreme court of the United States in the Barden case was always followed by the land department in administering railroad grants. This fact is so stated in the decision in that case, and the ruling announced by Secretary Noble in C. P. R. R. *v.* Valentine[1] is thus quoted at length:—

"The very fact, if it be true, that the office of the patent "is to define and identify the land granted, and to evidence "the title which vested by the act, necessarily implies that "there exists jurisdiction in some tribunal to ascertain "and determine what lands were subject to the grant and

[1] 11 Land Decisions, 238, 246.

"capable of passing thereunder. Now, this jurisdiction is "in the land department, and it continues, as we have seen, "until the lands have been either patented or certified to "or for the use of the railroad company. By reason of "this jurisdiction, it has been the practice of that depart- "ment for many years past to refuse to issue patents to "railroad companies for lands found to be mineral in char- "acter at any time before the date of the patent. Moreover, "I am informed by the officers in charge of the mineral "division of the land department that ever since the year "1867 (the date when that division was organized) it has "been the uniform practice to allow and maintain mineral "locations within the geographical limits of railroad grants, "based upon discoveries made at any time before patent, or "certification where patent is not required. This practice "having been uniformly followed and generally accepted "for so long a time, there should be, in my judgment, the "clearest evidence of error, as well as the strongest reasons "of policy and justice, controlling before a departure from "it should be sanctioned. It has, in effect, become a rule "of property."[1]

**§ 156. Distinctions between grants of sixteenth and thirty-sixth sections to states and grants of particular sections to railroads.**—Grants to railroads of particular sections bear a striking resemblance to the grants to the states of sixteenth and thirty-sixth sections for school purposes. Both are grants *in præsenti*. But in cases of school grants no patents issue to the state. The state has nothing to do or perform as a condition precedent to the taking effect of the grant. Nor is any action of the land depart-

[1] This case involved the same property in controversy in Valentine *v.* Valentine (47 Fed. 597). The author was counsel for the mineral claimant in both proceedings. Before the land department the inquiry was limited to the *present* character of the land. In the circuit court, under the previous ruling in that circuit in Francoeur *v.* Newhouse (40 Fed. 618), the inquiry was addressed to the date of the passage of the railroad act and the filing of the map of definite location. The ruling of the secretary in the case before the land department has been quoted approvingly and followed in later cases. North Star M. Co. *v.* C. P. R. R., 12 L. D. 608; N. P. R. R., 13 L. D. 691; Winscott *v.* N. P. R. R., 17 L. D. 274; N. P. R. R. *v.* Marshall, *Id.* 545; N. P. R. R. *v.* Champion Cons., 14 L. D. 639. See, also, the earlier cases of C. P. R. R. *v.* Mammoth Blue Gravel, 1 Copp's L. O. 134; G. D. Smith, 13 Copp's L. O. 28.

ment invoked preliminarily as to determination of the character of the land. It has the power, when called upon at the instigation of either party, to make the investigation; but it is not an exclusive power, and nothing in ordinary cases ever issues to the state which is evidence of any judgment of the land department upon the question of the character of the land. In cases of railroad grants the company is required to comply with a number of conditions before it can assert its right to a patent. The land department retains exclusive jurisdiction over these railroad lands until patent issues, for the purpose of determining whether or not the conditions have been complied with, and necessarily to adjudicate upon the patentability of the lands under the particular act in question. The late Judge Sawyer thus forcibly stated the rule:—

"Under the statute [Pacific railroad act] it is as clearly "the duty of the officers authorized to issue patents to the "railroad companies, to ascertain whether the lands pat- "ented are embraced in the congressional grant, and "patentable, or are mineral lands, and not patentable, as it "is in the case of pre-emption, homestead, or other entry "and sale of public lands to ascertain the facts authorizing "the issue of the patent. . . . There must be some point "of time when the character of the land must be finally "determined; and, for the interest of all concerned, there "can be no better point to determine this question than at "the time of issuing the patent."[1]

The supreme court of the United States thus announced the rule in the Barden–N. P. R. R. case,[2] heretofore discussed, after quoting the ruling of the land department in the case of C. P. R. R. *v.* Valentine:—

"The fact remains that under the law the duty of deter- "mining the character of the lands granted by congress "and stating it in instruments transferring the title of the "government to the grantees reposes in officers of the land "department. Until such patent is issued, defining the "character of the land granted and showing that it is non-

[1] Cowell *v.* Lammers, 10 Saw. 255, 257. See, also, N. P. R. R. *v.* Cannon, 54 Fed. 272.

[2] 154 U. S. 330.

"mineral, it will not comply with the act of congress in "which the grant before us was made.

"The grant, even when all the acts required of the "grantees are performed, only passes a title to non-mineral "lands; but a patent issued in proper form upon a judg- "ment rendered after a due examination of the subject by "the officers of the land department charged with its prep- "aration and issue that the lands were non-mineral, would, "unless set aside and annulled by direct proceedings, estop "the government from contending to the contrary."

As in cases of sixteenth or thirty-sixth sections there is no "instrument transferring the title issued by the "department, no patent in proper form upon a judgment "rendered after a due examination of the subject by the "officers of the land department," the question remains to be litigated whenever and wherever it may arise.

As we have heretofore seen, when dealing with school grants, the surveyor-general's return concludes no one.[1] Neither does it, for that matter, in the case of railroad grants.[2]

The foregoing illustrates the distinctions to be made between the two classes of grants. We think it nothing more than right that where a given tract of land has been applied for by a railroad company, and its selection thereof is of record, that the company should be notified in some way of an adverse application.[3] The published notice of application for a mineral patent required by section twenty-three hundred and twenty-five has been held to be sufficient.[4]

§ 157. **Indemnity lands.**—Ordinarily, it will not appear at the time the line of the road is definitely fixed how many acres of land or what lands are excepted from the grant of land "in place," by reason of their mineral character, prior sales, or reservations. Until this is ascertained

[1] See, *ante*, § 144.

[2] Barden v. N. P. R. R., 154 U. S. 288; Winscott v. N. P. R. R., 17 L. D. 274; Cal. & Ore. R. R., 16 L. D. 262. See, also, *ante*, § 105.

[3] S. P. R. R. v. Griffin, 20 L. D. 485.

[4] N. P. R. R. v. Cannon, 54 Fed. 252.

the grant is a float, extending over the indemnity limits defined by the act. When any deficiency of the lands in place is determined, the right to select lands in lieu thereof arises, and selection may then be made from any of the lands of the United States within the indemnity limits of the grant; and when such selection is made and approved, the grant for the first time attaches to any specific lands within those limits.[1]

The rules applicable to selection by the states of lands in lieu of sixteenth and thirty-sixth sections are alike applicable to the selection of indemnity lands under acts of congress granting aid to railroads. These rules will be found stated in a preceding section.[2]

As mineral lands cannot inure to the railroad companies within the primary, or place, limits of their respective grants, it follows, as a matter of course, that mineral lands within the indemnity limits cannot be selected in lieu of lands lost to the companies within the place limits.[3]

Until the selection is finally approved and certified to the railroad company, the land department retains jurisdiction for the purpose of investigating the character of the land. If it is found to be mineral, it remains a part of the public domain, and subject to exploration and purchase under the mining laws.

**§ 158. Restrictions upon the definition of "mineral "lands," when considered with reference to railroad grants.**—In most of the acts granting lands in aid of the construction of railroads, it is expressly stated that coal and iron are not to be classified as mineral within the meaning of that term, as employed in the reservation

[1] United States v. Winona & St. P. R. R., 67 Fed. 948, 967; Kansas Pac. R. R. v. Atchison, T. & S. F. R. R., 112 U. S. 414; Barney v. R. R. Co., 117 U. S. 228; Sioux City & St. P. R. R. v. Chicago, M. & St. P. R. R., 117 U. S. 406; Wis. Cent. R. R. v. Price Co., 133 U. S. 496; United States v. Missouri, K. & T. R. R., 141 U. S. 358.

[2] See, *ante*, § 143.

[3] United States v. Mullan, 7 Saw. 470; Mullan v. United States, 118 U. S. 271; S. P. R. R. v. Allen G. M. Co., 13 L. D. 165.

clauses. Where such legislative declaration is found, of course, lands containing coal and iron will pass to the railroad company under the grants of particular sections;[1] and where the right of indemnity selection is given, lands containing coal and iron within the indemnity limits may be selected by the railroad company with the same effect as if they were agricultural in character. It follows, as a matter of course, that if the granting act is silent upon the subject of these two commodities, lands containing them do not pass, nor can they be selected as indemnity lands.

In the administration of the railroad grants we encounter the same disposition upon the part of the land department to restrict the meaning of the term "mineral," as used in the reservation clauses of these grants, as we find in dealing with grants to states. What we have heretofore said with reference to this rule of construction when considering the latter class of grants applies with equal force to railroad grants.[2]

In our opinion, the department of the interior, in establishing this doctrine of limited interpretation as applied to land grants, has mistaken the law, and, if persisted in, will lead to harmful results.

Let us review the action of the land department in dealing with this subject as applied to railroad grants.

As early as 1875 the department held that lands more valuable for the deposits of limestone than for agriculture might be patented under the mining laws. This ruling has been followed in later cases.[3]

In the case of Elias Jacob,[4] Commissioner Williamson made a contrary ruling; but this decision was overruled by the secretary in the Hooper case.[5] We thus have established, by a uniform series of decisions, a departmental rule

[1] Rocky Mountain C. & I. Co., 1 Copp's L. O. 1.

[2] See, *ante*, §§ 137–141.

[3] *In re* H. C. Rolfe, 2 Copp's L. O. 66; *In re* W. H. Hooper, 8 Copp's L. O. 120; *In re* Josiah Gentry, 9 Copp's L. O. 5; Maxwell *v.* Brierly, 10 Copp's L. O. 50; Conlin *v.* Kelly, 12 L. D. 1; Shepherd *v.* Bird, 17 L. D. 82.

[4] 7 Copp's L. O. 83.

[5] 8 Copp's L. O. 120.

of construction, that lands valuable for deposits of lime are mineral in character, and may be entered under the mining laws.

In 1873, the department issued a circular[1] for the guidance of surveyors-general and registers and receivers, wherein it classified borax, carbonate and nitrate of soda, sulphur, alum, and asphalt as minerals, and open to entry under the mining laws. We are not aware that this classification has ever been questioned. But recently Secretary Hoke Smith has established the rule that in administering railroad grants the word "mineral," as used in the reservation clauses, is to be understood to apply only to the more valuable metals, such as gold, silver, cinnabar, and copper.[2]

His argument proceeds upon the theory that at the time of the *passage of the act* wherein mineral lands were reserved, either expressly or by implication, the substances in controversy (phosphates and petroleum) were not minerals in contemplation of congress, and therefore passed to the railroad; that congress at that time only had in contemplation the more valuable metals.

The vice of the distinguished secretary's reasoning is found in his assumption that after the passage of the railroad acts, and before title vests under them, congress has no power to change its policy or enlarge the scope of its legislation with respect to mineral lands. That this view is erroneous, we think we have fully demonstrated in the preceding article on the subject of grants to states for educational purposes.

Secretary Smith's ruling would enable railroad companies in the future to obtain title under the unadministered grants to a large class of valuable deposits, such as limestone, alum, soda, asphalt, marble, borax, sulphur, etc., which, by legislative and judicial construction, are within the purview of the mining laws, although no title to such lands became vested prior to the passage of these laws or

[1] Copp's Min. Decisions, 316.

[2] Tucker *et al.* v. Florida Ry. & Nav. Co., 19 L. D. 414; Union Oil Co., 23 L. D. 232.

the adoption by the land department of the now recognized rules of interpretation.

In the instructions issued to the commissioners appointed under the act providing for the classification of mineral lands within railroad grants in Idaho and Montana, the secretary was not unmindful of the injunction contained in that act, "That all said lands shall be classified as "mineral which, by reason of valuable mineral deposits, "are open to exploration, occupation, and purchase under "the provisions of the United States mining laws."[1] Is this not a legislative declaration that no lands which are subject to entry under those laws shall be patented to a railroad company? We think it is, although we are of the opinion that this was the law prior to the passage of this act.

**§ 159. Test of mineral character of land applied to railroad grants.**— We think we are amply justified in here reiterating the doctrine applied by us to the administration of school land grants.

The question whether a given tract of land within the primary, or place, limits of a railroad grant is mineral, and therefore excepted out of the grant, is to be determined according to the state of the law and the facts as they exist at the time the railroad company applies for its patent. If the mineral character is then established according to the rules announced in section ninety-eight, then it does not pass under the grant.

With respect to indemnity selections, the state of the law and the facts as they exist at the time of the selection is alone to be considered. If the lands sought to be selected fall within the rules announced in section ninety-eight, they cannot be selected by the railroad company.

These rules apply to all railroad grants to the extent that they remain unadministered. As we shall hereafter see, a patent issued to such companies is conclusive evidence that the lands are non-mineral. Consequently,

[1] 20 Land Decisions, 351.

changed conditions arising after the issuance of patents or final approval of selections cannot affect the title.

§ 160. **Classification of railroad lands under special laws in Idaho and Montana.**—To facilitate the administration of the land grants to the Northern Pacific railroad, and to provide for a more expeditious method of determining the character of lands within the primary and indemnity limits of this grant in the states of Idaho and Montana, congress, on February 26, 1895, passed an act, entitled "An "act to provide for the examination and classification of "certain mineral lands in the states of Montana and Idaho."[1]

This is the act referred to in section one hundred and fifty-eight. It establishes an auxiliary board, consisting of three commissioners for each state, appointed by the president, whose duties are to make examinations in their respective districts, take testimony of witnesses, and generally to investigate the mineral or non-mineral character of the lands within the railroad limits in their respective jurisdictions.

The act makes provision for determining protests and controversies relative to the character of lands, the results of all such investigations to be reported through the customary channels to the land department. The action of this board only becomes final upon the approval of its reports by the secretary of the interior.

It is unnecessary to here detail the particulars of the act. The functions of the board are largely those of referees or "roving commissioners" under the equity pratice; and in this aspect it is a mere adjunct of the land department. The secretary of the interior, shortly after the passage of the act, issued elaborate instructions, prescribing the duties of the commissioners, under which they are now acting.[2]

The act, however, possesses some general features of more than passing interest. In addition to the definition of the term "mineral lands," referred to in the preceding section, it provides that in determining the character of the lands

[1] 28 Stats. at Large, 683. [2] 20 Land Decisions, 351.

the commissioners may take into consideration certain conditions which, according to the previous rulings of the department and the courts, have not been considered as elements of controlling weight.

Thus, where mining locations have been made or patents issued for mining ground in any section of land, this shall be taken as *prima facie* evidence that the forty-acre subdivision within which it is located is mineral land. It is further provided that the examination and classification of lands shall be made without reference or regard to any previous examination, report, or classification; that the commissioners shall take into consideration the mineral discovered or developed on or adjacent to such land, and the geological formation of all lands to be examined and classified, or the lands *adjacent* thereto, and the *reasonable probabilities* of such land containing valuable mineral deposits because of its formation, location, or character.

These provisions seem wise and beneficent. As the railroad company has no vested right to any particular class of lands, the rules established by the act can work no legal hardship. What is lost to the company in the place limits may be compensated by selections within the indemnity limits. Nor do we think, taking a common-sense view of the situation, that any cause of complaint could be urged by any land-grant road to which similar laws might be made applicable, even where there are no provisions for indemnity selections. Judge Sawyer[1] and Judge Hawley[2] have both held that lands *reasonably supposed* to be mineral do not pass to the railroad companies; and the mineral character of a given tract may be reasonably inferred from geological conditions and local environment. It is to be hoped that the experiment will prove beneficial, and that like provisions may be made for the adjustment of all railroad land grants within the mineral regions.

[1] Francoeur *v.* Newhouse, 40 Fed. 618.
[2] Valentine *v.* Valentine, 47 Fed. 597.

**§ 161. Effect of patents issued to railroad companies.** —The supreme court of California has held in several cases that in an action at law a patent issued to a railroad company can be attacked by showing that the lands in controversy are mineral lands.[1]

These decisions were based upon the construction of patents which contained the reservation of "all mineral "lands, *should any be found to exist.*" Judge Sawyer, in the case of Cowell *v.* Lammers,[2] has conclusively shown that this exception is void, not being authorized by law. However, in later cases the supreme court of California has recognized the rule that when a law of congress provides for the disposal of certain public lands, upon the ascertainment of certain facts, the officers of the land department have jurisdiction to inquire into and determine those facts, and the patent issued thereupon is a conclusive declaration that the facts have been found in favor of the patentee, and that this rule applies to the determination of the particular character of the land which is the subject of the patent.[3]

The federal courts, whose views, in the end, on a question like this must prevail,[4] have from the beginning unhesitatingly announced the rule that the land department has jurisdiction to determine the character of lands, and its determination, culminating in the issuance of a patent, is conclusive. Such patent is not open to collateral attack.[5]

[1] McLaughlin *v.* Powell, 50 Cal. 64; Chicago Q. M. Co. *v.* Oliver, 75 Cal. 194; Hunt *v.* Steese, 75 Cal. 620.

[2] 10 Saw. 246.

[3] Gale *v.* Best, 78 Cal. 235; Irvine *v.* Tarbat, 105 Cal. 237; Dreyfus *v.* Badger, 108 Cal. 65.

[4] Gale *v.* Best, 78 Cal. 240.

[5] Barden *v.* N. P. R. R., 154 U. S. 288; French *v.* Fyan, 93 U. S. 169; Johnson *v.* Towsley, 13 Wall. 72; Moore *v.* Robbins, 96 U. S. 530; St. Louis Smelting Co. *v.* Kemp, 104 U. S. 636; Steel *v.* Smelting Co., 106 U. S. 447; Dahl *v.* Raunheim, 132 U. S. 260; Parley's Park S. M. Co. *v.* Kerr, 130 U. S. 256; United States *v.* Winona & St. P. R. R., 67 Fed. 948; Carter *v.* Thompson, 65 Fed. 329. See, also, King *v.* Thomas, 12 Pac. 865; Manning *v.* San Jacinto Tin Co., 7 Saw. 419; Butte & B. M. Co. *v.* Sloane, 40 Pac. 217; Ah Yew *v.* Choate, 24 Cal. 562 (state patent); Poire *v.* Wells, 6 Colo. 406; Meyerdorf *v.* Frohner, 3 Mont. 282.

If mineral lands have been patented under railroad or homestead laws, and were known to be such prior to final entry and certification, such patents may be vacated by the United States.[1]

Authorities might be multiplied indefinitely. Sufficient space has been devoted to this subject at this juncture. We shall have occasion to recur to it again when considering the force and effect of federal patents generally, in a later portion of the work.

§ 162. **Conclusions.**— We are authorized to deduce the following general conclusions from the foregoing exposition of the law:—

(1) That lands embraced within the primary, or place, limits of a railroad grant, whose mineral character is known or established at any time prior to the issuance of a patent, are not patentable to the railroad company, and are excepted out of the grant.

(2) Lands mineral in character within the indemnity limits of any railroad grant, where indemnity selections are authorized by the act, can not be selected in lieu of lands lost to the company within the place limits.

(3) Whether a given tract within either the primary or indemnity limits is mineral or not must be determined according to the state of the law and facts as they exist at the time patent is applied for or application to select is made. Until patent is issued or selections are finally approved, the land department retains jurisdiction to pass upon the character of the land; and its judgment, culminating in the issuance of a patent or final approval of a selection, is conclusive, and not open to collateral attack.

(4) The term "mineral land," as used in the reservation clauses of railroad grants, includes all valuable deposits, metallic and non-metallic, which are or may be subject to

[1] W. P. R. R. *v.* United States, 108 U. S. 510; McLaughlin *v.* United States, 107 U. S. 528; Mullan *v.* United States, 118 U. S. 271; United States *v.* Mullan, 7 Saw. 466; United States *v.* Reed, 12 Saw. 99; United States *v.* Culver, 52 Fed. 81; Gold Hill Q. M. Co. *v.* Ish, 5 Ore. 104.

entry under the mining laws, except coal and iron, where these substances are excepted out of the mineral reservation.

(5) Mineral lands within either the primary or indemnity limits of railroad grants, prior to patent or certification, belong to the public domain, and are open to exploration and purchase under the mining laws, the same as any other public mineral lands.

## ARTICLE V. TOWNSITES.

§ 166. Laws regulating the entry of townsites.
§ 167. Rules of interpretation applied to townsite laws.
§ 168. Occupancy of public mineral lands for purposes of trade or business.
§ 169. Rights of mining locator upon unoccupied lands within unpatented townsite limits.
§ 170. Prior occupancy of public mineral lands within unpatented townsites for purposes of trade, as affecting the appropriation of such lands under the mining laws—The rule prior to the passage of the act of March 3, 1891.
§ 171. Correlative rights of mining and townsite claimants recognized by the land department prior to the act of March 3, 1891.
§ 172. Section sixteen of the act of March 3, 1891, is limited in its application to incorporated towns and cities.
§ 173. The object and intent of section sixteen of the act of March 3, 1891.
§ 174. The act of March 3, 1991, not retroactive.
§ 175. Effect of patents issued for lands within townsites.
§ 176. What constitutes a mine or valid mining claim within the meaning of section twenty-three hundred and ninety-two of the Revised Statutes.
§ 177. In what manner may a townsite patent be assailed by the owner of a mine or mining claim.

**§ 166. Laws regulating the entry of townsites.**—The laws of the United States providing for the reservation and sale of townsites on the public lands are found in title thirty-two, chapter eight, of the Revised Statutes, sections twenty-three hundred and eighty to twenty-three hundred and ninety, supplemented by section sixteen of the act of

March 3, 1891, entitled "An act to repeal timber-culture "laws, and for other purposes."[1]

These laws provide three methods of acquiring title to town property on the public domain:—

(1) Where the president of the United States has directed the reservation provided for by section twenty-three hundred and eighty of the Revised Statutes;

(2) In cases where towns have already been established, or parties desire to found a town under the provisions of section twenty-three hundred and eighty-two;

(3) Under section twenty-three hundred and eighty-seven, by the terms of which the entry of land settled and occupied as a townsite may be made by the corporate authorities, if the town be incorporated, or, if unincorated, by the county judge, for the use and benefit of the several occupants.

We have no particular concern with townsites falling within sections twenty-three hundred and eighty or twenty-three hundred and eighty-two.

Section twenty-three hundred and eighty-seven is but a restatement or codification of the law as it existed at the time of the revision.[2]

It is under this section and the acts from which it was framed that most of the flourishing towns of the west have applied for and received patents, and it is the only one of the three methods of acquiring title to town property on the public lands which requires particular consideration at our hands,[3] although the principles of law discussed apply to all classes of townsites, by whatsoever method they are sought to be acquired.

Section twenty-three hundred and eighty-seven of the Revised Statutes is as follows:—

[1] 26 Stats. at Large, 1095.

[2] Act of March 2, 1867, 14 Stats. at Large, 541; Act of June 8, 1868, 15 Stats. at Large, 67.

[3] Public Domain, 298, 299.

"Whenever any portion of the public lands have been "or may be settled upon and occupied as a townsite, not "subject to entry under the agricultural pre-emption laws, "it is lawful, in case such town be incorporated, for the cor- "porate authorities thereof, and if not incorporated, for the "judge of the county court for the county in which such "town is situated, to enter at the proper land office, and at "the minimum price, the land so settled and occupied, in "trust for the several use and benefit of the occupants "thereof, according to their respective interests; the execu- "tion of which trust, as to the disposal of the lots in such "town, and the proceeds of the sales thereof, to be conducted "under such regulations as may be prescribed by the legis- "lative authority of the state or territory in which the "same may be situated."

The townsite acts and the chapter of the Revised Statutes into which their provisions are incorporated, contain certain restrictions and limitations upon the subject of mineral lands, which are necessary to be considered for the purpose of obtaining a proper understanding of the adjudicated cases, and to enable us to draw correct conclusions as to the rules of interpretation to be applied. These restrictions and limitations are as follows: —

Section twenty-three hundred and eighty-six of the Revised Statutes provides that,—

. . . "where mineral veins are possessed, which posses- "sion is recognized by local authority, and to the extent "so possessed and recognized, the title to town lots to be "acquired shall be subject to such recognized possession "and the necessary use thereof; but nothing contained in "this section shall be so construed as to recognize any "color of title in the possessors for mining purposes as "against the United States."

This is but a re-enactment of the proviso contained in the act of March 3, 1865,[1] and, of course, its original enactment antedates all legislation of congress, granting in express terms the right to explore and acquire by location any class of public mineral lands. Considering the state of the law on the subject of this class of lands at the time

[1] 13 Stats. at Large, 530.

of the revision of the federal statutes (December, 1873), it would seem that this section, framed to apply to conditions which no longer existed, was superfluous, and might with all propriety have been omitted. Since the original act was passed, congress, by its legislation, has given to valid mining locations the status of legal estates. As the law now stands, no possession of public mineral lands can be lawfully recognized by local authority which possession is not acquired and held under the sanction of the general mining laws. So far as an intelligent interpretation of the townsite laws is sought, under existing conditions, section twenty-three hundred and eighty-six performs but little, if any, function beyond that of an historical landmark or a link in the chain of evolution.

The act of March 2, 1867, entitled "An act for the relief "of the inhabitants of cities and towns upon public lands," contained the following provision:—

"No title shall be acquired under the foregoing provis- "ions of this chapter to any mine of gold, silver, cinnabar, "or copper."[1]

At the time this act was passed, the first mining act of July 26, 1866, was in full force, which declared that the mineral lands of the public domain should thereafter be free and open to exploration and occupation, and provided for the acquisition of title to veins, or lodes, of quartz or other rock in place bearing gold, silver, cinnabar, and copper. It is obvious that the townsite act of 1867 was framed in the light of the first mining act. The act of June 8, 1868, added to the above quoted provisions of the act of March 2, 1867, the following clause:—

. . . "or to any valid mining claim or possession held "under existing laws."[2]

The foregoing provisions of the two acts were united and incorporated into the Revised Statutes, and are embodied in section twenty-three hundred and ninety-two of

[1] 14 Stats. at Large, 541. [2] 15 Stats. at Large, 67.

the chapter relating to townsites, which now reads as follows:—

"SEC. 2392. No title shall be acquired under the fore-"going provisions of this chapter to any mine of gold, silver, "cinnabar, or copper, or to any valid mining claim or pos-"session held under existing laws."

It may be noted that the mining act of May 10, 1872, which was in force when the Revised Statutes went into effect, covered claims for lands bearing gold, silver, cinnabar, *lead*, *tin*, copper, *or other valuable deposits*, the words in italics not appearing in either the act of 1866 or the townsite laws.

As thus outlined, these laws stood, were construed and interpreted by the highest courts in the land, and a fair understanding of their provisions was about being reached, when congress, by a provision inserted in the "Act to repeal "the timber-culture laws, and for other purposes," passed March 3, 1891, (principally *for other purposes*),[1] injected some new elements into the townsite laws which thus far have not received the attention of the courts. The provisions referred to are found in section sixteen of the act in question, and are as follows:—

"SEC. 16. That townsite entries may be made by incor-"porated towns and cities on the mineral lands of the "United States, but no title shall be acquired by such "towns or cities to any vein of gold, silver, cinnabar, cop-"per, or lead, or to any valid mining claim or possession "held under existing law. When mineral veins are pos-"sessed within the limits of an incorporated town or city, "and such possession is recognized by local authority or "by the laws of the United States, the title to town lots "shall be subject to such recognized possession and the "necessary use thereof; and when entry has been made "or patent issued for such townsites to such incorporated "town or city, the possessor of such mineral vein may "enter and receive patent for such mineral vein and the "surface ground appertaining thereto: *provided*, that no "entry shall be made by such mineral vein claimant for "surface ground where the owner or occupier of the surface

[1] 26 Stats. at Large, 1095.

"ground shall have had possession of the same before the "inception of the title of the mineral vein applicant."

To what extent this act is an innovation upon the system theretofore existing, and how far the rules of law theretofore established by the current of judicial authority are strengthened, weakened, or have become obsolete, will be noted as we proceed.

It appears, however, that the act is limited in its application to incorporated cities or towns, and its provisions do not apply to cases of townsite entries made by the county judge or the judicial officer performing his functions for the use and benefit of the occupants, or entries made by trustees appointed by the secretary of the interior. In enumerating the minerals, the act adds *lead* to the category, as found in section twenty-three hundred and ninety-two of the Revised Statutes.

**§ 167. Rules of interpretation applied to townsite laws.**— It is not to be inferred from the caption to this section that in construing the townsite laws we are authorized or required to invoke any rules of interpretation peculiar to this branch of the public land laws. We are called upon simply to apply general rules, and note the instances where special application of these rules to the laws under consideration has been made by the courts.

The townsite laws, as they now exist, consist simply of a chronological arrangement of past legislation, an aggregation of fragments, a sort of "crazy quilt," in the sense that they lack harmonious blending. This may be said truthfully of the general body of the mining laws. The rules adopted for the interpretation of the one apply with equal force to the other.

We have endeavored to formulate these rules in a preceding section.[1] We may supplement these with another rule specially applicable; *i. e.* the townsite laws are to be read and construed in connection with all the existing legislation of congress regulating the sale and disposal of

[1] See, *ante*, § 96.

the public lands—that is, these laws are to be considered with all other laws which are essentially *in pari materia*.

**§ 168. Occupancy of public mineral lands for purposes of trade or business.**— Important mineral discoveries in new quarters, however remote from civilized centers, are invariably followed by a large influx of population. The advance guard sets its stakes upon the most convenient spot, erects tents, or constructs primitive habitations, which form the nucleus of the future town. As was said by Judge Field, speaking for the supreme court of the United States,—

"Some of the most valuable mines in the country are "within the limits of incorporated cities which have grown "up on what was, on its first settlement, part of the public "domain; and many of such mines were located and "patented after a regular municipal government had been "established. Such is the case with some of the famous "mines of Virginia City, in Nevada. Indeed, the discovery "of a rich mine in any quarter is usually followed by a "large settlement in its immediate neighborhood, and the "consequent organization of some form of local govern-"ment for the protection of its members. Exploration in "the vicinity for other mines is pushed in such case by "new-comers with vigor, and is often rewarded with the "discovery of valuable claims."[1]

That conflicts should arise between mineral claimants and occupants of lands for purposes of business and trade in the newly discovered mineral regions is but natural. Frequently these controversies are of an aggravated nature, and resort to force is a matter of common occurrence, particularly so before the organization of any form of local government. But eventually the more important ones find their way into the courts, whose decisions have resulted in establishing certain definite rules of law, governing the respective rights of the miner and the merchant within the limits of the settlement. These limits are not always

[1] Steel *v.* St. Louis Smelting Co., 106 U. S. 447, 449; Deffeback *v.* Hawke, 115 U. S. 392, 406.

well defined. Until application is made to enter and purchase the townsite, the exact area which may properly be considered as within the site of the future town, may be limited by the extent of actual occupancy. In some instances, some enterprising individual surveys a tract of land into lots and blocks, streets and alleys, thus giving a semblance to a claim within the exterior limits of the survey. When such town is incorporated, the territorial limits over which municipal jurisdiction is asserted are, of course, defined by the act of incorporation. When application is made to enter the townsite by the town authorities, if incorporated, or by the county judge, if unincorporated, the area which may be thus entered will depend upon the number of inhabitants, the maximum area allowed being twenty-five hundred and sixty acres.[1]

It frequently happens that a large portion of this area, as finally entered and patented, is unoccupied, and remains so indefinitely. We are called upon to determine the respective rights of the two classes of claimants within the asserted limits of the townsite, both before and after patents are issued to one or the other.

§ 169. **Rights of mining locator upon unoccupied lands within unpatented townsite limits.** — It is hardly necessary to state that the owner of a valid and subsisting mining location which had its inception at a time prior to any occupancy within the surface limits of his claim, for purposes of trade or business, cannot be deprived of any of his rights flowing from such location by settlement thereon of later arrivals desiring to engage in commercial traffic or to assist in the founding of a city. The land embraced within the mining location is just as much withdrawn from the public domain as the fee is by a valid grant from the United States under authority.[2] Such location is a grant from the government.[3]

[1] Rev. Stats., § 2389.

[2] Silver Bow M. & M. Co. v. Clark, 5 Mont. 406.

[3] Butte City Smokehouse Lode Cases, 6 Mont. 397; Belk v. Meagher, 104 U. S. 284; Gwillim v. Donnellan, 115 U. S. 45, 49.

There is no room for a further grant; for the government would have nothing to convey.[1]

That the mining location is within the claimed or actual limits of the unpatented townsite is therefore of no moment. As was said by the supreme court of the United States,—

"To such claims, though within the limits of what may "be termed the site of the settlement or new town, the "miner acquires as good a right as though his discovery "was in a wilderness."[2]

**§ 170. Prior occupancy of public mineral lands within unpatented townsites for purposes of trade as affecting the appropriation of such lands under the mining laws —The rule prior to the passage of the act of March 3, 1891.**—In discussing the effect of a prior occupancy of public mineral lands for townsite purposes, upon the right of subsequent appropriation under the mining laws, it is our purpose to first arrive at a correct understanding, if it be possible, of the state of the law as it existed prior to the passage of the act of March 3, 1891. This will enable us to consider "the old law, the mischief, and the remedy" in logical order.

In a subsequent article,[3] we have endeavored to state the law, generally, with reference to the rights of mere occupants of public lands without color of title, as against one seeking to appropriate such lands under the mining laws. Much that is there said will apply to the subject presently under consideration, and need not be here repeated. We deem it sufficient for our present purpose to deal with those cases wherein the courts have had under consideration controversies between mining claimants and prior occupants for the purposes of trade or business—*i. e.* under the townsite laws.

In reviewing the decisions of the supreme court of the United States upon this and kindred subjects, we meet with

[1] Silver Bow M. & M. Co. *v.* Clark, 5 Mont. 406.

[2] Steel *v.* St. Louis Smelting Co., 106 U. S. 447, 449; Deffeback *v.* Hawke, 115 U. S. 392.

[3] See, *post*, art. x., §§ 216-219.

apparent contradictions, rendering it difficult to reach satisfactory conclusions. Language employed in one decision, construed literally, cannot be harmonized with expressions found in another. One case does not necessarily overrule the other, as the ultimate results reached are consistent one with the other; but an analysis of the reasoning employed and the terms used in reference to the question now being considered have a tendency to raise different inferences in different cases.

In none of the reported cases, other than those decided by the land department, do we find the question presented between the two classes of claimants unaided by presumptions flowing from a patent.

In all such cases coming under our observation an attempt has been made to collaterally assail a federal patent, issued to either the townsite or the mineral claimant. In some instances both classes of claimants possessed patents. In all of these cases the operative force of the patent as a judgment, and its conclusiveness upon collateral attack, have rendered the consideration of conditions existing prior to its issuance to a large extent unnecessary. With these preliminary suggestions we proceed to examine the decisions.

The supreme court of the United States has made use of the following language:—

"Land embraced within a townsite on the public domain, "when *unoccupied*, is not exempt from location and sale for "mining purposes. Its exemption is only from settlement "and sale under the pre-emption laws of the United "States. . . . The acts of congress relating to townsites "recognize the possession of mining claims within their "limits, and forbid the acquisition of any mine of gold, "silver, cinnabar, or copper within them under proceed-"ings by which title to other lands there situated are "secured, thus leaving the mineral deposits within the "townsites open to exploration, and the land in which "they are found to occupation and purchase in the same "manner as such deposits are elsewhere explored and "possessed, and the lands containing them are acquired.

"Whenever, therefore, mines are found in lands belonging "to the United States, whether within or without townsites, "they may be claimed and worked, provided existing *rights* "*of others from prior occupation* are not interfered with."[1]

The italics employed in the excerpt are ours. Literally construed, it would appear that the supreme court had in mind all classes of occupancy of the public lands, thus giving sanction to the rule that occupancy for trade or business purposes on lands confessedly mineral prevents their appropriation under the mining laws, although such appropriation might be effected without force or violence.[2]

In the case of Davis *v.* Weibbold, the same court, referring to its language used in Steel *v.* Smelting Company, says:—

"It was in reference to mines in *unoccupied* public lands "in unpatented townsites that the language was used; and "to them, and to mines in public lands in patented town- "sites outside of the limits of the patent, it is only appli- "cable."[3]

This seems to strengthen the inference that prior occupancy for townsite purposes, although upon land confessedly mineral, withdraws it from appropriation under the mining laws.

In the same case, the court, referring to the case of Deffeback *v.* Hawke,[4] thus states its views:—

"In Deffeback *v.* Hawke, the mining patentee's rights "antedated those of the occupants under the townsite law, "and wherever such is the case his rights will be enforced "against the pretensions of the townsite holder; but where "the latter has acquired his rights in advance of the dis- "covery of any mines, and the initiation of proceedings "for the acquisition of their title or possession, his rights "will be deemed superior to those of the mining claimant."[5]

[1] Steel *v.* St. Louis Smelting Co., 106 U. S. 447, 449.

[2] The land department, however, cites this case as authority for the rule that the occupancy of land by townsite settlers is no bar to its entry under the mining laws, provided the land is mineral, and belongs to the United States. *In re* Rankin, 7 L. D. 411.

[3] 139 U. S. 507, 529.

[4] 115 U. S. 392.

[5] 139 U. S. 526.

When we consider the circumstances surrounding the Deffeback–Hawke case (hereafter more fully discussed), where there were two patents issued — one to the mining claimant, and one to the townsite, the former by relation to the certificate of purchase being the senior,— and the admitted facts that the land was occupied for townsite purposes prior to the inception of the mineral right, we must conclude that the supreme court in speaking of the *rights* of a townsite claimant referred to *rights under the townsite patent*. Otherwise, the statement that the "mining "patentee's rights antedated those of the occupants" would be in direct conflict with the facts which were admitted for the purpose of the decision.

In Steel *v.* Smelting Company, an action of ejectment, the townsite claimants endeavored to assail a patent issued to a mineral claimant upon the ground that the land embraced in such patent was, prior to the initiation of the mining right, occupied and improved for townsite purposes. It was held that the patent could not be thus collaterally assailed.[1]

Davis *v.* Weibbold was a case involving a tract of land in the townsite of Butte, Montana, for which a patent had been issued in 1877. There was no suggestion that at the the time the townsite was patented the land was known to be mineral, or that there were any valuable mineral lands within the townsite. The mineral claimant asserted rights under a mineral patent issued in 1880, based upon a discovery and appropriation made years after the issuance of a patent to the townsite. It was held that the discovery of minerals after the issuance of the townsite patent could not affect the holder of the townsite title.[2]

The case of Hawke *v.* Deffeback[3] was an action of ejectment. It involved a placer claim within the limits of the townsite of Deadwood, Dakota. The land became subject to the operation of the public land laws, February 28, 1877,

[1] 106 U. S. 447. [2] 139 U. S. 507. [3] 4 Dak. 21.

by the extinguishment of the Indian title, by treaty with the Sioux Indians. The precise date of the location of the mining claim does not appear. The application for patent therefor was filed on November 10, 1877, the entry and payment were made on January 31, 1878, and patent issued on January 31, 1882. No protest or adverse claim was filed. In July, 1878, the town of Deadwood being unincorporated, the probate judge entered at the local land office the townsite, paid the government price therefor, and received duplicate receipt, in trust for the use and benefit of the occupants.

The defendant, Deffeback, was the owner of a lot within the townsite. His contention was that upon the extinguishment of the Indian title the tract in question was, with other lands, laid out into lots, blocks, streets, and alleys, for municipal purposes and for trade; that the land in controversy was one of the lots originally laid out and occupied for townsite purposes, and had always been thus occupied by defendant and his grantor, with the buildings and improvements thereon, for the purposes of business and trade, and not for agriculture; that the placer mining claim was not located or claimed by plaintiff or any other person until after the selection and settlement upon and appropriation of that and adjacent lands for townsite purposes.

The mineral character of the land was not disputed. The foregoing facts were deemed admitted for the purpose of the decision. They were set up as an equitable defense, and a decree was asked by the owner of the town lot adjudging that the holder of the placer patent was a trustee for the benefit of the prior townsite occupant.

The supreme court of Dakota, in an able opinion, sustained a demurrer interposed to the equitable defense, and, the defendant failing to amend, judgment was entered for the mining patentee.

The case was appealed to the supreme court of the United States, from whose opinion we select the following extracts:—

"It is plain, from this brief statement of the legislation "of congress, that no title from the United States to land "known at the time of the sale to be valuable for its min- "erals of gold, silver, cinnabar, or copper can be obtained "under the pre-emption or homestead laws, or the townsite "laws, or in any other way than as prescribed by the laws "specially authorizing the sale of such lands, except in the "state of Michigan (and other states). . . . In the present "case there is no dispute as to the mineral character of the "land claimed by plaintiff. It is upon the alleged prior "occupation of it for trade and business, the same being "within the settlement or townsite of Deadwood, that "defendant relies, as giving him a better right to the prop- "erty. But the title to the land being in the United States, "its occupation for trade or business did not and could not "initiate any right to it, the same being mineral land, nor "delay proceedings for the acquisition of the title under "the laws providing for the sale of lands of that character."[1]

In a later portion of the decision, when dealing with the effects of a townsite patent within the limits of which are found land that was known to be mineral at the date of the townsite patent, and also lands that were not so known, the supreme court supplements the foregoing with the following: —

"Whilst we hold that a title to known valuable mineral "land can not be acquired under the townsite laws, and "therefore could not be acquired to the land in contro- "versy under the entry of the townsite of Deadwood by "the probate judge of the county in which that town is "situated, we do not wish to be understood as expressing "any opinion against the validity of the entry, so far as it "affected property other than mineral lands, if there were "any such at the time of entry. . . . It would seem, "therefore, that the entry of a townsite, even though "within its limits mineral lands are found, would be as "important to the occupants of other lands as if no min- "eral lands existed. Nor do we see any injury resulting "therefrom, nor any departure from the policy of the gov- "ernment, the entry and the patent being inoperative as "to all lands known at the time to be valuable for their "minerals or discovered *to be such before their occupation or "improvement for residences or business under the townsite title.*"[2]

[1] Deffeback *v.* Hawke, 115 U. S. 392, 405. [2] *Id.* 407.

The language last quoted has led some of the trial courts into the error of ruling that mines discovered within *patented* townsites before the occupation of a lot for business or residence purposes could be held as against the grantee from the townsite, although not discovered until after patent to the townsite had issued.[1]

The question as to whether a mining location could be legally made on mineral lands in possession of a prior occupant for business purposes within the limits of an unpatented townsite *was* raised in the Deffeback–Hawke case, and while the issuance of a patent to the mineral claimant, without any adverse claim or protest on the part of the townsite claimant, and prior to the entry of the townsite, was a conclusive determination that the lands were mineral and rightfully patented to the mineral claimant, the decision of the supreme court of the United States does hold, as that court has uniformly held, that mineral lands could only be appropriated under the mining laws, and that no title to such lands could be initiated by mere occupancy under the townsite laws. The time when the character of the land within a claimed townsite is to be determined is when application to enter is made. This is the rule as to all classes of grants, such as grants to states other than sixteenth or thirty-sixth sections,[2] grants to railroads within both place and indemnity limits,[3] and entries under the pre-emption and homestead laws.[4] If the lands are mineral, the fact of their mere occupancy for purposes of trade or business is of no moment. Such occupancy is not color of title as against the government or those in privity with it, and a mining locator is in such privity.

The case of Sparks *v.* Pierce was considered by the supreme court of the United States at the same time as Deffeback *v.* Hawke, and involved the same controversies, with the exception that no application to enter the townsite (Central City, Dakota) had been made. The case pre-

[1] McCormick *v.* Sutton, 97 Cal. 375.
[2] See, *ante*, §§ 140, 143.
[3] See, *ante*, §§ 156, 157.
[4] See, *post*, § 207.

sented was that of occupants of the public lands without title resisting the enforcement of the patent of the United States, on the ground of occupation antedating the acquisition of any mining right or claim of right.

The court held that—

"Mere occupancy of the public lands and improvements thereon give no vested right therein as against the "United States, and consequently not against any purchaser from them."[1]

When the application for the mineral patent in this case was before the land department, the commissioner of the general land office held, that although it was sufficiently established that the land was occupied for townsite purposes prior to the initiation of rights under the mining claim, yet, as the lands were in fact mineral, the occupants had no right to it. Patent was issued to the mineral claimant in accordance with this ruling, without any reservation. The townsite claimants endeavored to erect a trust upon the mineral patent, on the ground that the commissioner erred as a matter of law in issuing the mineral patent without reserving their asserted rights as occupants. Concerning this plea, the supreme court held that "to entitle a party to relief against a patent of the govern-"ment, he must show a better right to the land than the "patentee, such as in law should have been respected by "the land department, and, being respected, would have "given him the patent."

There can be no doubt that the case clearly indicates that priority of occupation of mineral lands for townsite purposes establishes no claim which the government is called upon to recognize, as against a subsequent appropriation under the mining laws.

Considering the facts involved in the several cases which we have heretofore reviewed, and construing the townsite laws in connection with the general mining laws and other enactments *in pari materia*, we feel that we are

[1] 115 U. S. 408, 413.

justified in the conclusion that the supreme court of the United States never intended to establish the rule that prior occupancy of the public mineral lands for trade or business purposes operated to withdraw such lands prior to the issuance of a townsite patent from appropriation under the mining laws, provided always that such appropriation was effected by peaceable methods, and without resort to force or violence. The expressions found in the cases noted leading to a contrary inference were not intended to be of controlling weight. There may be some room for doubt as to the correctness of the conclusions reached by us; but we are forced to accept one of the two constructions. We have adopted that which to us seems to be in consonance with the general theories of the public land laws, according to the tenor of all the decisions promulgated by the court of last resort. We can conceive of no middle ground. If prior occupants for townsite purposes were to be considered as being entitled to equities as against the subsequent mining locators, there would have been no necessity for the legislation found in section sixteen of the act of March 3, 1891. The conclusions here reached are in harmony with the views of the supreme court of Montana[1] and the supreme court of Arizona;[2] also, of the land department since the decision in Steel *v.* Smelting Company.[3]

**§ 171. Correlative rights of mining and townsite claimants recognized by the land department prior to the act of March 3, 1891.**—In passing upon applications for patents to mineral lands within the claimed limits of townsites, the land department has until within a comparatively recent period proceeded upon the theory that there were correlative or reciprocal rights existing between townsite occupants and mineral claimants which were to

[1] Talbot *v.* King, 6 Mont. 76; Silver Bow. M. & M. Co. *v.* Clark, 5 Mont. 406; Butte City Smokehouse Lode Cases, 6 Mont. 397; Chambers *v.* Jones, 42 Pac. 758.

[2] Tombstone Townsite Cases, 15 Pac. 26; Blackmore *v.* Reilly, 17 Pac. 72.

[3] *In re* Rankin, 7 L. D. 411. See, also, Goldstein *v.* Townsite of Juneau, 3 L. D. 417.

be regarded and properly provided for when patents were issued.

General Burdett, when commissioner of the general land office, thus expressed his views:—

"The townsite laws clearly contemplate that towns will "exist in mining localities; by clear implication, townsite "entries are to be permitted on mineral lands. This is "indicated by the clause excepting title to mines from the "title acquired by the town. It is inevitable that where the "surface is suitable, it will, in a mining vicinity, be popu- "lated, and attain the character of a town or city. Where "any branch of business flourishes, there capital and popu- "lation will concentrate. The various trades and callings "will center there. Hotels will be a necessity. Dwellings "will be built, and permanent homes established; all the "various interests which constitute valuable property rights "as connected with the soil will be created. And this is "not necessarily antagonistic to the miners. The protec- "tion of municipal government is in the miner's interest, as "it is in the interest of any other class of business men."[1]

The secretary of the interior had previously held that persons in possession of the surface of a lode claim were adverse claimants within the meaning of the mining law of 1866, and were entitled to be heard in the local courts before patent was issued.[2]

Out of this and similar rulings, originated the practice of inserting reservation clauses in mineral patents to lode claims of the following character:—

"Excepting and excluding from said patent all townsite "property rights upon the surface, and all houses, buildings, "lots, blocks, streets, alleys, or other municipal improve- "ments on the surface of said mining claim not belonging "to the grantees, and all rights necessary or proper to the "occupation, possession, and enjoyment of the same."

Such reservations, however, were not inserted, it seems, where the discovery and location of the mining claim antedated the town settlement.[3]

[1] Townsite of Central City, Colo., 2 Copp's L. O. 150.

[2] Becker v. Central City Townsite, 2 Copp's L. O. 98. See, also, Papina v. Alderson, 10 Copp's L. O. 52.

[3] Monroe Lode, 4 L. D. 273.

In townsite patents, in addition to the limiting clause sanctioned by section twenty-three hundred and ninety-two of the Revised Statutes the following proviso, or its equivalent, was inserted:—

"That the grant hereby made is held and declared to "be subject to all the conditions and restrictions contained "in section twenty-three hundred and eighty-six of the "Revised Statutes of the United States, so far as the same "are applicable thereto."[1]

A different rule prevailed with reference to placer patents, for the reason that in this class of mining claims the surface of the ground is absolutely necessary to the successful working of the mine; therefore, it could not be included in a townsite entry or patent, nor could any surface rights therein be reserved, under any circumstances, to the townsite occupant.[2]

But the courts have uniformly held these reservations void. The officers of the land department are merely agents of the government, and have no authority to insert in a patent any other terms than those of conveyance, with recitals showing compliance with the conditions which the law prescribes. Could they insert clauses in patents of their own description, they could limit or enlarge without warrant of law.[3]

In accordance with this action by the courts, the land department considers it to be fully established as a principle of law that the government could not (at least prior to March 3, 1891) by its patent "partition lands horizontally,"

[1] Turner *v.* Lang, 1 Copp's L. O. 51; Central City Townsite, 2 Copp's L. O. 150; Butte City Townsite, 3 Copp's L. O. 114, 131; Hickey's Appeal, 3 L. D. 83; Com'rs' Letter, Copp's Min. Dec. 207; Townsite of Eureka Springs *v.* Conant, 8 Copp's L. O. 3; Papina *v.* Alderson, 10 Copp's L. O. 52; Rico Townsite, 1 L. D. 556; Vizina Cons. M. Co., 9 Copp's L. O. 92; Esler *v.* Townsite of Cooke, 4 L. D. 212.

[2] Townsite of Butte, 3 Copp's L. O. 114; Townsite of Deadwood, 8 Copp's L. O. 18, 153; Com'rs' Letter, Copp's Min. Dec. 156; Kemp *v.* Starr, 5 Copp's L. O. 130.

[3] Davis *v.* Weibbold, 139 U. S. 507; Deffeback *v.* Hawke, 115 U. S. 392; Talbot *v.* King, 6 Mont. 76; Butte City Smokehouse Lode Cases, 6 Mont. 397.

and the practice of inserting these correlative reservations ceased.[1]

**§ 172. Section sixteen of the act of March 3, 1891, is limited in its application to incorporated towns and cities.**— We have in a previous section[2] quoted the provisions of the act of March 3, 1891, so far as it supplements the prior existing townsite laws. It is manifest that this supplemental legislation was intended to apply only to cases of *incorporated* towns, the territorial limits of which are subject to an organized form of municipal government. As to towns and settlements upon the public mineral domain for townsite purposes which are unincorporated, including those which must be entered and patented to the county judge, or the judicial officer performing his functions, as well as all other classes of townsites, the townsite laws, as heretofore understood and explained by the courts, as shown in the preceding sections, remain in force, and are unaffected by the act of March 3, 1891. We are not aware that any judicial interpretation of this act has yet been made. We reason simply from the language of the text and the application of the familiar rule, *Expressio unius est exclusio alterius.* The land department has not, to our knowledge, issued any circular instructions giving its views upon the act in question; nor do we find that the act has been referred to by the department in any of its decisions, except in a case involving the townsite of Juneau, in the district of Alaska.

The act providing a civil government for Alaska, passed May 17, 1884,[3] provided for a government for this district, and made it a land district of the United States, over which was extended only the mineral laws of the United States. The general laws of Oregon, then in force, were declared to be the law of the district. The act also preserved the *status*

[1] W. A. Simmons *et al.*, 7 L. D. 283; Antediluvian Lode & Millsite, 8 L. D. 602; Secretary's Letter, 5 L. D. 256.

[2] See, *ante*, § 166.

[3] 23 Stats. at Large, 24.

*quo* as to use and occupancy for other than mining purposes until congress should act, and declared that nothing in the act should be construed to put in force in said district the general land laws of the United States.

By section eleven of the act of March 3, 1891, (section sixteen of which we are now considering), the provisions of section twenty-three hundred and eighty-seven of the Revised Statutes (the townsite law) were made applicable to Alaska, with the proviso that the entry of the townsites should be made by a trustee or trustees designated by the secretary of the interior, for the use and benefit of the occupants.

The trustee appointed by the secretary made application to enter the townsite of Juneau, against which a protest was filed by a mineral claimant, and the question involved was the mineral or non-mineral character of the land.

The secretary of the interior thus states his views:—

"Looking to the provisions of the act of May 17, 1884, "and of the act of March 3, 1891, it seems to have been the "purpose of congress to permit and authorize mineral pros- "pecting and mining upon lands owned by the United States, "and merely occupied by others, for some purpose other "than mining, provided that such mining operations did "not interfere with such occupancy. There is no complaint "that the mineral claimant in his discovery and develop- "ment work interfered with the occupancy of any person "in possession at the date of the passage of the act of May "17, 1884, or at the time the work was done. The town- "site application and entry made pending the mineral "location, and with a view to obtaining patent to the "entire interest in all the land included in said mineral "location, puts the townsite in the attitude of asserting "the non-mineral character of all of said land, and of assum- "ing the burden of establishing that fact by proof."[1]

The finding was that the land was mineral, and the secretary directed that the townsite entry should be canceled as to the land covered by the mineral location. As the town of Juneau was not an incorporated town, we can not see how section sixteen of the act of March 3, 1891, could

[1] Goldstein *v.* Townsite of Juneau, 23 L. D. 417, 420.

be considered as a factor. It would seem that the extension, by section eleven of that act, of the provisions of the federal townsite laws over the district of Alaska operated *propria vigore* to inhibit the acquisition of mineral lands under the townsite laws; and the town being unincorporated, there was no sanction for the consideration of correlative rights between miner and townsite occupant. It is true that the act of May 17, 1884, provided in terms that the *status quo* as to use and occupancy for other than mining purposes should be preserved until congress should act. But by extending the provisions of the townsite laws over the district *it acted*. The general mining laws having been put in force by the act of 1884, the townsite provisions, subsequently made applicable, are necessarily to be construed in the light of the mining laws theretofore in force. It follows that the rules of construction, as applied by the courts to the system thus extended to Alaska, have the same controlling force there as elsewhere. There is nothing in the decision of the secretary in this case which suggests that section sixteen of the act of March 3, 1891, applies to other than incorporated towns. The act seems to be clear and unambiguous in this respect.

§ 173. **The object and intent of section sixteen of the act of March 3, 1891.**— We think that an analysis of this act, when considered with reference to the state of the law as it existed at the time of its enactment, viewed in connection with those statutes *in pari materia* remaining in force, justifies us in deducing the following as the true object and intent of the law:—

(1) The old law inhibited the acquisition of title to mineral lands under townsite laws, whether located as such under the mining laws at the time of the proposed townsite entry or not. The land department at the time application was made to enter under the townsite was called upon to investigate the character of the land. If its mineral character was established, patent could not issue, although it might not be occupied or claimed by any one

under the mining laws. The new law permits mineral lands within incorporated towns, if so unoccupied and unclaimed, to be entered under the townsite law. It would therefore seem that, as to future entries applied for by this class of towns, the character of the land, if unoccupied and unclaimed under the mining laws, is not a fact necessarily to be passed upon by the department. If mineral, the fact of the existence or non-existence of such occupancy or claim must necessarily be adjudicated prior to the issuance of a patent. The probable force of such a patent and its unassailable character on collateral attack will be considered in a subsequent section. This much may be here said, however. The issuance of such patent to an incorporated city or town is no longer a conclusive determination that the land was non-mineral in character, as the department has now, under a certain state of facts, the power to issue townsite patents for mineral lands. It may be that such patent would be conclusive evidence of the patentability of such lands under the townsite laws.

(2) The provisions of section twenty-three hundred and ninety-two of the Revised Statutes, that —

. . . "no title shall be acquired under the foregoing "provisions of this chapter to any mine of gold, silver, "cinnabar, or copper, or to any valid mining claim or "possession under existing laws,"

and of section twenty-three hundred and eighty-six, that—

. . . "where mineral veins are possessed, which pos- "session is recognized by local authority, and to the extent "so possessed and recognized the title to town lots to be "acquired shall be subject to such recognized possession "and the necessary use thereof,"

are re-enacted. To this last provision, which, as we have heretofore shown,[1] was passed prior to the enactment of the lode law of July 26, 1866, is added the following: —

. . . "and when entry has been made or patent issued "for such townsites to such incorporated town or city, the "possessor of such mineral vein may enter and receive

[1] See, *ante*, § 166.

"patent for such mineral vein, and the surface ground "appertaining thereto."

The purpose of this supplemental clause is evidently to relieve the land department from embarrassments caused by their previous construction of the prior existing law. That department had held that with the issuance of a townsite patent their jurisdiction as to all land embraced therein terminated, and that, although the law as well as the patent contained the proviso that no title should be thereby acquired to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession held under existing laws, and although it may be sufficiently established that at the date of the issuance of the patent there existed within the limits of the townsite as patented such a mine or claim as was clearly within the proviso, yet it had no power to issue a patent to such claim; that the only remedy was by a proceeding in equity, brought by the United States to annul the townsite patent.[1]

At one time a contrary rule obtained.[2]

(3) As to placers, if they are unclaimed under the mining laws, they may be patented by an incorporated city or town. Patents may issue on valid placer locations within such limits, independently of prior occupation, for purposes of trade or business; but only one patent may issue, as no correlative rights between townsite and mineral claimants are possible.

(4) Where the right to a lode claim originates after settlement within the surface boundaries for townsite purposes, the prior townsite occupant is entitled to be protected in his surface rights, if they are not on the vein or lode; and it is probable that the extent and boundaries of such surface occupation will be required to be shown through adverse proceedings. Heretofore such adverse proceedings

[1] Pacific Slope Lode, 12 L. D. 686; Cameron Lode, 13 L. D. 369; Protector Lode, 12 L. D. 662; Plymouth Lode, *Id.* 513.

[2] South Comstock G. & S. M. Co., 2 Copp's L. O. 146; Townsite of Butte, 3 Copp's L. O. 114; *Id.* 130.

were not sanctioned, as nothing could inure to the townsite claimant by virtue of such proceedings. He could obtain no patent, and the law made no provision for the severance of any portion of the surface for his benefit.[1]

The provisions of the law of March 3, 1891, in this behalf will require either a segregation of such surface at the time lode patents are issued or the insertion of reservation clauses, protecting prior surface occupants, and defining the extent of such occupancy. The act undoubtedly gives sanction to a practice as to lode claims within townsites which has heretofore been declared by the courts to be improper.

Except as herein announced, we do not understand that the townsite laws, as they existed prior to March 3, 1891, have been modified.

**§ 174. The act of March 3, 1891, not retroactive.**— There is nothing in the terms of the act making it retrospective in its operation. The language clearly indicates that it was intended to apply only to entries made after its passage. This is the view taken by the land department, and it is manifestly correct.[2]

**§ 175. Effect of patents issued for lands within townsites.**— It is difficult to intelligently discuss the force and effect of patents for any particular class of lands without involving the consideration of the general principles of law applicable to all land patents issued by the government. We appreciate the fact that at some place in this treatise the full consideration of such general principles will be a necessity; but we doubt the propriety of doing so every

[1] We are aware that there are several cases arising under the law as it existed prior to March 3, 1891, which, in discussing mining patents within townsites, seem to lay some stress upon the failure of the townsite claimant to adverse the mineral applicant. But, as we understand the cases, such ruling was not necessary for the purpose of the case under consideration. We shall discuss this question further when dealing with the subject of adverse claims.

[2] Plymouth Lode, 12 L. D. 513; Protector Lode, *Id.* 662; Pacific Slope Lode, *Id.* 686.

time we are called upon to deal with patents to an individual class. When we shall have passed that portion of the work dealing with the method of initiating and perfecting title to mineral lands, and have outlined the proceedings culminating in the issuance of the patent, we hope to present the subject fully. For the present, we are considering the question of patents for lands issued within townsites, a somewhat limited, though by no means unimportant, class. In doing so it will be sufficient to simply epitomize what we understand to be the underlying principles controlling the courts in determining the operative force and effect of a federal patent.

We understand the general rules to be as follows:—

(1) A patent for land is the highest evidence of title, and is conclusive against the government and all claiming under junior patents or titles, until set aside or annulled;[1]

(2) The land department is a tribunal appointed by congress to decide certain questions relating to the public lands, and its decision upon matters of fact cognizable by it, in the absence of fraud or imposition, is conclusive everywhere else;[2]

(3) The government having issued a patent, cannot by the authority of its own officers invalidate that patent by the issuing of a second one for the same property;[3]

(4) A patent may be collaterally impeached in any action, and its operation as a conveyance defeated, by showing that the department had no jurisdiction to dispose

[1] Stone v. United States, 2 Wall. 525; Hooper v. Scheimer, 23 How. 235; Johnson v. Towsley, 13 Wall. 72; Gibson v. Chouteau, *Id.* 92; Warren v. Van Brunt, 19 Wall. 646; St. Louis Smelting Co. v. Kemp, 104 U. S. 636; Hoofnagle v. Anderson, 7 Wheat. 212.

[2] Lee v. Johnson, 116 U. S. 48; Johnson v. Towsley, 13 Wall. 72; Warren v. Van Brunt, 19 Wall. 646; Shepley v. Cowan, 91 U. S. 330; Moore v. Robbins, 96 U. S. 530; Marquez v. Frisbie, 101 U. S. 473; Vance v. Burbank, *Id.* 514; Quinby v. Conlan, 104 U. S. 420; St. Louis Smelting Co. v. Kemp, *Id.* 636; Steel v. St. Louis Smelting Co., 106 U. S. 447; Baldwin v. Starks, 107 U. S. 463; United States v. Minor, 114 U. S. 233; Davis v. Weibbold, 139 U. S. 507; Barden v. N. P. R. R., 154 U. S. 288.

[3] Iron S. M. Co. v. Campbell, 135 U. S. 286; Davis v. Weibbold, 139 U. S. 507.

of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale or dedicated to special purposes, or had been previously transferred to others.[1]

Applying these principles to the class of patents under consideration, we are justified in deducing the following:—

(A) A mining patent issued prior to the final entry of a townsite is conclusive evidence that all antecedent steps necessary to its issue have been properly and legally taken,[2] and necessarily inhibits the issuance of a subsequent patent to the townsite claimants covering the same property. In cases of incorporated cities and towns, under the present state of the law granting certain surface privileges to prior occupants of the surface of lode claims, we think the law gives this prior occupant the status of an adverse claimant, and that, to protect his rights to the surface, he must file his adverse claim and pursue his remedy in the courts. Failing in this, the patent issued will be a conclusive adjudication that no such prior occupancy existed. We might go a step farther, and assert that a general reservation in a patent of surface rights would not protect the prior occupant or enable him to collaterally assail the mineral patent. The fact and extent of his occupancy should be definitely determined when the mineral patent is issued, and the boundaries and extent inserted in a special reserving clause. This would enable the government to subsequently patent the surface under a townsite application, and the two patents, when taken together, would clearly show jurisdiction in the land department to issue both. The thing reserved by one would be granted by the other.[3]

[1] Wright *v.* Roseberry, 121 U. S. 488; Davis *v.* Weibbold, 139 U. S. 507; Hardin *v.* Jordan, 140 U. S. 371; United States *v.* Winona & St. P. R. R., 67 Fed. 948.

[2] Davis *v.* Weibbold, 139 U. S. 507; Iron S. M. Co. *v.* Campbell, 29 Pac. 513; Kahn *v.* Old Tel. Co., 2 Utah, 174; Chambers *v.* Jones, 42 Pac. 758; Poire *v.* Wells, 6 Colo. 406; Justice M. Co. *v.* Lee, 40 Pac. 444; United States *v.* Iron S. M. Co., 128 U. S. 673; Mont. Cent. Ry. *v.* Migeon, 68 Fed. 811.

[3] Iron S. M. Co. *v.* Campbell, 135 U. S. 286-292.

That the government, as the paramount proprietor, can create such a severance of title, cannot be denied. It was of frequent occurrence under the common law.[1] And the right of a private owner to separate the ownership of the minerals from that of the overlying surface has always been recognized in America.[2]

The surface proprietor, as an incident to his grant, would, of course, be entitled to the right of subjacent support; and the mineral patentee would be compelled to so conduct mining operations underneath the surface as not to interfere with the full enjoyment of the surface and the buildings and improvements thereon.[3]

(B) When a townsite patent is issued, it is in law such a declaration of the patentability of the land under the townsite laws that no subsequent discovery of minerals can deprive the townsite owner of his property. The patent to the townsite effectually withdraws the land from the body of the public domain, and it is no longer subject to exploration and purchase under the mining laws, based upon discoveries subsequent to the townsite patent.[4]

(C) In the case of patents to incorporated cities or towns issued under the act of March 3, 1891, the patent is no longer conclusive evidence of the fact that the lands are non-mineral, as the department is no longer called upon to determine the character of the land, unless it be to segregate the known veins, or lodes, and determine upon proper proceedings in that behalf the fact of the existence of such veins, or lodes, or of valid subsisting mining claims, and segregating them from the other lands subject to entry under the townsite, that patents may issue ultimately to

[1] See, *ante*, § 9.

[2] Hartwell *v.* Camman, 2 Stockt. Ch. 128; Stewart *v.* Chadwick, 8 Iowa, 463; Caldwell *v.* Fulton, 31 Pa. St. 475; Arnold *v.* Stevens, 24 Pick. 106; Johnstown I. Co. *v.* Cambria I. Co., 32 Pa. St. 241; Knight *v.* Indiana C. & I. Co., 47 Ind. 105, 110; Marble Co. *v.* Ripley, 10 Wall. 339; Riddle *v.* Brown, 56 Am. Dec. 202; French *v.* Brewer, 3 Wall. Jr. 346.

[3] 6 Lawson's Rights and Remedies, § 2787, p. 4544, and cases there cited.

[4] Davis *v.* Wiebbold, 139 U. S. 507; McCormick *v.* Sutton, 97 Cal. 373; Smith *v.* Hill, 89 Cal. 122; Carter *v.* Thompson, 65 Fed. 329.

the mineral claimant, as contemplated in the act. We doubt the propriety of inserting general clauses of reservation. The two patents when issued should show that the property granted by the junior patent is identically that which is reserved out of the senior patent. A reservation of a specific boundary, laid down so as to be identified in the first patent, needs no judicial action to determine what it is that is reserved.[1]

**§ 176. What constitutes a mine or valid mining claim within the meaning of section twenty-three hundred and ninety-two of the Revised Statutes.**—Section twenty-three hundred and ninety-two of the Revised Statutes provides that no title can be acquired under the townsite laws to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession under existing laws.

What is meant by the term "mine," as used in this section?

We have heretofore had occasion to discuss the meaning of the word "mine" in its etymological sense, and have shown that the word is not a definite term, but is susceptible of limitation, according to the intention with which it is used. We have also traced what we have called the evolution of denotation, showing the gradual extension of the meaning from an underground excavation made for the purpose of getting minerals to its use as an equivalent for "vein," "seam," or "lode."[2]

Construing the word as we find it in the context, and considering those portions of the Revised Statutes *in pari materia*, we think it clear that "mine" is used in its enlarged sense, and is synonymous with "vein," or "lode."

A valid mining claim can only be based upon a discovery within the limits of the claim, and the existence of mineral in such quantities as to render the land more valuable for mining than for any other purpose, or as will

[1] Iron S. M. Co. *v.* Campbell, 135 U. S. 286, 292.
[2] See, *ante*, §§ 88, 89.

justify a prudent man in the expenditure of time and money in its exploitation and development.[1]

The character of the land being thus established, its proper location, marking of boundaries, and compliance with the local laws, if any such exist, is necessary to perfect a valid mining claim.

In order to exempt such veins, lodes, or claims from the operation of a townsite patent, they must at the time of its issuance be *known* to be valuable for their minerals. To use the language of the supreme court of the United States:—

"We say 'land *known* at the time of the sale to be *val-*
"'*uable* for its minerals,' as there are vast tracts of public
"land in which minerals of different kinds are found, but
"not in such quantity as to justify expenditures in the
"effort to extract them. . . . We also say lands *known* at
"the time of their sale to be thus valuable, in order to avoid
"any possible conclusion against the validity of titles
"which may be issued for other kinds of land in which
"years afterwards rich deposits of mineral may be discov-
"ered."[2]

"It is established by former decisions of this court that
"under the acts of congress which govern this case, in
"order to except mines or mineral lands from the opera-
"tion of a townsite patent, it is not sufficient that the
"lands do in fact contain minerals, or even valuable min-
"erals, when the townsite patents take effect, but that they
"must at that time be known to contain minerals to such
"extent and value as to justify expenditures for the pur-
"pose of extracting them; and if the lands are not known
"at that time to be so valuable for mining purposes, the
"fact that they have once been valuable or are afterwards
"discovered to be still valuable for such purposes does not
"defeat or impair the title of persons claiming under the
"townsite patent."[3]

The case from which the last quotation is made was taken to the supreme court of the United States on writ of error to the supreme court of California.

[1] See, *ante*, § 98.

[2] Deffeback *v.* Hawke, 115 U. S. 392, 404.

[3] Dower *v.* Richards, 151 U. S. 658, 663, (citing, Deffeback *v.* Hawke, 115 U. S. 392; Davis *v.* Weibbold, 139 U. S. 507).

It appears from the facts in this case that the defendant, Dower, claimed that the portion of the lot which was in his possession was not granted by the patent, being reserved or excepted out of its operation, by reason of the fact that it contained a gold-bearing quartz vein, the existence of which was known at and before the date of the patent. The defendant did not claim under a location made prior to the patent to the townsite, but his asserted rights accrued under a location made subsequent to the issuance of such patent. It appeared that at one time during the history of the town, but prior to the patent, the lode in question was successfully and profitably worked, but that it had been abandoned, and work thereon had ceased for a number of years before the location of the defendant. Upon this state of facts the supreme court of the state of California thus announced its views:—

"Assuming, then, that at the date of the issuance of the "townsite patent that part of the Wagner ledge embraced "in these lots was regarded as worked out and as of no "further value for mining purposes, we find that the pre- "decessors of plaintiffs purchased the lots from the pat- "entee, went into possession of them, fenced them, divided "them into different inclosures, built valuable houses and "outhouses upon them, planted them with fruit-trees, filled "up the old mining excavations, and, in short, devoted "them to the purposes of a home.

"After fifteen years, and more, during which there was "a complete cessation of mining on the lode, the defend- "ants entered upon the possession of the plaintiffs, made a "location of the ledge, claiming three hundred feet of sur- "face on each side of the croppings,—a strip of six hun- "dred feet in width across plaintiffs' lots,—and proceeded "to dig up their garden and orchard, demolish their fences, "and undermine their houses.

"All this the defendants justify upon the ground that "the ledge and adjacent surface which they have located "was reserved by the United States out of the land patented "to the townsite trustee. It remains to consider whether "they are correct in their construction of the law upon this "point. . . .

"The question, then, is reduced to this: What was a "mine of gold within the meaning of the act of 1867?

"Without the aid of any judicial or legislative construc-
"tion, we should say, without hesitation, that one essential
"requisite of a gold mine would be a natural deposit of
"rock or earth containing a sufficient quantity of gold to
"admit of profitable working. If lands are known to con-
"tain precious metals, but in quantities so small as not to
"justify the attempt to extract them, they are not properly
"called mineral lands; and even if they might be mined at
"a very small profit, but are clearly of more value for agri-
"culture than for mining, they are agricultural rather than
"mineral lands."[1]

In a later case a similar rule was declared by the same court:—

"The term 'mine of gold, silver, cinnabar, or copper,'
"as used in the exception found in the act, and in the res-
"ervation of the patent, means a paying mine known to
"exist at the time of the grant to the county judge, or one
"which there was good reason to believe then existed."[2]

The supreme court of the United States announced similar doctrines in reference to "known mines," as that term was used in the pre-emption act of 1841,[3] and with reference to lodes within patented placers known to exist at the time of the application for patent, and which are unclaimed by the applicant.[4]

Following the construction given to placer patents reserving lodes known to exist prior to the filing of the placer application and not claimed by the applicant, it would seem that where a location of a vein, or lode, of mineral or other deposits has, prior to the issuance of a townsite patent, been made under the law, and its boundaries have been specifically marked on the surface so as to be readily traced, and notice of the location has been recorded in the usual books of record, that vein is such a "mine" as is, under the terms of the law, reserved from the operation of the townsite patent, although personal knowledge

[1] Richards *v.* Dower, 81 Cal. 44, 49.
[2] Smith *v.* Hill, 89 Cal. 122, 125.
[3] Colo. C. & I. Co. *v.* United States, 123 U. S. 307, 328.
[4] United States *v.* Iron S. M. Co., 128 U. S. 673-683; Iron S. M. Co. *v.* Mike & Starr Co., 143 U. S. 394-404.

of its existence may not be possessed by the applicant for patent. The information which the law requires the locator to give to the public must be deemed sufficient to acquaint the placer applicant with the existence of the vein or lode.[1]

If it were a valid perfected lode claim, it would be embraced within the last clause of section twenty-three hundred and ninety-two of the Revised Statutes, and there is no necessity to resort to the rule in the case of lodes within placers for analogy.

But where there is no location embracing it, the vein, or lode, or "mine," if falling within the designation as heretofore defined, is just as much excepted from the operation of the townsite patent as if it were a located lode.

If it is such a known vein, it may be located at any time. This is the rule applied by the supreme court of the United States in the case of known lodes within patented placers;[2] and we cannot see why a similar rule should not apply to known mines or veins within townsite patents.

As to the valid mining claim which is reserved from the operation of the townsite patent, it must necessarily have been located with all the formalities required by law, and be subsisting at the time the townsite patent takes effect. If the location were for any reason invalid at that time, an amended location, made subsequent to the issuance of the townsite patent, would not relate back to the original invalid location.

A case of this character was considered by the supreme court of Arizona, which court thus states its views:—

"A location of a mining claim, to fix the title as against "after-acquired rights by entry and patent, should be suffi- "ciently clear to designate the ground claimed, and should "be marked on the ground by monuments, showing the "extent of possession. If the location on its face be uncer- "tain, the uncertainty could be aided by evidence of the "possession, or of monuments; but a location notice, on "its face uncertain and without evidence of what land was

[1] Noyes v. Mantle, 127 U. S. 348.
[2] Iron S. M. Co. v. Mike & Starr Co., 143 U. S. 194.

"occupied, cannot be evidence for any purpose. An amend-
"ment, afterwards made, describing different land or mak-
"ing certain what was uncertain, cannot revert back to the
"original defective location. The entry of the townsite
"intervening after the first location and before the amend-
"ment, must be prior in right, as it is prior in time."[1]

**§ 177. In what manner may a townsite patent be assailed by the owner of a mine or mining claim.**—Where a mine or valid mining claim exists within the patented townsite at the time the patent is issued—or, to be more exact, at the time final entry thereof is made, and certificate of purchase is issued,—such mine or claim does not pass by the patent; and it seems from the current of authority that the claimant or owner of such a mine or claim may defend in actions at law against the townsite title by showing the fact of the existence of such mine or claim.

As was said by the supreme court of Montana, in the Smokehouse Lode cases,—

"An exception in a townsite patent, excluding from its
"operation all mines, mining claims, and possessions held
"under existing laws, is an exception required by the law,
"and is made by the law itself, and is conclusive upon the
"question that the government did not, and did not intend,
"by such townsite patent to convey any valid mine or
"mining claim or possession held under existing laws; and
"it is therefore impossible, under a patent to a townsite, to
"acquire any interest in any valid mine or mining claim,
"or in the surface thereof. . . . A valid location of a
"quartz lode mining claim on the public mineral lands of
"the United States is a grant from the government to the
"locator thereof, and carries with it the right, by a compli-
"ance with the law, of obtaining a full and complete title to
"all the lands included within the boundaries of the claim,
"which by the location are withdrawn from sale or pre-
"emption; and the patent, when issued, relates back to the
"location, and is not a distinct grant, but the consumma-
"tion of the grant which had its inception in the location
"of the claim."[2]

[1] Tombstone Townsite Cases, 15 Pac. 26.
[2] Butte City Smokehouse Lode Cases, 6 Mont. 397, 401.

The same court, in a previous case, thus states its views:—

"If, then, the location of a mining claim has the effect "of a grant by the United States to the locator of the right "to the present and exclusive possession of the ground "located, it follows that there could not be a like grant of "the same property to any other person. There would be "no room for a further grant; for the government would "have nothing further to convey. After such a grant, "which also carries with it the right to purchase the abso- "lute title, the land described within the grant ceases to "be public land, and the pre-emption laws, and laws provid- "ing for the sale and purchase of the public domain, have "no application to it or effect upon it. It is just as much "withdrawn from the public domain as the fee is by a valid "grant from the United States under authority, or the pos- "session by a valid and subsisting homestead or pre- "emption entry. It is already sold, and becomes private "property, which may be disposed of at the will of the "owner. And so land thus sold and disposed of is not "affected one way or another by the subsequent acts of "congress providing for the entry of townsites upon the "public lands. The application and entry for townsites is "only authorized on the public lands; and after the lands "have been granted and sold, as in the case of a valid "mining location and claim, the entry of a townsite does "not affect such claim, though situate within the bound- "aries of the townsite. The reason is that the mining "claim and ground has already been granted and sold, "and has thereby ceased to be a portion of the public lands, "for which only the townsite entry could be made; and, "for a further reason, the townsite act expressly provides "that no title shall be acquired under the provisions of "said act, to any mine of gold, silver, cinnabar, or copper, "or to any valid mining claim or possession under exist- "ing laws. If no title can be acquired to a mining claim "or possession by virtue of the townsite act, then the "defendants herein, who claim by virtue of a subsequent "townsite entry and patent, cannot disturb the exclusive "possession of the plaintiff, who claims by virtue of a "prior valid location and patent of the mining claim in "question."[1]

To the same purport is the case of Talbot *v.* King, decided by the same court.[2]

[1] Silver Bow M. & M. Co. *v.* Clark, 5 Mont. 378, 415. [2] 6 Mont. 76.

These Montana cases were not appealed to the supreme court of the United States, but were referred to by that tribunal in the case of Davis *v.* Weibbold;[1] and the language then used would seem to imply a sanction to the doctrine announced by the supreme court of Montana.[2]

The force of this rule has been recognized in a recent case by the court of appeals of Colorado, although the question there raised in this respect was merely collateral to the main issue. This court, speaking through Presiding Judge Reed, says:—

"The first contention of appellant is that the court "erred in refusing to allow the plaintiff to prove that the "discovery of the 'Lady B' was within the patented limits "of the town of Blackhawk. All the evidence shows that "the existence of a mineral-bearing vein at the place the "discoveries were made was known long previous to the "application for a receipt of the title by the town. That "under the statute was sufficient. The town took no title."[3]

This rule is necessarily based upon the theory that the land department had no jurisdiction to convey to the townsite that which had already been withdrawn from the public domain by appropriation under the mining laws. The results reached seem illogical. With the exception of the case of incorporated cities and towns, townsite entries can not be permitted upon mineral lands. The patent when issued is entitled to the presumption that the lands are non-mineral. As the supreme court of the United States has said, the presumption in favor of the validity of a patent is so potential and efficacious that it has been frequently held by the supreme court of the United States that if under any circumstances in the case the patent might have been rightfully issued, it will be presumed on collateral attack that such circumstances existed.[4]

[1] 139 U. S. 530.

[2] King *v.* Thomas, 6 Mont. 409. See, also, decision of Judge De Witt in Chambers *v.* Jones, 42 Pac. 758; Tombstone Townsite Cases, 15 Pac. 26; Blackmore *v.* Reilly, 17 Pac. 72.

[3] Moyle *v.* Bullene, 44 Pac. 69, 71.

[4] St. Louis Smelting Co. *v.* Kemp, 104 U. S. 636, 646. See, also, dissenting opinion in Iron S. M. Co. *v.* Mike & Starr Co., 143 U. S. 394, 407.

If there existed at the time of the townsite entry a mine or valid mining claim within the limits of the town, it necessarily follows that some of the lands, at least, were mineral, and the patent was to such extent wrongfully issued. If it is necessary to determine the fact of the existence or non-existence of mineral in paying quantities within the limits of a townsite before patent could issue, why is the patent not a judgment that it is non-mineral,— therefore, that no mine or valid mining claim exists?

The question seems to us uncomfortably close.

The difficulties of the situation were appreciated by the supreme court of the United States in a case involving a claimed known lode within a prior placer patent to which the placer applicant asserted no right at the time of filing his application, a junior patent to the lode claimant having been issued. The supreme court thus announced its views:—

"We are not ignorant of the many decisions by which "it has been held that the rulings of the land officers in "regard to the facts on which patents for lands are issued "are decisive in actions at law, and that such patents can "only be impeached in regard to those facts by a suit in "chancery, brought to set the grant aside. But these are "cases in which no prior patent had been issued for the "same land, and where the party contesting the patent had "no evidence of a superior legal title, but was compelled to "rely on the equity growing out of frauds and mistakes in "issuing the patent to his opponent.

"Where each party has a patent from the government, "and the question is as to the superiority of the title under "those patents, if this depends upon extrinsic facts not "shown by the patents themselves, we think it is competent "in any judicial proceeding where this question of superi- "ority of title arises to establish it by proof of these facts. "We do not believe that the government of the United "States, having issued a patent, can, by the authority of its "own officers, invalidate that patent by the issuance of a "second one for the same ground."[1]

From the doctrine as announced by the majority court in this case, the chief justice and Justice Brewer dissented.

[1] Iron S. M. Co. v. Campbell, 135 U. S. 286, 292.

Justice Brewer, speaking for the minority of the court, said:—

"From Johnson *v.* Towsley (13 Wall. 72) to the present "time, the uniform ruling of this court has been that ques- "tions of fact passed upon by the land department are "conclusively determined, and that only questions of law "can be brought into court. The right to this patent de- "pends solely upon these two questions of fact, which were "considered by the land office when the original patent "was issued. I think that its determination was con- "clusive."

In a later case before the same tribunal,[1] the lode claimant had no patent, but rested his case upon a location made after the final entry of the placer claim, but upon a lode which, it was claimed, was known to exist at the time of the application for the placer patent, and which was not included in the application. The right to establish these facts by extrinsic evidence, and thus to limit the operation of the placer patent, was upheld by the majority of the court. The minority of the court, speaking through Justice Field, thus presented its views:—

"I am unable to agree with my associates in the dis- "posal of this case. The decision and the opinion upon "which it is founded will do much, in my judgment, to "weaken the security of patents of the United States for "mineral lands, and leave them open to attack and over- "throw upon mere surmises, notions, and loose gossip of the "neighborhood, which ought not to interfere with any "rights of property resting upon the solemn record of the "government."

In Dahl *v.* Raunheim,[2] Judge Field, speaking for the entire court, in a case of the same class, says:—

"That it was *placer* ground is conclusively established "in this controversy against the defendant by the fact no "adverse claim was asserted by him to the plaintiff's appli- "cation for patent of the premises as such ground. That "question is not now open to litigation by private parties "seeking to avoid the effect of plaintiff's proceedings."

[1] Iron S. M. Co. *v.* Mike & Starr Co., 143 U. S. 394, 407.
[2] 132 U. S. 260, 263.

In perfecting mining locations the government is not an actor. It assures to the explorer the right to his mining location, but it does not surrender the right to determine for itself the qualifications of the locator, the fact of his discovery, his compliance with the law, and the character of the land. A judgment by a court of competent jurisdiction in proceedings brought upon adverse claims does not conclude the government as to these matters. There is no notice brought to the attention of the government of the existence of mining locations or known lodes prior to the application for patent. The only record made is with an officer who has no connection with the land department, and who owes no responsibility to the government. And yet a townsite patent issued by the government may be assailed in an action between individuals, and its operation defeated by showing facts the existence of which the government neither actually nor constructively could have any knowledge, unless it was a part of its duty to ascertain them when the townsite patent was applied for; and if it was a part of its duty, the patent should be conclusive evidence that that duty was performed. To say that a perfected mining claim is a grant from the government, is true in one sense; but it does not follow that in establishing the existence of such a grant the government has no voice. It is not a grant in the sense that the government has absolutely parted with its title. It does not seem right that where only one patent is issued, and where the government has not attempted to issue a second one covering any portion of the premises described in the first, that the operative effect of the prior patent should be limited by judgments in actions to which the government is in no sense a party. It would seem that the remedy in such cases should be by action instituted by the government to vacate the patent, after notice of the facts brought to its attention.

But that the law as applied to the particular class of cases under consideration is different, we cannot, in the light of the adjudicated cases, deny.

While instances are found in the books of the issuance by the land department of a prior patent to a townsite and a subsequent one to the mineral claimant, that department in later years has taken the position that its jurisdiction is exhausted by the issuance of the prior patent, and until that is set aside it is not authorized to issue the junior mineral patent within the limits of the townsite.[1]

If the lode or mining claim is by operation of law reserved out of the patent, it certainly follows that the department may subsequently issue a patent for the thing so reserved. This is the rule now followed by the department with reference to lodes known to exist within patented placers;[2] and we cannot see, in the the light of the law as expounded by the courts, why the same doctrine should not apply to lodes or claims existing at the date of the townsite entry within the townsite limits.

## Article VI. Indian Reservations.

§ 181. Nature of Indian title.
§ 182. Manner of creating and abolishing Indian reservations.
§ 183. Lands within Indian reservations are not open to settlement or purchase under the public land laws.
§ 184. Status of mining claims located within limits of an Indian reservation prior to the extinguishment of the Indian title.
§ 185. Effect of creating an Indian reservation embracing prior valid and subsisting mining claims.
§ 186. Conclusions.

**§ 181. Nature of Indian title.**— The scope of this treatise neither calls for nor permits elaborate discussion of the legal or ethical relationship existing between the government of the United States and the "wards of the nation," as the Indian tribes within our borders are popularly styled.

[1] See, *ante*, § 173, p. 212; Pacific Slope Lode, 12 L. D. 686; Cameron Lode, 13 L. D. 369; Protector Lode, 12 L. D. 662; Plymouth Lode, *Id.* 513.

[2] South Star Lode, 20 L. D. 204 (on review); Butte & Boston M. Co., 21 L. D. 125, reversing Pike's Peak Lode, 14 L. D. 47, and Com'rs' decision, South Star Lode, 17 L. D. 280.

The government legislates upon the conduct of strangers or citizens within the limits of their reservation, and for many years innumerable treaties formed with them acknowledged them to be independent people.[1]

But by the act of congress passed March 3, 1871,[2] it was declared that no Indian nation or tribe within the territory of the United States should thereafter be recognized as an independent nation, tribe, or power with whom the United States might contract by treaty.[3]

It was determined in the early history of our country that the absolute, ultimate title to lands in the possession of the Indians was acquired by the discoverers of the country, subject only to the Indian title of occupancy, and that the discoverers possessed the exclusive right of acquiring this title; or, in other words, the exclusive right of pre-emption. As was said by Chief Justice Marshall,—

"It has never been contended that the Indian title "amounted to nothing. Their right of possession has never "been questioned. The claim of the government extends "to the complete ultimate title, charged with this right of "possession, and to the exclusive power of acquiring that "right."[4]

Indians have a right to the lands they occupy until that right is extinguished by voluntary cession to the government.[5] But they are mere occupants; they do not hold a fee in the land of their original occupation, but only a usufruct, the fee being in the United States, if within the public land states or territories, or in some of the several states, if the national government acquired no lands therein.[6]

[1] Fletcher *v.* Peck, 6 Cranch, 87, 147.

[2] 16 Stats. at Large, 566.

[3] Public Domain, 244.

[4] Johnson & Graham's Lessees *v.* McIntosh, 8 Wheat. 543, 603.

[5] Cherokee Nation *v.* Georgia, 5 Peters, 1; Godfrey *v.* Beardsley, 2 McLean, 412; Holden & Warner *v.* Joy, 17 Wall. 211.

[6] United States *v.* Cook, 19 Wall. 591; Marsh *v.* Brooks, 8 How. 223; Mann *v.* Wilson, 23 How. 457; Minter *v.* Crommelin, 18 How. 87; Beecher *v.* Wetherby, 95 U. S. 517; Worcester *v.* State of Georgia, 6 Peters, 515; United States *v.* Cook, 86 U. S. 591.

Lands conveyed by the government to an Indian nation in lieu of original territory surrendered by them under treaties, for the purpose of inducing a change of habitat, are alike subject to the preferred right of the government to extinguish or acquire the Indian title.

**§ 182. Manner of creating and abolishing Indian reservations.**— Mr. Donaldson thus explains the manner of creating and abolishing Indian reservations:—

"The method of making an Indian reservation is by an "executive order withdrawing certain lands from sale or "entry and setting them apart for the use and occupancy "of the Indians, such reservation previously having been "selected by officers acting under the direction of the com- "missioner of Indian affairs or that of the secretary of the "interior, and recommended by the secretary of the inte- "rior to the president. The executive order is sent to the "office of Indian affairs, and copy thereof is furnished by "that office to the general land office, upon receipt of which "the reservation is noted upon the land-office records, and "local land officers are furnished with a copy of the order, "and are directed to protect the reservation from inter- "ference.

"When such reservation is no longer required, and the "president is so informed by the secretary of the interior, "an executive order is issued restoring the lands to the "public domain, and the order being received by the com- "missioner of Indian affairs, a copy thereof is furnished to "the general land office, where it is noted, and information "is communicated to the United States land officers, after "which the lands are disposed of as other public lands."[1]

Indian reservations existing by virtue of treaty stipulations are usually abolished, and the Indian title extinguished by compact between chiefs of the tribes and agents of the government, the agreement being subject to approval by congress and the president.[2]

**§ 183. Lands within Indian reservations are not open to settlement or purchase under the public land laws.**— It has been the policy of the government from the begin-

[1] Public Domain, 243. [2] *Id.* 244.

ning to prohibit the settlement of lands in the occupation of the Indians.[1]

As was said by the supreme court of the United States,—

"That lands dedicated to the use of the Indians should "upon every principle of natural right be carefully guarded "by the government and saved from a possible grant, is a "proposition which will command universal assent."[2]

While the government may dispose of the fee of the land, it remains burdened with the right of occupancy in the Indians.[3] This right of occupancy can not be interfered with nor determined, except by the United States. No private individual can invade it, and the manner, time, and conditions of its extinguishment are matters solely for the consideration of the government, and are not open to contestation in the judicial tribunals.[4] Where land is reserved for the use of an Indian tribe by treaty, the treaty is notice that the land will be retained for the use of the Indians, and this purpose can not be defeated by the action of any officers of the land department.[5] The lands embraced therein are no longer public lands.[6]

The nature of this use requires the absolute reservation and withdrawal of every foot of land within the defined limits, and no portion of it is disposable to settlers or to purchasers so as to enable them to invade the Indian occupancy. In this respect Indian reservations differ from that class of Mexican grants called "floats," within the exterior boundaries of which the government may grant lands to others than the claimants, so long as sufficient land remains to satisfy the grant.[7]

In most of the compacts entered into between the

[1] Hot Springs Cases, Rector & Hale *v.* United States, 92 U. S. 698.

[2] Leavenworth L. & G. R. Co. *v.* United States, 92 U. S. 733; Missouri, K. & T. Ry. Co. *v.* United States, *Id.* 760.

[3] Beecher *v.* Whetherby, 95 U. S. 517; Buttz *v.* N. P. R. R., 119 U. S. 55.

[4] *Id.*

[5] United States *v.* Carpenter, 111 U. S. 347.

[6] Missouri, K. & T. Ry. Co. *v.* Roberts, 152 U. S. 114; Spalding *v.* Chandler, 160 U. S. 394, 405.

[7] United States *v.* McLaughlin, 127 U. S. 428; Carr *v.* Quigley, 149 U. S. 652. See, *ante*, § 124.

government and Indian tribes, the United States has agreed that only such persons as were specified in the treaty should ever be permitted to pass over, settle upon, or reside in the territory so set apart for the use of the Indians. The treaty with the Sioux Indians, proclaimed February 24, 1869, embracing within its limits the famous Black Hills, in Dakota, and with the confederated band of Ute Indians, in Colorado, contained these stipulations.[1]

But in the absence of such specific stipulations, the policy of the government has been to preserve the reservation from invasion by those seeking to establish settlement within the boundaries.

**§ 184. Status of mining claims located within limits of an Indian reservation prior to the extinguishment of the Indian title.**—It logically follows from the nature and object of a reservation of land for the use and occupancy of the Indians that no rights can be lawfully initiated to mineral lands within the limits of such reservation. It would be a violation of public faith to permit these lands, so long as the Indian title remains unextinguished, to be invaded with a view to their exploration and appropriation for mining purposes. Such invasion, although peaceful in its inception, would invariably end in conflicts. The government could not lend its sanction to such intrusion without being charged with a violation of its solemn obligations.[2]

The supreme court of Colorado, in a case which involved a mining claim within the limits of what was at the time of its discovery and location the Ute Indian reservation in that state, clearly announced the rule:—

"The effect of the treaty was to withdraw the whole of "the land embraced within the reservation from private "entry or appropriation, and during its existence the gov- "ernment could not have authorized the plaintiffs to enter "upon the ground in controversy for the purpose of dis-

[1] Uhlig *v.* Garrison, 2 Dak. 71-95; Kendall *v.* San Juan S. M. Co. 9 Colo. 349.

[2] See the interesting account of the settlement of Deadwood and the Black Hills region, in 8 Copp's L. O. 153.

" covering and locating a mining claim. On the contrary, " the government stood pledged to prevent its citizens from " entering upon the reservation for any such purposes. " The right to locate mineral lands of the United States is " declared to be a privilege granted by congress. No such " grant including the premises in controversy existed at " the time of the plaintiff's location. It is also held that " a location to be effective must be good at the time it was " made, and that it can not be good when made if there is " then an outstanding grant of the exclusive right of pos- " session to another. The possession of the plaintiffs at " the time of their location of the Bear lode was tortious. " Such being the character of their possession, and assum- " ing to locate a claim, not only *without legal* authority, but " in violation of law, the attempted location was a nullity. " It was just as if it had never been made."[1]

The supreme court of the United States affirmed the rule thus announced. Said that court:—

" The effect of the treaty was to exclude all intrusion " for mining or other private pursuits upon the territory " thus reserved for the Indians. It prohibited any entry " of the kind upon the premises, and no interest could be " claimed or enforced in disregard of this provision. Not " until the withdrawal of the land from this reservation of " the treaty by a new convention with the Indians, and " one which would throw the lands open, could a mining " location therein be initiated by the plaintiffs. The loca- " tion of the Bear lode, having been made whilst the treaty " was in force, was inoperative to confer any rights upon " the plaintiffs."[2]

The supreme court of Dakota set its seal of condemnation upon the attempted assertion of rights to occupy lands within the Black Hills region prior to the extinguishment of the title of the Sioux Indians,[3] and with reference to attempted mining locations it established the rule that a party can not acquire a mining claim by acts performed within an Indian reservation. But it was also held that a party in possession on the day the Indian title became

[1] Kendall *v.* San Juan S. M. Co., 9 Colo. 349, 357 (citing United States *v.* Carpenter, 111 U. S. 347; Belk *v.* Meagher, 104 U. S. 279).

[2] Kendall *v.* San Juan S. M. Co., 144 U. S. 658, 663.

[3] Uhlig *v.* Garrison, 2 Dak. 71, 95.

extinguished, with the requisite discovery, with surface boundaries marked and notice posted, could adopt these antecedent steps, and manifest their adoption by then recording his notice of location in the proper office, and by so doing and performing the amount of labor and making improvements could date his rights from that day;[1] and this doctrine also met with the approval of the supreme court of the United States.[2]

The general rule with reference to mining claims within Indian reservations was first announced by the supreme court of Dakota in the case of French *v.* Lancaster;[3] but no written opinion was filed. In this case it seems that both parties litigant, being rival mineral claimants *in pari delictu*, stipulated to waive all objections that might have been raised to evidence of acts of location and appropriation performed prior to the extinguishment of the Indian title. The trial court acted upon the stipulation, and determined the case regardless of the existence of the reservation.[4]

The appellate court, however, held that public policy required that notice should be taken of the facts, and held the attempted locations invalid.

The general doctrine announced in this case was followed by the same court in a later case.[5]

The land department has uniformly adhered to the doctrine that the occupancy and location of mining claims within an Indian reservation prior to the extinguishment of the Indian title is an open violation of solemn treaty obligations, and without even a shadow of right.[6]

Manifestly, the precise time when the Indian title becomes effectually extinguished, and the reserved lands

[1] Caledonia G. M. Co. *v.* Noonan, 3 Dak. 189.

[2] Noonan *v.* Caledonia G. M. Co., 121 U. S. 393.

[3] 2 Dak. 346.

[4] See Golden Terra M. Co. *v.* Mahler, 4 Morr. Min. Rep. 390, 405.

[5] Golden Terra M. Co. *v.* Smith, 2 Dak. 374, 402.

[6] Townsite of Deadwood *v.* Mineral Claimants, 8 Copp's L. O. 153; Rattlesnake Jack Placer, 10 Copp's L. O. 87; Crow Indian Reservation, Copp's Min. Lands, 236; Circ. Instructions, 3 L. D. 371; 6 L. D. 341.

In a recent case decided by Judge Hanford, sitting as circuit judge for the district of Washington, it was held in the case of the Colville

become open to entry and occupation for any purpose, depends upon the facts of each particular case.[1]

**§ 185. Effect of creating an Indian reservation embracing prior valid and subsisting mining claims.** — The land department, following the opinion of the attorney-general with reference to military reservations,[2] has held that mining claims valid and subsisting cannot be included within an Indian reservation set apart after the location of such claims so as to deprive the locator of his previously acquired rights. Where an Indian reservation has been made including such claim, the locators may show by proper proof, that their claims were valid and subsisting at the date of such reservation.[3]

Considering the dignity accorded to a mining title, perfected and acquired at a time when the lands were a part of the public domain, we think the ruling in harmony with the spirit and intent of the mining laws. Should the claim, however, become forfeited, after the reservation was created, it would not be open to relocation, but would become subject to the reservation. No new right could be initiated after the original right lapsed. The creation of the reservation would operate as an intervening obstacle, cutting off subsequent locations, as well as preventing the

Indian reservation that the act of congress opening a part of it *pro tanto* annulled the executive order creating the reservation and restored the lands to the public domain, subject only to the right of the Indians to make selection for allotments in severalty. For this purpose settlements upon and entries of agricultural lands must be postponed under the act until six months after the president's proclamation opening the lands; but prospectors and miners are not required to wait for the proclamation to open the tract to exploration for minerals, mineral lands not being subject to allotment to the Indians. Collins *v.* Bubb, 73 Fed. 735.

By act of Feb. 20, 1896, the mineral land laws were extended to the north half of this reservation. (1st sess. 54th Cong., p. 9.)

[1] Congress has passed several special acts opening lands within Indian reservations to occupation, location, and purchase, under the provisions of the mineral laws only, with a preference right of purchase to those who had located prior to the opening of the reservation — for example, the Blackfeet, Fort Belknap, and San Carlos reservations. (1st sess. 54th Cong.)

[2] See, *post*, § 192.

[3] Chief Moses Indian Reservation, 9 Copp's L. O. 189.

restoration of the estate of the original locator by resumption of work.

§ 186. **Conclusions.** — We announce the following as our conclusions from the foregoing exposition of the law: —

No right to appropriate a mining claim within the limits of an Indian reservation can be initiated so long as the Indian title remains unextinguished. Acts which in the absence of such reservation might be valid may be adopted upon the extinguishment of the Indian title, if such adoption is manifested by perfection of the location and the performance of the required work or making improvements. Otherwise, the claim may be located by the first-comer, regardless of the acts done by others while the land was withdrawn from the public domain. A mining claim valid and subsisting at the time an Indian reservation is created is not affected by such reservation, nor are the rights of the prior locator impaired, so long as he perpetuates his estate by the performance of the requsite annual labor; but upon the abandonment or forfeiture of the claim, it becomes subject to the reservation; nor can the estate of the original locator be restored by resumption of work.

## Article VII. Military Reservations.

§ 190. Manner of creating and abolishing military reservations.
§ 191. Status of mining claims located within the limits of a subsisting military reservation.
§ 192. Effect of creating a military reservation embracing prior valid and subsisting mining claims.

§ 190. **Manner of creating and abolishing military reservations.** — The method of creating military reservations is thus outlined by Mr. Donaldson: —

"The commanding officer of a military department rec-
"ommends the establishment of a reservation, with certain
"boundaries; the secretary of war refers the papers to the
"interior department, to know whether any objection exists

"to the declaration of the reserve by the president. If no "objection is known to the general land office, and it is so "reported, the reservation is declared by the president, upon "application of the secretary of war for that purpose, and "the papers are sent to the general land office, through the "secretary of the interior, for annotation upon the proper "records. If upon surveyed land, the United States land "officers are at once instructed to withhold the same from "disposal, and respect the reservation. If upon unsurveyed "land, the United States surveyor-general is furnished with "a full description of the tract, and is instructed to close "the lines of public surveys upon the outboundaries of the "reserve; the United States land officers are also instructed "not to receive any filing of any kind for the reserved "lands."[1]

The authority of the president, acting through the secretary of war and his officers, to have posts and forts established, with a proper quantity of ground appropriated for military purposes, is unquestioned.[2]

Such reservation is vacated, or "reduced," by executive proclamation.

Whenever in the opinion of the president of the United States the lands, or any portion of them, included within the limits of any military reservation have become useless for military purposes, he causes the same, or so much thereof as he shall designate, to be placed under the control of the secretary of the interior for disposition under the general laws relating to the public lands, and causes to be filed with the secretary of the interior a notice thereof.[3]

The lands thus restored are not always opened immediately for entry and settlement for agricultural purposes. Congress usually provides for their sale or extends the privilege of settlement upon them under the homestead laws. But with reference to mineral lands, the act of July 5, 1884,[4] in terms provides that whenever any lands

[1] Public Domain, 249.

[2] Wilcox *v.* Jackson, 13 Peters, 498; Stone *v.* United States, 2 Wall. 525; Grisar *v.* McDowell, 6 Wall. 381.

[3] Act of July 5, 1884, 23 Stats. at Large, 103. See, also, Act of Aug. 23, 1894, 28 Stats. at Large, 491; Act of Feb. 15, 1895, *Id.* 664.

[4] 23 Stats. at Large, 103.

containing valuable mineral deposits shall be vacated by the reduction or abandonment of any military reservation under the provisions of the act, the same shall be disposed of exclusively under the mineral land laws of the United States.

§ 191. **Status of mining claims located within the limits of a subsisting military reservation.**— Every tract set apart for some special use is reserved to the government, to enable it to enforce that use; and there is no difference in this respect whether it be appropriated for Indian occupancy or for other purposes. There is an equal obligation resting on the government to see that neither class of reservation is diverted from the uses to which it was assigned.[1]

Much that has been said in the preceding articles with reference to Indian reservations applies with equal force to military reservations. In an opinion given by Attorney-General McVeagh to the secretary of war, that officer was advised that mineral lands might be included in reservations for military purposes, and they are not subject to appropriation by mineral claimants while such reservation exists.[2] And this is the rule recognized by the land department.[3]

The law is too well settled to require discussion, that no right exists under any of the public land laws to invade the limits of a subsisting reservation for the purpose of initiating a title to the lands therein.

The creation of the reservation is a withdrawal of the lands from the operation of the public land laws; and so long as such reservation remains in force, no entry thereon can be lawfully made under the mining or other public land laws.

§ 192. **Effect of creating a military reservation embracing prior valid and subsisting mining claims.**— Mr. Armstrong, while acting commissioner of the general land

[1] Leavenworth L. & G. R. Co. v. United States, 92 U. S. 733.
[2] Fort Maginnis, 1 L. D. 552.
[3] Sucia Islands, 23 L. D. 329.

office, held that the subsequent enlargement of a military reservation, so as to include within its limits previously located mining claims, prevented the locator from perpetuating his title by performance of annual work, his only remedy being to relocate the claim upon the restoration of the reservation to the public domain.[1]

But in the opinion given by Attorney-General McVeagh at the request of the secretary of war, referred to in the preceding section, a contrary rule is stated. Mr. McVeagh thus expresses his views:—

"It seems to me that where such rights have attached "to mineral lands in favor of the locator of a mining "claim, the land during the continuance of the claim (*i. e.* "so long as it is maintained in accordance with law) "becomes by force of the mining laws appropriated to a "specific purpose—namely, the development and working "of the mine located; and unless congress otherwise pro- "vides, it can not, while that right exists, notwithstanding "the title thereto remains in the government, be set apart "for public uses."[2]

Ever since the promulgation of this opinion the land department has accepted the rule as stated by the attorney-general. This is the accepted doctrine of that department with reference to previously located mining claims within Indian reservations.[3]

The rule is different with reference to inchoate preemption claims. As to such classes of claims, the government does not enter into any contract with the settler or incur any obligation that the land occupied by him shall ever be put up for sale. Whatever may be the possessory rights of such occupant as against other claimants under the ordinary land laws, such rights cannot avail against the power of congress to make whatsoever disposition of such lands as it pleases at any time prior to the final entry and purchase.[4]

[1] Camp Bowie Reservation, 7 Copp's L. O. 4.

[2] 1 Land Decisions, 552, 554; 8 Copp's L. O. 137.

[3] See, *ante*, § 185.

[4] Frisbie v. Whitney, 9 Wall. 187; Hutchins v. Low (Yosemite Valley Case), 15 Wall. 77.

As was said by the supreme court of the United States,—

"Mere settlement upon the public lands with the intention to obtain title under the pre-emption laws does not create in the settler such a vested interest as deprives congress of the power to dispose of the property."[1]

But a mining claim perfected under the law is property, in the highest sense of that term. It has the effect of a grant by the government of the right of present and exclusive possession of the lands located[2] against every one, including the United States itself.[3]

A patent issued to the locator adds but little to the security of his title.[4] Mineral lands of the government are always for sale.[5]

One locating them does so upon the express invitation of the government, and under a compact by which he is secured the absolute and exclusive right of enjoyment of his properly discovered and located claim, so long as he complies with the law. While the right of the government undoubtedly exists to extinguish an imperfect and incomplete pre-emption claim, we cannot admit that a similar right exists with reference to perfected mining claims. The nature of the estate held by a pre-emptor and that owned by a locator of a valid and subsisting mining claim is essentially different.

If the rule is correctly stated, it follows necessarily that a locator holding a valid mining claim subsisting at the time the reservation for military purposes is created, has a right to perpetuate his estate and enjoy his property by operating and developing it, and should be entitled to the right of ingress and egress at all reasonable times over the reservation, as well as to all other privileges reasonably

[1] Shepley v. Cowan, 91 U. S. 330, 338; Gonzales v. French, U. S. Sup. Ct., Nov. 30, 1896.

[2] Belk v. Meagher, 104 U. S. 279, 284; Gwillim v. Donnellan, 115 U. S. 45.

[3] McFeters v. Pierson, 15 Colo. 201; Gold Hill Q. M. Co. v. Ish, 5 Ore. 104; Seymour v. Fisher, 16 Colo. 188.

[4] Chambers v. Harrington, 111 U. S. 350; Shafer v. Constans, 3 Mont. 369.

[5] Rev. Stats., § 2319.

necessary or incident to the full and fair enjoyment of the property granted to him by the government.

The conclusions reached in reference to Indian reservations, announced in section one hundred and eighty-six, are equally applicable to military reservations.

## Article VIII. National Park and Forest Reservations.

§ 196. Manner of creating national park reservations, and purposes for which they are created.
§ 197. Manner of creating forest reservations, and purposes for which they are created.
§ 198. Status of mining claims within forest reservations.

**§ 196. Manner of creating national park reservations, and purposes for which they are created.** — The most renowned of all national parks is the "Yellowstone," embracing within its limits thirty-five hundred and seventy-five square miles, or two million two hundred and eighty-eight thousand acres, the largest reservation of its kind in the world.[1] It was dedicated and set apart as a public park and pleasure ground for the benefit and enjoyment of the people, by a special act of congress, passed March 1, 1872.[2]

All lands within its limits were by the terms of the act withdrawn from settlement, occupancy, or sale under the laws of the United States, and the secretary of the interior was authorized to make regulations for the government of the park, which provide, among other things, for the preservation from injury or spoliation of all timber, mineral deposits, natural curiosities, or wonders within the park, and their retention in their natural condition.[3]

The act further declares that all persons who should locate, settle upon, or occupy the same, or any part thereof,

[1] Public Domain, 1294.
[2] Rev. Stats. §§ 2474, 2475.
[3] For regulations governing the park, see Public Domain, 1296.

except for certain prescribed purposes, under permission of the secretary of the interior, shall be considered as trespassers.

Several other reservations were subsequently created, for similar purposes, the acts of dedication being drawn upon lines parallel to the Yellowstone act. The acts of September 25, 1890,[1] and of October 1, 1890, reserving lands in the vicinity of the Yosemite valley in California,[2] are of this class. The effect of these reservations is the same as in the case of Indian and military reservations—that is, to absolutely withdraw the lands from settlement, entry, occupation, and purchase,—and the rules of law applicable to the latter classes of reservations apply with equal force to national parks. It is unnecessary to here repeat these rules. As these parks are dedicated by act of congress, it will probably require a congressional act to restore them to the public domain.

§ 197. **Manner of creating forest reservations, and purposes for which they are created.**— We do not encounter forest reservations as a distinctive class until within a recent period. By an act of congress, passed March 3, 1891,[3] the president of the United States was authorized from time to time to set apart and reserve in any state or territory having public land bearing forests in any part of the public lands, wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, the establishment of such reservations and their limits to be declared by executive proclamation.

Under this law, numerous forest reservations have been declared, notably those adjoining the Yellowstone park,[4] and the following in the several states and territories:—

In Colorado: The Battlement Mesa;[5] Pike's Peak;[6] Plum Creek;[7] South Platte;[8] White River Plateau.[9]

[1] 26 Stats. at Large, 478.
[2] *Id.* 650.
[3] *Id.*, p. 1103, § 24.
[4] *Id.* 1095; 27 Stats. at Large, 989.
[5] Dec. 24, 1892, 27 Stats. at Large, 1053.
[6] Feb. 11, 1892, *Id.* 1099.
[7] June 23, 1892, *Id.* 1029.
[8] Dec. 9, 1892, *Id.* 1044.
[9] Oct. 16, 1891, *Id.* 993.

In Oregon: The Ashland and Cascade;[1] Bull Run.[2]

In California: The San Bernardino;[3] San Gabriel;[4] Sierra;[5] Trabuco Cañon.[6]

In Washington: The Pacific.[7]

In New Mexico: The Pecos River.[8]

In Arizona: The Grand Cañon.[9]

In Alaska: Afognak Island.[10]

The object of these reservations was to reserve public lands in mountainous and other regions which are covered with timber or undergrowth, at the head-waters of rivers, and along the banks of streams, creeks, and ravines, where such timber or undergrowth is the means provided by nature to absorb and check the mountain torrents and to prevent the sudden and rapid melting of the winter's snows and the resultant inundation of the valleys below.[11]

The data upon which these reservations are proclaimed are supplied by reports of special agents of the general land office, and upon these reports the commissioner of the general land office or secretary of the interior orders the lands embraced in the report temporarily withdrawn from the operation of the public land laws, pending the formal proclamation by the president. This action of the department officers in ordering these withdrawals is deemed in law the act of the president.[12]

[1] Sept. 28, 1893, 28 Stats. at Large, 1240, 1243.
[2] June 17, 1892, 27 Stats. at Large, 1027.
[3] Feb. 25, 1893, *Id.* 1008.
[4] Dec. 20, 1892, *Id.* 1049.
[5] Feb. 14, 1893, *Id.* 1059.
[6] Feb. 27, 1893, *Id.* 1006.
[7] Feb. 20, 1893, *Id.* 1063.
[8] Jan. 11, 1892, *Id.* 998.
[9] Feb. 20, 1893, *Id.* 1064.
[10] *Id.* 1052.
[11] See instructions relating to timber reservations, May 15, 1891, 12 L. D. 489.
[12] Wolsey v. Chapman, 101 U. S. 755, 769; Wilcox v. Jackson, 13 Peters, 498; *In re* State of California, 20 L. D. 327; Battlement Mesa Forest Reserve, 16 L. D. 190.

An order of withdrawal takes effect on the day of its date, not on the date notice is received at the local office.[1]

As was said by Judge Bellinger, sitting as circuit judge for the district of Oregon,[2] the reservation of these lands is an appropriation to a special public use, and is therefore a disposal of them, so far as the public domain is concerned.

Reservations of this class may be restored to the public domain by executive proclamation, without special authority of congress.[3]

**§ 198. Status of mining claims within forest reservations.**—The rules heretofore enunciated with reference to mining claims within Indian and military reservations apply with equal force to forest reservations. However, the proclamation itself provides specially for preserving the status of mining claims valid and subsisting at the date of the withdrawal.

All the proclamations creating forest reservations, with one or two exceptions, contain the following clauses:—

"Excepting from the force and effect of this proclamation all lands which may have been prior to the date "hereof embraced in any legal entry, or covered by any "lawful filing, duly of record in the proper United States "land office, or upon which any valid settlement has been "made pursuant to law, and the statutory period within "which to make entry or filing of record has not expired; "and all mining claims duly located and held according to "the laws of the United States and rules and regulations "not in conflict therewith.

"*Provided*, that this exception shall not continue to apply "to any particular tract of land, unless the entryman, settler, "or claimant continues to comply with the law under which "the entry, filing, settlement, or location was made."

In some instances congress has opened forest reservations for the location of mining claims. An act of this character was passed at the first session of the fifty-fourth congress (February 26, 1896), which provides that the

[1] *In re* Zumwalt, 20 L. D. 32; Currie *v.* State of California, 21 L. D. 134.
[2] United States *v.* Tygh Valley L. & S. Co., 76 Fed. 623.
[3] Opinion of Asst. Atty-Gen. Shields, 14 L. D. 209.

Pike's Peak, Plum Creek, and South Platte forest reservations, in Colorado,—

"Shall be open to the location of mining claims therein "for gold, silver, and cinnabar, and that title to such min- "ing claims may be acquired in the same manner as it may "be acquired to mining claims upon the other mineral "lands of the United States for such purposes; *provided*, "that all locations of mining claims heretofore made in "good faith within said reservation, and which have been "held and worked in the same manner as mining claims "are held and worked under existing law upon the public "domain, are validated by this act."

And, by a subsequent section, the right to cut timber from such claim for actual mining purposes was authorized.

In the absence of such permission of congress no mining claim can be located within the limits of a forest reservation after the date of withdrawal or proclamation.[1]

## ARTICLE IX. HOMESTEAD AND OTHER AGRICULTURAL CLAIMS.

§ 202. Introductory.
§ 203. Classification of laws providing for the disposal of the public lands.
§ 204. Manner of acquiring homestead claims.
§ 205. Nature of inceptive right acquired by homestead claimant.
§ 206. Location of mining claims within homestead entries.
§ 207. Proceedings for the determination of the character of the land.
§ 208. When decision of land department becomes final.
§ 209. The reservation of "known mines" in the pre-emption laws.
§ 210. Timber and stone lands.
§ 211. Scrip.
§ 212. Desert lands.

**§ 202. Introductory.**— We have no particular concern with the manner of of acquiring title to lands of the public domain, other than those falling within the purview of

[1] By an act of congress, passed May 14, 1896, the secretary of the interior is empowered to permit the use of a right of way to the extent of twenty-five feet, with the use of necessary ground, not exceeding forty acres, within forest reservations, for the purpose of generating, manufacturing, and distributing electric power.

the mining laws, except in so far as the administration of the public land system requires the adjustment of controversies between mineral claimants and those asserting privileges under the homestead and other laws applicable to public lands which are non-mineral in character. Incidentally, we are called upon to investigate the general scope of the latter class of laws, the character of lands to which they relate, the rules governing the determination of conflicts arising between mineral and other claimants, and the point of time in the proceedings seeking the transmission of title when these controversies are to be finally determined.

**§ 203. Classification of laws providing for the disposal of the public lands.**—The existing laws providing for the disposal of the public domain may be thus classified:—

(1) Those regulating the acquisition and enjoyment of rights upon public mineral lands, including in this designation laws applicable to coal and salines;

(2) The townsite laws;

(3) The homestead laws;

(4) Laws regulating the sale of lands chiefly valuable for timber or stone;

(5) Laws applicable to desert lands;

(6) The appropriation of lands by "covering" with bounty land warrants, agricultural college, private land, and other classes of "scrip."

The pre-emption laws which, in one form or another, existed from an early period of our history until March 3, 1891, were repealed on that date,[1] and no longer form a part of our public land system, except so far as may be necessary to preserve and perfect rights accruing prior to the passage of the repealing act.

The timber-culture laws, originally enacted March 3, 1873,[2] a substitute for which was passed June 14, 1878,[3]

[1] 26 Stats. at Large, 1093. [2] 17 Stats. at Large, 605. [3] 20 Stats. at Large, 113.

were abrogated by section one of the same act, which effected the repeal of the pre-emption laws.

As to sales at public auction, they are no longer permitted,[1] except in cases of abandoned military or other reservations, isolated and disconnected fractional tracts authorized to be sold by section twenty-four hundred and fifty-five of the Revised Statutes, and other lands under special acts having local application.

Since March 2, 1889,[2] with the exception of lands in the state of Missouri and in other specified localities, no sales or locations at private entry are allowed.[3]

As to the townsite laws, we have in a preceding article[4] fully discussed their provisions, and it is unnecessary to further consider them.

For the purposes announced in the introduction to this article, we need devote our attention only to those branches of the public land system which deal with homesteads, timber and stone lands, desert lands, and scrip locations. For certain illustrative purposes, we may also include in the category deserving consideration, the repealed pre-emption laws.

§ 204. **Manner of acquiring homestead claims.**—The homestead laws secure to the head of a family, of lawful age, who is a citizen of the United States, or who has declared his intention to become such, the right to settle upon, enter, and acquire title to not exceeding one hundred and sixty acres of unappropriated non-mineral[5] public lands, by establishing and maintaining residence thereon, and improving and cultivating the land for the continuous period of five years.[6]

To obtain an inceptive right to a homestead, the appli-

[1] Act of March 3, 1891, §§ 9, 10; 26 Stats. at Large, 1099.
[2] 25 Stats. at Large, 854.
[3] *Id.*
[4] See, *ante*, art. v., §§ 166-177.
[5] Rev. Stats., § 2302.
[6] Rev. Stats. § 2289, as amended by act of March 3, 1891, § 5; 26 Stats. at Large, 1093.

cant files with the register of the local land office an application, stating his qualifications, and describing the land he desires to enter. If it appears from the tract-books that the land is of the character subject to entry under the law, and is clear — that is, unappropriated, — the applicant is permitted to make entry of the land; the receiver of the land office issues a receipt for the fees paid for filing the application, a record is made in the local office, and the fact reported to the general land office. If the lands are returned as mineral, and borne on the tract-books as such, the homestead claimant will not be permitted to initiate his right until a hearing is had for the purpose of determining the character of the land. To use the common expression, the mineral must be "proved off," before any right to the land can be inaugurated under the agricultural land laws. Whatever may be the effect of the surveyor-general's return as evidence in litigated cases involving the character of the land,[1] the land officers in administering the land laws accept such return as controlling their action in the first instance.

§ 205. **Nature of inceptive right acquired by homestead claimant.** — It would seem that the estate acquired by a homestead claimant who has filed his application and received his preliminary receipt from the receiver of the land office, is of greater dignity than that acquired by filing a declaratory statement under the pre-emption laws. By the pre-emption laws the United States did not enter into any contract with the settler, or incur any obligation that the land occupied by him should ever be offered for sale. They simply declared that, in case their lands were thrown open for sale, the privilege to purchase should be first given to parties who had settled upon and improved them.[2]

[1] See, *ante*, §§ 105, 106, 107.

[2] Frisbie *v.* Whitney, 9 Wall. 187; Hutchins *v.* Low (Yosemite Valley Cases), 15 Wall. 77; Campbell *v.* Wade, 132 U. S. 34; Black *v.* Elkhorn M. Co., 49 Fed. 549.

Public land covered by a pre-emption filing, as to which there has been no payment made or final certificate issued, may be appropriated by congress to public purposes, or otherwise disposed of, without infringing any legal right held by the pre-emptioner.

In an opinion of Attorney-General McVeagh, given at the request of the secretary of war,[1] it was stated, that upon the "entry" by the homestead claimant at the local land office, a right in his favor would seem to attach to the land, which is liable to be defeated only by failure on his part to comply with the requirements of the homestead law in regard to settlement and cultivation; that this right amounts to an equitable interest in the land, subject to the future performance by the settler of certain conditions, and until forfeited by failure to perform the conditions, it must prevail, not only against individuals, but against the government; that, in contemplation of the homestead law, the settler acquires an immediate interest in the land, which, for the time being at least, becomes severed from the public domain.

The land department has invariably acted upon this theory; and the supreme court of the United States has given its sanction to the rule that such an entry, so long as it remains subsisting, is such an appropriation of the tract as segregates it from the public domain.[2] Innumerable filings under the pre-emption laws have been accepted for the same tract by the land office; but from the moment a homestead entry is accepted and the preliminary receipt issued, no further applications or filings for the tract are permitted, so long as the entry remains uncanceled.

Although the land may be in fact mineral in character, and a mining claim be located thereon, no application to patent such mining claim will be received by the land officers until a hearing is had to determine the character of the land.[3]

[1] 2 Copp's Pub. Land Laws, 1198.

[2] Hastings *etc.* R. R. *v.* Whitney, 132 U. S. 357, 364; Kan. Pac. Ry. *v.* Dunmeyer, 113 U. S. 629.

[3] Hooper *v.* Ferguson, 2 L. D. 712.

If the land be found at such hearing to be mineral in character, a cancellation *pro tanto* of the homestead entry will be ordered, and the mineral lands will be segregated, whereupon the mineral applicant may proceed to patent.

**§ 206. Location of mining claims within homestead entries.**— As lands which are essentially mineral in character cannot be the subject of appropriation under the homestead laws, but may be appropriated under the mining laws, an entry within the limits of a homestead claim, for the purpose of initiating a mining right, may be made at any time prior to the issuance of the final certificate to the homestead claimant, if such entry be made in good faith and without force or violence. The principles of law applicable to such cases will be found presented in the article dealing with "Townsites,"[1] and the one treating of "Occupancy without color of title."[2] It will be unnecessary to here repeat what is there said.

**§ 207. Proceedings for the determination of the character of the land.**— As heretofore indicated,[3] a mineral claimant may take the initiative in securing an investigation as to the character of the land covered by a homestead filing for the purpose of clearing the records and enabling him to proceed to his patent. Should this be not done, the determination of the quality and character of the land necessarily arises at the time the homestead claimant presents his application to make final proof for the purpose of obtaining his patent. The practice governing these proceedings is controlled by the regulations prescribed by the secretary of the interior, and will be found in the appendix to this treatise. Provisions are made for citing the interested parties to appear before the local land officers, where testimony may be adduced in support of their respective contentions. In these proceedings the return of the surveyor-general is *prima facie* evidence of the character of

[1] See, *ante*, art. v., §§ 166–177.
[2] See, *post*, art. x., §§ 216–219.
[3] See, *ante*, § 205.

the land, and the burden of proof rests upon him who seeks to contradict the return. The mineral character of the land must be established as a present fact.[1]

The question is really one of comparative value — Is the tract more valuable as a present fact for the mineral which it contains than for agricultural purposes?[2]

We have heretofore endeavored to formulate such rules for the determination of this question as seem to fall within the sanction of the law as determined by the courts and the land department. These rules will be found stated in a previous chapter,[3] and further repetition is unnecessary. The land sought to be subjected to the operation of the mining laws must be mineral in fact, and not in theory. A tract of land containing mineral products in quantities sufficient to justify a prudent man in the expenditure of time and money in extracting or developing it is mineral in fact;[4] but the law cannot be subverted to gratify a mere whim. While the mining interests are entitled to and must receive protection against the encroachments of persons who, under the guise of agricultural claimants, seek to secure title to large tracts of mining land, the rights of *bona fide* homestead claimants to lands clearly agricultural in character are also entitled to the same protection against adverse combinations of miners.[5]

The question of the character of land is always one of fact; and the decisions of the land department upon questions of fact in cases clearly within its jurisdiction are conclusive.[6]

[1] Hamilton *v.* Anderson, 19 L. D. 168; Magalia G. M. Co. *v.* Ferguson, 6 L. D. 218; Dughi *v.* Harkins, 2 L. D. 721; Cleghorn *v.* Bird, 4 L. D. 478; Roberts *v.* Jepson, *Id.* 60. See, *ante*, §§ 94, 98.

[2] Davis *v.* Weibbold, 139 U. S. 507; United States *v.* Reed, 28 Fed. 482; Ah Yew *v.* Choate, 24 Cal. 562; Mitchell *v.* Brown, 3 L. D. 65; Magalia G. M. Co. *v.* Ferguson, *Id.* 234; Peirano *v.* Pendola, 10 L. D. 536; Tinkham *v.* McCaffrey, 13 L. D. 517; Winters *v.* Bliss, 14 L. D. 59; Savage *v.* Boynton, 12 L. D. 612; Walton *v.* Batten, 14 L. D. 54.

[3] Tit. III., ch. i., §§ 94-98.

[4] See, *ante*, § 98.

[5] Kenna *v.* Dilion, Copp's Min. Dec. 93.

[6] Parley's Park *v.* Kerr, 130 U. S. 256; Pac. M. & M. Co. *v.* Spargo, 8 Saw. 615; Cowell *v.* Lammers, 10 Saw. 248, 257; Barden *v.* N. P. R. R., 154

The courts will not interfere with the officers of the government while in the discharge of their duties in disposing of the public lands.[1]

**§ 208. When decision of land department becomes final.**—Before final certificate issues, a homestead entry is open to attack on the ground that the land embraced therein is mineral in character, without regard to the date of the alleged discovery.[2]

The submission of final homestead proof will not preclude a hearing as to the subsequent discovery of mineral upon the land involved where final certificate is not issued and the general land office requires new proof to be made.[3]

Any intermediate determination of the character of the land which does not result, and which is not intended to result, in its final disposal to one claimant or the other, does not preclude subsequent investigation on the part of the department as to the character of such land, inasmuch as the department retains jurisdiction to consider and determine the character of the land claimed until deprived thereof by the issuance of the patent.[4]

A decision of the department in such intermediate proceedings, holding a tract to be non-mineral, is conclusive up to the period covered by the hearing; but such decision will not preclude a further consideration, based on subsequent exploration.[5]

U. S. 288; United States *v.* Winona & St. P. R. R., 67 Fed. 948; Lee *v.* Johnson, 116 U. S. 48; Johnson *v.* Towsley, 13 Wall. 72; Warren *v.* Van Brunt, 19 Wall. 646; Shepley *v.* Cowan, 91 U. S. 330; Moore *v.* Robbins, 96 U. S. 530; Marquez *v.* Frisbie, 101 U. S. 473; Vance *v.* Burbank, *Id.* 514; Quinby *v.* Conlan, 104 U. S. 420; St. Louis Smelting Co. *v.* Kemp, *Id.* 636; Steel *v.* St. Louis Smelting Co., 106 U. S. 447; Baldwin *v.* Stark, 107 U. S. 463; United States *v.* Minor, 114 U. S. 233; Grant *v.* Oliver, 91 Cal. 158; Shanklin *v.* McNamara, 87 Cal. 371; Powers *v.* Leith, 53 Cal. 711; Hays *v.* Steiger, 76 Cal. 555; Hess *v.* Bolinger, 48 Cal. 349; Caldwell *v.* Bush, 45 Pac. 488.

[1] Litchfield *v.* The Register, 9 Wall, 575; Gaines *v.* Thompson, 7 Wall. 347; Cox *v.* McGarrahan, 9 Wall. 298.

[2] Jones *v.* Driver, 15 L. D. 514.

[3] Spratt *v.* Edwards, 15 L. D. 290.

[4] Searle Placer, 11 L. D. 441.

[5] Stinchfield *v.* Pierce, 19 L. D. 12; McCharles *v.* Roberts, 20 L. D. 564; Dargin *v.* Koch, *Id.* 384.

When the land has once been adjudged to be mineral, if subsequent development prior to patent demonstrates that the mineral then found has disappeared, or that it is worthless and unprofitable to work as a mining claim, and abandoned as such, it is not in any sense a readjudication of the former issues.[1]

As was said by the department, in cases of railroad grants, a hearing had as to the agricultural or mineral character of a number of tracts of land claimed under a railroad grant, and a judgment thereon that a specific tract included therein is in fact agricultural, will not preclude a subsequent inquiry as to the character of such tract on the protest of a mineral claimant prior to the issuance of patent therefor, if the showing is clear and convincing.[2]

We see no reason why the rule thus announced should not be applied to all classes of entries. So long as the land department retains jurisdiction over the land, it may prevent the patenting of mineral lands under agricultural laws, and *vice versa*. This jurisdiction does not cease until the patent has actually issued.[3]

Lands duly and properly entered for a homestead under the homestead laws are, and continue to be, from the time of entry and pending proceedings before the land department, lands of the United States until patent is issued.[4]

The patent, when issued, is the judgment of a tribunal charged under the law with investigating the facts, and thereafter the character of the land is no longer open to contestation.

The final certificate issued by the receiver of a United States land office after the submission of final proof and payment of the purchase price, where such is required, has been repeatedly held to be the equivalent of a patent.

The holder of such certificate is vested with the complete

[1] Dargin *v.* Koch, 20 L. D. 384.

[2] Barnstetter *v.* C. P. R. R., 21 L. D. 464. See, also, Zadig *v.* C. P. R. R., 20 L. D. 26.

[3] Searle Placer, 11 L. D. 441; Wingate Placer, 22 L. D. 704.

[4] Shiver *v.* United States, 159 U. S. 491.

equitable title; and after its issuance the government holds the dry legal title for the benefit of such holder.[1]

Such certificate having been once issued upon a perfected final agricultural entry, no subsequent discovery of mineral can defeat the title of the holder.[2]

While such certificate, so long as it remains uncanceled, possesses the force of the patent, yet the power of supervision by the commissioner of the general land office over the acts of the register and receiver of the local land office in the disposition of the public lands undoubtedly authorizes him, in proper cases, to correct and annul entries of land allowed by them. The exercise of such power is necessary to the administration of the land department.[3]

If the proceedings before the register and receiver are defective, or the proofs insufficient or fraudulent, or the jurisdictional facts wanting, the certificate may afterwards be canceled by the commissioner or secretary of the interior; or the entry may be suspended, a hearing ordered, and the party notified to show, by supplemental proof, a full compliance with the law, and on failure to do so, the entry may then be canceled.[4]

An agricultural entry covering land that is mineral in character, with the knowledge of prior mineral locations thereon, and of the fact that the land was at such time regarded by many in the vicinity as valuable for the mineral therein, must be canceled, as having been allowed for "known" mineral land.[5]

[1] Witherspoon *v.* Duncan, 4 Wall. 210; Carroll *v.* Safford, 3. How. 441; Wis. R. R. *v.* Price Co., 133 U. S. 496; Cornelius *v.* Kessel, 128 U. S. 456; Deffeback *v.* Hawke, 115 U. S. 392; Benson M. & S. Co. *v.* Alta M. & S. Co., 145 U. S. 428; Hamilton *v.* Southern Nev. G. & S. M. Co., 13 Saw. 113; Amador Medean Co. *v.* S. Spring Hill Co., *Id.* 523; Aurora Hill Cons. *v.* 85 M. Co., 12 Saw. 355; Pac. Coast M. & M. Co. *v.* Spargo, 8 Saw. 645; Deno *v.* Griffin, 20 Nev. 249.

[2] Pac. Coast M. & M. Co. *v.* Spargo, 8 Saw. 645; Arthur *v.* Earle, 21 L. D. 92; Rea *v.* Stephenson, 15 L. D. 37.

[3] Harkness *v.* Underhill, 1 Black, 316; Knight *v.* U. S. Land Assn., 142 U. S. 161; Cornelius *v.* Kessel, 128 U. S. 456, 461; Ger. Ins. Co. *v.* Hayden, 21 Colo. 127.

[4] Hastings *etc.* R. R. *v.* Whitney, 132 U. S. 357, 364; Caldwell *v.* Bush, 45 Pac. 488; Hosmer *v.* Wallace, 47 Cal. 461; Hays *v.* Steiger, 76 Cal. 555.

[5] Aspen Cons. M. Co. *v.* Williams, 23 L. D. 34.

When such certificate is suspended, it cannot be used as evidence so long as the suspension continues.[1] Its cancellation, of course, deprives it of all force.[2]

This power of supervision and correction, however, is not an unlimited or arbitrary power. It can be exerted only when the entry was made upon false testimony or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered.[3]

Generally speaking, and for all practical purposes, the issuance of the final certificate to an agricultural entryman closes the case, and no collateral attack on the certificate so issued is allowed.

The land embraced in such final entry is absolutely withdrawn from the public domain, and is no longer subject to exploration or purchase under the mining laws, although it may subsequently appear that the lands are essentially mineral. Where a contest is pending, as a rule the certificate does not issue until final disposal is made, on appeal to the commissioner, and from him to the secretary, if such appeals be taken. Under ordinary circumstances, the supervision of the general land office at Washington is confined to an examination of the record as made in the local offices, for the purposes of ascertaining whether the facts presented justify the conclusions reached, the requisite jurisdictional facts appearing.

**§ 209. The reservation of "known mines" in the pre-emption laws.**— We have heretofore said[4] that the term "known mines," as used in the pre-emption act of 1841, is not the precise equivalent of the term "mineral lands," as used in the mining laws, and should undoubtedly receive a more limited interpretation. It will be borne in mind that when this pre-emption act was passed the only mines of which the government had any knowledge were those

[1] Figg *v.* Handley, 52 Cal. 295; Vance *v.* Kohlberg, 50 Cal. 346; Vantongeren *v.* Heffernan, 5 Dak. 180, 226; Hestres *v.* Brennan, 50 Cal. 211; United States *v.* Steenerson, 50 Fed. 504.

[2] Murray *v.* Polglase, 17 Mont. 455.

[3] Cornelius *v.* Kessel, 128 U. S. 456, 461.

[4] See, *ante*, § 86, p. 92.

containing copper, in the region of the great lakes, and those containing lead, in the Mississippi valley.[1]

The privilege of pre-emption during that period could be exercised only as to surveyed lands, and the public surveys had not been extended west of the Mississippi river. The government had at that time inaugurated a policy of leasing lead mines, and it is probable that the framers of these earlier laws had particular reference to those which came within the category of opened mines. In construing the term "known mines," as used in this law, which was subsequently re-enacted in later acts, the supreme court of the United States announced its opinion that, so far as the decision of that court had gone, no lands had been held to be "known mines," unless at the time the rights of the purchaser accrued there was upon the ground an actual and opened mine, which had been worked or was capable of being worked.[2] Said that court, after reviewing the case of Deffeback *v.* Hawke:—[3]

"If upon the premises at that time there were not "actual 'known mines' capable of being profitably worked "for their product, so as to make the land more valuable for "mining than for agriculture, a title to them acquired under "the pre-emption act can not be successfully assailed."[4]

We think we are justified in our view, that "known "mines" and "mineral lands" are not legal equivalents. At all events, the pre-emption laws have been repealed, and the term "known mines" has been eliminated from the statute-books. The nearest approach to an equivalent still remaining in the public land laws is the word "mine," as used in the townsite laws,[5] which laws have been fully discussed in a previous article.[6]

[1] See, *ante*, § 36.

[2] Colo. C. & I. Co. *v.* United States, 123 U. S. 307, 327.

[3] 115 U. S. 392.

[4] Colo. C. & I. Co. *v.* United States, 123 U. S. 307, 328. See, also, Richards *v.* Dower, 81 Cal. 44; United States *v.* Reed, 28 Fed. 482; Gold Hill Q. M. Co. *v.* Ish, 5 Ore. 104; *In re* Abercrombie, 6 L. D. 393; Bellows *v.* Champion, 4 Copp's L. O. 17; Nancy Ann Caste, 3 L. D. 169; Harnish *v.* Wallace, 13 L. D. 108.

[5] Rev. Stats., § 2392.

[6] See, *ante*, art. v., § 176.

**§ 210. Timber and stone lands.**— The act of June 3, 1878,[1] commonly called the "Stone and timber act," was originally confined in its operations to California, Oregon, Nevada, and Washington;[2] but by an amendatory act, passed August 4, 1892, its provisions were extended to all the public land states.[3]

Under this act lands chiefly valuable for timber or stone, unfit for cultivation, and consequently not subject to disposal under the homestead laws, may be entered. The quantity is limited to one hundred and sixty acres to any one person.

An application to purchase under this act must be supported by evidence that the tract contains no mining or other improvements, except for ditch or canal purposes (when any such exist), nor any valuable deposit of gold, silver, cinnabar, copper, or coal.

Provisions are made for the determination of the character of the lands prior to the issuance of patents, and for the issuance of final certificates of entry upon payment.

The lands embraced within an application to purchase lands under this act are not withdrawn from the mass of the public domain until such final certificate is issued, and until that time are subject to exploration and purchase under the mining laws, if they are, in fact, mineral in character.[4]

The same principles of law in this respect apply to timber and stone entries as to inchoate homestead entries, discussed in preceding sections. The judgment of the department, culminating in the issuance of the final receipt or certificate, is final and conclusive as to the character of the land, and no subsequent discovery of mineral can affect the title of the purchaser. This is a universal rule governing all classes of entries on the public domain.

[1] 20 Stats. at Large, 89.

[2] United States v. Smith, 8 Saw. 101; United States v. Benjamin, 10 Saw. 264.

[3] 27 Stats. at Large, 348.

[4] Kaweah Colony, 12 L. D. 326.

With particular reference to lands chiefly valuable for building-stone, the department had held at different times that prior to passage of the stone and timber act such lands might be entered under the placer mining laws,[1] which practice was sustained by some of the courts,[2] and denied by others.[3]

The passage of the act of August 4, 1892,[4] however, restored this class of lands to the category of mineral lands, and henceforward they are subject to entry under the so-called placer mining laws. In the opinion of the land department, this last act did not withdraw such lands from entry under the stone and timber act,[5] thus intimating that stone lands may be entered either as placers or under the stone and timber act, at the option of the claimant.

§ 211. **Scrip.**—There are innumerable classes of so-called land scrip—such as agricultural college, Porterfield, Valentine, Sioux half-breed, supreme court, and others in infinite variety, issued under special laws of congress, enabling the holder to "cover" unappropriated public lands, surrendering such scrip in payment for the lands sought to be entered. Mineral lands cannot be so selected or covered with any class of scrip.[6]

Selections of land for the purpose of utilizing scrip are, of course, under the supervision of the land department, whose jurisdiction over the land is retained until the selection is finally approved, a certificate to that effect issued, and the scrip surrendered. As in case of other entries, the land department passes upon the character of the land

[1] Bennett's Placer, 3 L. D. 116; McGlenn *v.* Weinbroeer, 15 L. D. 370; Vandoren *v.* Plested, 16 L. D. 508; Maxwell *v.* Brierly, 10 Copp's L. O. 50. See, *ante*, § 139. *Contra: In re* Delaney, 17 L. D. 120; Clark *v.* Ervin, 17 L. D. 550; *Id.*, 16 L. D. 122; Conlin *v.* Kelly, 12 L. D. 1; *In re* Simon Randolph, 23 L. D. 322.

[2] Freezer *v.* Sweeney, 8 Mont. 508; Johnson *v.* Harrington, 5 Wash. 93.

[3] Wheeler *v.* Smith, 5 Wash. 704.

[4] 27 Stats. at Large, 348.

[5] See Circ. Information, 15 L. D. 360; 23 L. D. 322.

[6] *In re* A. V. Weise, 2 Copp's L. O. 130; *In re* Nerce Valle, *Id.* 178; Com'rs' Letter, 3 Copp's L. O. 83.

applied for, and until such final approval and certification the lands are not withdrawn from the public domain, but are subject to exploration and purchase under the mining laws.

§ 212. **Desert lands.**—By the act of March 3, 1877,[1] supplemented by the act of March 3, 1891,[2] provision is made for the reclamation of desert lands, and the transmission of the title in quantities not exceeding six hundred and forty acres. Mineral lands cannot be acquired under this act. Desert land claimants will rarely come in conflict with mining claimants. Of course, beds of borax, nitrate, and carbonate of soda are found in the desert regions, but their mineral character is generally so obvious that no controversy is likely to arise. It would be much cheaper and more expeditious for a claimant to enter these classes of lands under the placer laws than to attempt to acquire title under the onerous provisions of the desert land laws. Should such conflicts arise, they would be governed by the same general rules of law applicable to other classes of entries discussed in the preceding sections of this article.

## Article X. Occupancy Without Color of Title.

§ 216. Naked occupancy of the public mineral lands confers no title—Rights of such occupant.
§ 217. Rights upon the public domain can not be initiated by forcible entry upon the actual possession of another.
§ 218. Appropriation of public mineral lands by peaceable entry in good faith upon the possession of a mere occupant without color of title.
§ 219. Conclusions.

§ 216. **Naked occupancy of the public mineral lands confers no title—Rights of such occupant.**—Title to mineral lands of the public domain can be initiated and

[1] 19 Stats. at Large, 377; 26 Stats. at Large, 1095.
[2] 26 Stats. at Large, 1095.

acquired only under the mining laws. As was said by the supreme court of the United States,—

"No title from the United States to land known at the "time of sale to be valuable for its minerals of gold, silver, "cinnabar, or copper can be obtained under the pre-emption, "homestead, or townsite laws, or in any other way than as "prescribed by the laws specially authorizing the sale of "such lands."[1]

There can be no strictly lawful possession of such lands, unless that possession is referable to the mining laws.

"There can be no color of title in an occupant who does "not hold under any instrument, proceeding, or law, pur- "porting to transfer to him the title, or to give to him the "right of possession. And there can be no such thing as "good faith in an adverse holding, where the party knows "that he has no title, and that under the law, which he "is presumed to know, he can acquire none by his occu- "pation."[2]

As heretofore shown, when dealing with occupants of the public mineral lands for the purposes of trade or business,[3] mere occupancy of the public lands and improvements thereon give no vested right therein as against the United States, or one connecting himself with the government, by compliance with the law.[4]

This is the universal rule as to all classes of public lands.[5] While this is true, the occupant has certain rights based upon the fact of actual possession, which, from motives of public policy, are accorded to him.

As was said by the supreme court of California,—

"As against a mere trespasser, one in possession of a "portion of the public land will be presumed to be the "owner, notwithstanding the circumstance that the court "has judicial notice that he is not the owner, but that the

[1] Deffeback v. Hawke, 115 U. S. 392, 404.

[2] *Id.*

[3] See, *ante*, § 170.

[4] Sparks v. Pierce, 115 U. S. 408.

[5] Frisbie v. Whitney, 9 Wall. 187; Hutchins v. Low, 15 Wall. 77; Campbell v. Wade, 132 U. S. 34; Jourdan v. Barrett, 4 How. 169; Burgess v. Gray, 16 How. 48; Gibson v. Chouteau, 13 Wall. 92; Oaksmith v. Johnston, 92 U. S. 343; Morrow v. Whitney, 95 U. S. 551.

"government is. This rule has been maintained from "motives of public policy, and to secure the quiet enjoy- "ment of possessions which are intrusions upon the United "States alone."[1]

This is nothing more than a reiteration of the familiar rule, that, as against a mere intruder, or one claiming no higher or better right than the occupant, possession is *prima facie* evidence of title.[2]

But this is all that can be claimed. As against one connecting himself with the government, this occupancy must yield to the higher right.

**§ 217. Rights upon the public domain can not be initiated by forcible entry upon the actual possession of another.**— To what extent actual possession of any portion of the public mineral lands prevents their valid appropriation under the mining laws depends upon the facts and circumstances of each particular case. There are certain recognized principles, however, which are necessarily involved in all such cases, the application of which will, generally speaking, result in their proper solution.

It is a doctrine well established that no rights upon the public domain can be initiated by a forcible entry upon the possession of another. A forcible and tortious invasion of such possession confers no privilege upon the invader, and can not be made the basis of a possessory title. A rightful seisin can not flow from a wrongful disseisin.

It has been distinctly held in cases arising under the former pre-emption laws that no right of possession could be established by settlement and improvement upon a tract of land conceded to be public where the pre-emption claimant forcibly intruded upon the actual possession of another who, having no other valid title than possession, had already settled upon, inclosed, and improved the tract;

[1] Brandt *v.* Wheaton, 52 Cal. 430.

[2] Campbell *v.* Rankin, 99 U. S. 261; Atwood *v.* Fricot, 17 Cal. 38; English *v.* Johnson, *Id.* 108; Hess *v.* Winder, 30 Cal. 349.

that such an intrusion was but a naked and unlawful trespass, and could not initiate a right of pre-emption.[1]

In conformity with this rule, it was wisely said by the late Judge Sawyer, in the ninth circuit, district of California, that the laws no more authorize a trespass upon the actual possession and occupation of another claiming a pre-emption right, for the purpose of locating and acquiring the title to a piece of mineral land, than to initiate an ordinary pre-emption right to a tract of agricultural land; that the law does not encourage or permit for any purpose unlawful intrusions and trespasses upon the actual occupation and possession of another. To permit a right to accrue or confer authority to thus initiate a title to the public land, would be to encourage strife, breaches of the peace, and violence of such character as to greatly disturb the public tranquility.[2]

**§ 218. Appropriation of public mineral lands by peaceable entry in good faith upon the possession of a mere occupant without color of title.**— Conceding that the law is correctly stated in the three preceding sections, it is not to be understood that a mere occupant of the public mineral lands can by virtue of such occupancy prevent, under all circumstances, their appropriation for mining purposes. The law interdicts entries effected with force and violence for any purpose. But a mere intruder upon the public lands, a mere occupant, whose possession is not referable to some law or right conferred by virtue of an instrument giving color of title, can not by reason of such occupancy prevent a peaceable entry in good faith by one seeking to avail himself of the privilege vouchsafed by the mining laws.

The doctrine that by mere entry and possession a right may be acquired to the exclusive enjoyment of any given quantity of the public mineral lands, was condemned by

[1] Atherton *v.* Fowler, 96 U. S. 513; Quinby *v.* Conlan, 104 U. S. 421; Hosmer *v.* Wallace, 97 U. S. 575.

[2] Cowell *v.* Lammers, 10 Saw. 246.

the supreme court of California in its earliest decisions. If such doctrine could be maintained, said that court,—

"It would be fraught with the most pernicious and disas-
"trous consequences. The appropriation of these lands in
"large tracts for agricultural and grazing purposes, and
"the concentration of the mining interest in the hands of
"a few persons, to the exclusion of the mass of the people
"of the state, are some of the evils which would necessarily
"result from such a doctrine."[1]

There is no grant from the government under the acts of congress regulating the disposal of mineral lands, unless there is a location according to law and the local rules and regulations. Such a location is a condition precedent to the grant. Mere possession, not based upon a valid location, would not prevent a valid location under the law.[2] This doctrine is clearly established by the supreme court of the United States in Belk *v.* Meagher,[3] affirming the decision of the supreme court of Montana. In that case Belk undertook to locate a mining claim. His entry was peaceable, and he did all that was necessary to perfect his rights, if the premises had been at the time open for that purpose. But at the time of such attempted appropriation the ground was covered by a prior, and, as the court found, a valid, subsisting location. Subsequently this prior subsisting location lapsed, and thereafter Meagher relocated the claim, his entry for that purpose being made peaceably and without force. Belk brought ejectment, and being unsuccessful in the territorial courts, took the case on writ of error to the supreme court of the United States.

It having been established that when Belk made his relocation, in December, 1876, the claim of the original locators was still subsisting and valid, and remained so until January 1, 1877, the supreme court considered three propositions of law as necessarily arising in the case:—

[1] Smith *v.* Doe, 15 Cal. 101, 105; Gillan *v.* Hutchinson, 16 Cal. 154.
[2] Belk *v.* Meagher, 3 Mont. 65, 80.
[3] 104 U. S. 279, 284.

(1) Whether Belk's relocation was valid as against everybody but the original locators, his entry being peaceable and without force;

(2) Whether, if Belk's relocation was invalid when made, it became effectual in law on the 1st of January, 1877, when the original claims lapsed;

(3) Whether, even if the relocation of Belk was invalid, Meagher could, after the 1st of January, 1877, make a relocation which would give him, as against Belk, an exclusive right to the possession and enjoyment of the property, the entry for that purpose being made peaceably and without force.

All three propositions were resolved against Belk, the court holding that he had made no such location as prevented the lands from being in law vacant, and that others had the right to enter for the purpose of taking them up, if it could be done peaceably and without force. His possession might have been such as would have enabled him to bring an action of trespass against one who entered without any color of right, but it was not enough to prevent an entry peaceably and in good faith for the purpose of securing a right under the acts of congress to the exclusive possession and enjoyment of the property. This doctrine was held not to be in conflict with the rule announced by the same court in Atherton *v.* Fowler,[1] cited in a preceding section, wherein it was determined that a right of pre-emption could not be established by a *forcible* intrusion upon the possession of one who had already settled upon, improved, and inclosed the property.

The controlling force of the doctrine of Belk *v.* Meagher has been abundantly recognized by the courts since its promulgation.[2]

[1] 96 U. S. 513.

[2] Noyes *v.* Black, 4 Mont. 527; Hopkins *v.* Noyes, *Id.* 550; Sweet *v.* Weber, 7 Colo. 443; Horswell *v.* Ruiz, 67 Cal. 111; Russell *v.* Hoyt, 4 Mont. 412; Du Prat *v.* James, 65 Cal. 555; Russell *v.* Brosseau, *Id.* 605; Garthe *v.* Hart, 73 Cal. 541.

A similar doctrine had been previously announced by Judge Deady, United States district judge, in Oregon,[1] where a location of mining ground in the possession of Chinese was upheld, on the theory that this class of aliens could acquire no rights by location, purchase, or occupancy upon the mineral lands of the public domain.

As was said by the supreme court of Montana,—

"Possession within a mining district, to be protected "or to give vitality to a title, must be in pursuance of the "law and the local rules and regulations. Possession, in "order to be available, must be properly supported. . . . "The mere naked possession of a mining claim upon the "public lands is not sufficient to hold such claim against "a subsequent location made in pursuance of the law, and "kept alive by a compliance therewith."[2]

The right of possession comes only from a valid location.[3]

Possession is good as against mere intruders; but it is not good as against one who has complied with the mining laws.[4]

Several cases appear in the reports which might be construed to be not entirely in harmony with the rule announced in the foregoing cases.[5] Some of them recognize the doctrine as to all ground not covered by the *pedis possessio*. Others do not mention the element of force as entitled to controlling weight in determining the question. In most of these cases the statement of facts upon which the decisions are based is very meager, and we are therefore unable to say to what extent, if at all, any of them repudiate the doctrine of Belk *v.* Meagher. Be that as it may, it cannot be denied that if there is any conflict between the decisions here referred to and the doctrine announced by the supreme court of the United States, they must, to the extent of such conflict, be disregarded.

[1] Chapman *v.* Toy Lung, 4 Saw. 23.

[2] Hopkins *v.* Noyes, 4 Mont. 550, 556.

[3] Hammond *v.* Foster, 4 Mont. 421.

[4] Garthe *v.* Hart, 73 Cal. 541, 543.

[5] Eilers *v.* Boatman, 3 Utah, 159; Armstrong *v.* Lower, 6 Colo. 581; Weise *v.* Barker, 7 Colo. 178; Lebanon M. Co. *v.* Con. Rep. M. Co., 6 Colo. 380; Faxon *v.* Barnard, 4 Fed. 702; North Noonday *v.* Orient, 6 Saw. 507.

§ 219. **Conclusions.** — We are justified in deducing the following general rules upon the subject under discussion:—

(1) Actual possession of a tract of public mineral land is valid as against a mere intruder, or one having no higher or better right than the prior occupant;

(2) No mining right or title can be initiated by a violent or forcible invasion of another's actual occupancy;

(3) If a party goes upon the mineral lands of the United States and either establishes a settlement or works thereon without complying with the requirements of the mining laws, and relies exclusively upon his possession or work, a second party who locates peaceably a mining claim covering any portion of the same ground, and in all respects complies with the requirements of the mining laws, then such second party is entitled to the possession of such mineral ground to the extent of his location as against the prior occupant, who is, from the time said second party has perfected his location and complied with the law, a trespasser.[1]

The peaceable adverse entry by the locator, coupled with the perfection of his location, operates in law as an ouster of the prior occupant.[2]

In some of the states laws are enacted protecting the right of a discoverer upon the public mineral lands for a limited period of time, to enable him to perfect his location. Where no such local statutes are in force, according to the current of authority, by the policy of the law a reasonable time is allowed to such discoverer to complete his appropriation. During such periods the possession or occupation of the discoverer will be protected as against subsequent locators. This subject will be fully considered in another portion of this treatise and the application of the doctrines above enunciated to such cases will there be fully explained.

[1] This is substantially the charge to the jury upheld in Horswell v. Ruiz, 67 Cal. 111.

[2] Belk v. Meagher, 3 Mont. 65, 80.

# CHAPTER IV.

## OF THE PERSONS WHO MAY ACQUIRE RIGHTS TO PUBLIC MINERAL LANDS.


ARTICLE I. CITIZENS.
II. ALIENS.
III. GENERAL PROPERTY RIGHTS OF ALIENS IN THE STATES.
IV. GENERAL PROPERTY RIGHTS OF ALIENS IN THE TERRITORIES.


### ARTICLE I. CITIZENS.


§ 223. Only citizens, or those who have declared their intention to become such, may locate mining claims.
§ 224. Who are citizens.
§ 225. Minors.
§ 226. Domestic corporations.
§ 227. Citizenship, how proved.


**§ 223. Only citizens, or those who have declared their intention to become such, may locate mining claims.**— As the paramount proprietor of its public domain, the United States has not only the right to regulate the terms and conditions under which it may be disposed of, but it is also its privilege to designate the persons who may be the recipient of its bounty, and prescribe the qualifications of those why may acquire and enjoy permanent estates on its lands. In the exercise of this privilege, it has ordained that,—

"All valuable mineral deposits in lands belonging to the "United States, both surveyed and unsurveyed, are hereby "declared to be free and open to exploration and purchase, "and the lands in which they are found to occupation and "purchase, by citizens of the United States, and those who "have declared their intention to become such, under

"regulations prescribed by law, and according to the local "customs or rules of miners in the several mining districts, "so far as the same are applicable and not inconsistent "with the laws of the United States."[1]

Therefore, to lawfully locate and hold a mining claim, the locator must be either a citizen of the United States or he must have declared his intention to become such in the manner provided by the naturalization laws of congress. As to who may attack a location made by an alien, and how it may be attacked, will be fully considered in a succeeding section. We here state simply the abstract rule of law.

§ 224. **Who are citizens.**— It is hardly within the legitimate scope of this treatise to exhaustively discuss the law of citizenship. But as introductory to the presentation of the law governing the qualifications of locators of mining claims, and the effect of alienage upon the validity of titles during the various stages of transmission from the government, as the primary source, to the ultimate grantee, we are justified in presenting in general outline the laws of congress upon the subject, and the decisions of the courts construing them in cases arising under the mining laws.

The fourteenth amendment to the constitution of the United States provides that,—

"All persons born or naturalized in the United States, "and subject to the jurisdiction thereof, are citizens of the "United States and of the state wherein they reside."

The clause "subject to the jurisdiction of the United "States" means completely subject to the political jurisdiction of the United States, and owing them direct and immediate allegiance.[2]

They may be citizens of the United States without being citizens of any particular state.[3]

[1] Rev. Stats., § 2319.

[2] Elk *v.* Wilkins, 112 U. S. 94; Slaughterhouse Cases, 16 Wall. 36; Strauder *v.* West Virginia, 100 U. S. 303.

[3] Slaughterhouse Cases, 16 Wall. 36; United States *v.* Cruikshank, 92 U. S. 542.

Neither age nor sex is involved in the definition of the word "citizen." It therefore includes men, women, and children,[1] and, for certain purposes, as we shall have occasion to observe later on, corporations organized under the laws of the several states.[2]

Citizenship is either —

(1) By birth; or
(2) By naturalization.

Citizens by birth are those born within the United States, or in a foreign country, if at the time of their birth their fathers were citizens.[3]

There are certain exceptions to this rule of natural citizenship.

Children born in the United States of ambassadors and diplomatic representatives, whose residence, by a fiction of law, is regarded as a part of their own country, are not citizens.[4]

Indians born members of any of the Indian tribes within the United States which still hold their tribal relations are not citizens. They are not citizens, even if they have separated themselves from their tribe and reside among white citizens of a state, but have not been naturalized, or taxed, or recognized as citizens by the United States, or by any of the states.[5]

To become citizens, they must comply with some treaty providing for their naturalization or some statute authorizing individuals of special tribes to assume citizenship by due process of law.[6]

The fact that the parents of a child (Chinese) born in the United States are prohibited from becoming citizens

[1] 1 Bouvier's Law Dict., *verb. citizen.*

[2] See, *post*, § 226.

[3] Rev. Stats., § 1993; Ludlam v. Ludlam, 26 N. Y. 356; Oldtown v. Bangor, 58 Me. 353; State v. Adams, 45 Iowa, 99.

[4] *In re* Look Tin Sing, 21 Fed. 905.

[5] Elk v. Wilkins, 112 U. S. 94.

[6] 3 Am. & Eng. Encyc. of Law, p. 245, note 1.

does not militate against the citizenship of the child. Such child is a citizen.[1]

Generally speaking, citizenship by birth is the rule. Ordinarily, a married woman partakes of a husband's nationality,[2] although marriage with an alien produces no dissolution of the native allegiance of the wife.[3]

The law recognizes the right of expatriation; but instances of it are so rare that the subject deserves no attention here.

One not a citizen may become such by complying with the provisions of the federal naturalization laws.[4]

Naturalization gives the alien all the rights of a natural-born citizen. He thereby becomes capable of receiving property by descent, whereas, as an alien, he might not so receive it, and of transmitting it in the same way.[5]

Ordinarily, naturalization is not complete until the lapse of a probationary period after a preliminary declaration of intention to become a citizen. During this period, between the taking out of "first" and "second" papers, the declarant is not considered as a citizen to the extent that he may either exercise the elective franchise or hold office. He is entitled to no privileges other than those specially vouchsafed to him by the law. In the location of mining claims he is endowed with the full rights of a citizen, to the same extent as if his naturalization were completed by taking the final oath and the issuance to him of his final papers. Therefore, for all purposes within the purview of this treatise, we shall treat an alien who has declared his intention to become a citizen as if he were fully naturalized; and when we employ the word "naturalization," it is to be understood as designating the act which confers upon the alien the right to enjoy, in common with citizens, the privilege of locating and purchasing mining claims upon the public domain.

[1] *In re* Look Tin Sing, 21 Fed. Rep. 905.
[2] Wharton on Conflict of Laws, § 11.
[3] Shanks *v.* Dupont, 3 Peters, 242.
[4] Rev. Stats., §§ 2165-2174.
[5] Jackson, *ex dem.* Doran *v.* Green, 7 Wend. 333.

§ 225. **Minors.**—Minors born in the United States are citizens, and may locate mining claims. There is no requirement in the general mining laws that the citizen shall be of any particular age. To say that minors are not qualified locators, is to say that they are not citizens. The conclusion is strengthened by the circumstance that in some instances the statutes expressly require that the citizen shall be of a particular age before he may acquire certain classes of public lands. Thus, in reference to coal lands, the provision is, that every person above the age of twenty-one years who is a citizen of the United States may enter such lands.[1] A similar provision exists as to homesteads under the federal laws.[2] The expression of a requirement as to age in some instances, and the omission of it in others, is significant.[3] It is quite true that minors may not transmit title during infancy with the same freedom as adults. During this minority they are incapacitated from entering into contracts, except with reference to necessaries, and, generally speaking, may act only through guardians, under the supervision of the courts. But this circumstance does not prevent them from acquiring property. As was said by the supreme court of California,—

"Nor is there any reason in the nature of things why a "minor may not make a valid location. . . . It may be "added that, so far as we know, it is the practice in many "mining communities for minors to locate claims."[4]

The fact that this is the recognized practice in many mining communities is, perhaps, not of controlling weight; but it carries with it the suggestion that a contrary rule would disturb many titles acquired in good faith, and that such rule should not be invoked without the most substantial and cogent reasons.

§ 226. **Domestic corporations.**—By domestic corporations, we mean those created or organized under the laws of the several states of the union, using the term in contradistinction to foreign corporations, or those who owe

[1] Rev. Stats., § 2347.
[2] *Id.*, § 2289.
[3] Thompson v. Spray, 72 Cal. 528.
[4] *Id.* 532.

their existence to the laws of foreign countries. The latter class will receive attention when we deal with the subject of aliens. A corporation is a citizen of the state which created it.[1]

A corporation created and existing under the laws of a state is to be deemed a citizen within the meaning of the statute regulating the right to acquire public mineral lands,[2] and as such is competent to purchase and hold a mining claim.[3]

The supreme court of the United States has held that a corporation created under the laws of the states of the union, *all of whose members are citizens* of the United States, is competent to locate, or join in the location, of a mining claim upon the public lands of the United States in like manner as individual citizens.[4]

The italics in the above quotation are ours. Judge Knowles, speaking for the circuit court of appeals in the ninth circuit, is of the opinion that the inference to be drawn from this decision, although not so stated, is that only corporations whose stockholders are citizens can locate mining claims.[5] We do not think that the supreme court intended to lay particular stress upon the word "*all.*" If it did, it went entirely beyond the exigencies of the case under consideration. There was nothing in the facts requiring such a ruling. It is probable that the expression was used unadvisedly, and not with the intention of establishing a fixed rule that a corporation organized under the laws of a state could not lawfully acquire or hold unpatented mining claims if one of its stockholders were an alien. In the territories, under the alien act of March 3, 1887,[6] aliens are prohibited from acquiring real estate;

[1] St. Louis *v.* Wiggin's Ferry Co., 11 Wall. 423; Chicago & N. W. R. R. *v.* Whitton, 13 Wall. 270; Muller *v.* Dows, 94 U. S. 444.

[2] Rev. Stats., § 2319.

[3] North Noonday M. Co. *v.* Orient M. Co. 6 Saw. 299, 316.

[4] McKinley *v.* Wheeler, 130 U. S. 630; followed in Dahl *v.* Montana C. Co., 132 U. S. 264; Thomas *v.* Chisholm, 13 Colo. 105.

[5] Doe *v.* Waterloo M. Co., 70 Fed. 455.

[6] 24 Stats. at Large, 477.

yet domestic corporations may freely acquire such lands, and aliens are permitted to own and hold twenty per cent. of the stock of such domestic corporations. Is it to be presumed that in the states wherein the laws make no discrimination between aliens and citizens, with regard to the acquisition and enjoyment of landed estates, that the government should insist that none of the stock of a domestic corporation holding or locating an unpatented mining claim shall be held by an alien, under penalty of being refused a title by patent, if sought, or of suffering escheat after patent, should the government see fit to enforce it? Judge Knowles, in the case above referred to,[1] gives a logical solution of the question. Where a corporation is created by the laws of a state, the legal presumption is that its members are citizens of the same state.[2]

A suit may be brought in the federal courts by or against a corporation; but in such case it is regarded as a suit brought by or against the stockholders of a corporation, and for the purposes of jurisdiction it is *conclusively presumed* that *all* the stockholders are citizens of the state which by its laws created the corporation.[3]

In the language of Judge Knowles,—

"Congress was familiar with this rule, and, it seems "probable, intended to establish a similar rule under the "mineral land act of 1872."

This view is strengthened by a consideration of the section of the Revised Statutes regulating the proof of citizenship in proceedings under the mining laws.

"Proof of citizenship under this chapter may consist, "in the case of an individual, of his own affidavit thereof; "in the case of an association of persons unincorporated, "of the affidavit of their authorized agent, made on his "own knowledge or upon information and belief; and in "the case of a corporation organized under the laws of "the United States, or of any state or territory thereof, by "the filing of their charter or certificate of incorporation."[4]

[1] Doe v. Waterloo M. Co., 70 Fed. 455. [2] Muller v. Dows, 94 U. S. 444.
[3] Ohio R. R. v. Wheeler, 1 Black, 286. [4] Rev. Stats., § 2321.

Under this section, the land department holds that a properly authenticated certificate of incorporation filed by a corporation that is applying for a mineral patent is sufficient proof of citizenship.[1]

It is not within the power of the land department to determine whether such corporation is authorized under its charter to acquire patent for mineral lands.[2]

Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign (*i. e.* the state to which it owes its existence) alone can object. It is valid until assailed in a direct proceeding for that purpose.[3]

The supreme court of Montana has held that the fact that an alien owns stock in a corporation which has acquired title to mining claims does not disturb the title of the corporation to such claims.[4]

If it be true that all of the stockholders of a domestic corporation seeking to locate public mineral lands must be citizens, as may be inferred from the ruling of the supreme court of the United States, then a properly authenticated certificate of such corporation is conclusive evidence of such citizenship.[5]

We think we are justified in deducing the rule that within the states domestic corporations may locate and hold mining claims, and that an inquiry as to the citizenship of the stockholders is not permitted, for the simple reason that such citizenship is conclusively presumed. As to the status of such corporations in the territories, we will have occasion to investigate it in a subsequent section.

The supreme court of the United States has suggested the question as to the extent of ground which may be located by a corporation; that is, whether it will be treated

[1] Rose Lode Claim, 22 L. D. 83; Silver King M. Co., 20 L. D. 116; Gen. Min. Circ., par. 76, (see appendix).

[2] Rose Lode Claim, 22 L. D. 83.

[3] National Bank *v.* Matthew, 98 U. S. 621, 628.

[4] Princeton M. Co. *v.* First Nat. Bank, 7 Mont. 539.

[5] Doe *v.* Waterloo M. Co., 70 Fed. 455; Ohio R. R. *v.* Wheeler, 1 Black, 286; Muller *v.* Dows, 94 U. S. 444.

as one person, and is entitled to locate only to the extent permitted to a single individual, or otherwise.[1]

We do not appreciate the embarrassments of the situation as to lode claims, as no one person or association of persons can locate by one location in excess of the statutory limit of fifteen hundred by six hundred feet of surface. As to placers, it might be considered as an association of persons, which it is, and be entitled to locate as such one hundred and sixty acres, if it had eight stockholders, and they usually have many more. The suggested difficulty could be easily overcome by individual stockholders locating and transferring to the corporation. This is the usual method adopted.

§ 227. **Citizenship, how proved.**—Citizenship may be proved like any other fact.[2] It is a question for the jury.[3]

In proceedings before the land department, and in actions brought in the local courts under the sanction of the Revised Statutes[4] to determine the right of possession, the judgment in such actions being advisory to the land department, the law provides that proof of citizenship may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, by the affidavit of their authorized agent, made on his own knowledge, or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any state or territory thereof, by the filing of a certified copy of their charter or certificate of incorporation.[5] However, proof by affidavit is not the only method of establishing citizenship.[6] It may be established by any other competent legal evidence. In fact, in the case of naturalized citizens, some of the courts have insisted that exemplifications of the record of naturaliza-

[1] McKinley v. Wheeler, 130 U. S. 630.
[2] Thompson v. Spray, 72 Cal. 528.
[3] Golden Fleece M. Co. v. Cable Cons., 12 Nev. 313.
[4] Rev. Stats., § 2326.
[5] Rev. Stats., § 2321; North Noonday M. Co. v. Orient M. Co., 6 Saw. 503.
[6] Thompson v. Spray, 72 Cal. 528.

tion should be produced,[1] or its loss accounted for, and the foundation laid for the introduction of secondary evidence. This is not the rule in the land department, however, which is governed entirely by the provisions of the Revised Statutes.[2]

In all actions between individuals disconnected with proceedings to obtain title under the federal mining laws, if we may admit that the question of citizenship could in any such action be properly the subject of inquiry,—a proposition we are not prepared to concede,—the rules of evidence prescribed by the several states would control. In such cases, we do not understand that an *ex parte* affidavit would be admissible. The opposing party could not be deprived of the right to cross-examine the witness by whose oath the fact of citizenship is sought to be proved.

It may be here noted, although we shall have occasion to again refer to the subject, that in proceedings before the land department upon applications for patents under the mining laws, proof of citizenship is not required of the original locators or intermediate owners, but of the applicant for patent or adverse claimants only.[3]

It has been said that a presumption of citizenship arises from the fact of residence.

The supreme court of Arizona has held that—

"It will be presumed that a man being a resident of the "United States, and who has made a mining location, was "a citizen of the United States, . . . where it appears "that he recorded at or near the time, a location notice "reciting these facts. Such evidence will make out a *prima* "*facie* title."[4]

This was on the assumption that a location notice, when recorded, is, by reason of the law authorizing or requiring the record, *prima facie* evidence of the facts therein cited,

[1] Wood v. Aspen M. Co., 36 Fed. 25.

[2] *In re* John Mooney, 3 Copp's L. O. 68; Circ. Instructions, Aug. 2, 1876, *Id.* 68; *Id.*, Dec. 10, 1891, par. 76, (see appendix).

[3] Cash Lode, 1 Copp's L. O. 97; City Rock & Utah v. Pitts, *Id.* 146; Wandering Boy, 2 Copp's L. O. 2.

[4] Jantzen v. Arizona C. Co., 20 Pac. 93, 94.

following the rule approved in Colorado,[1] and other states.[2]

In the opinion of Judge Sawyer, in the class of proceedings provided for by the Revised Statutes,[3] no presumptions of fact should be indulged in, but each party must establish his right by evidence.[4] These presumptions, if properly considered to any extent, are, of course, disputable.

After patent or certificate of purchase has once issued, however, the citizenship of the patentee is conclusively presumed. This presumption arises from the accepted rule that the qualifications of an applicant for patent are necessarily involved in the inquiry made by the land department, and the patent, when issued, is a conclusive adjudication that the patentee possessed the status of a citizen.[5]

We are of the opinion that, as between individuals, the question of the alienage of a locator or claimant of a mining claim can only arise in the proceedings brought before the land department upon application for patent, or in actions brought under section twenty-three hundred and twenty-six of the Revised Statutes. In all other classes of cases, it is not open to question. We have attempted to demonstrate this in a succeeding section.[6]

[1] Strepey v. Stark, 7 Colo. 614.

[2] Flick v. Gold Hill M. Co., 8 Mont. 298; Dillon v. Bayliss, 11 Mont. 171; Brady v. Husby, 21 Nev. 453; Garfield M. & M. Co. v. Hammer, 6 Mont. 53; Hammer v. Garfield M. & M. Co., 130 U. S. 291; Wood v. Aspen, 36 Fed. 25.

[3] Rev. Stats., § 2326.

[4] Bay State S. M. Co. v. Brown, 10 Saw. 243.

[5] Justice M. Co. v. Lee, 21 Colo. 260, overruling the decision of the court of appeals in the same case; Lee v. Justice M. Co., 2 Colo. Ct. App. 112.

[6] See, *post*, § 233.

## Article II. Aliens.

§ 231. Acquisition of title to unpatented mining claims by aliens.
§ 232. The effect of naturalization of an alien upon a location made by him at a time when he occupied the status of an alien.
§ 233. What is the legal status of a title to a mining claim located and held by an alien who has not declared his intention to become a citizen?
§ 234. Conclusions.

**§ 231. Acquisition of title to unpatented mining claims by aliens.**—As we have already seen, aliens who have not declared their intention to become citizens can not lawfully locate mining claims upon the public mineral domain. But it frequently occurs that such aliens do so locate such claims and transmit the title so acquired apparently the same as if this disqualification did not exist; and there are innumerable examples of aliens purchasing from citizen locators, and in turn transmitting the title so acquired to others. These facts suggest the following inquiries:—

(1) What is the status of the title to a mining claim located and held by an alien?

(2) What estate may such alien transmit to another?

(3) What is the effect of subsequent naturalization upon a location made at a time when the locator occupied the status of an alien?

(4) What is the status of the title to a mining claim located and held jointly by an alien and a citizen?

In discussing these questions and others incidentally arising out of them, we shall encounter much difficulty in arriving at the true state of the law. The supreme court of the United States, the final arbiter of these problems, has cleared the atmosphere to a limited extent, but the proper solution of some of them remains in doubt, so far as direct adjudication is concerned. When we review the decisions of the courts of last resort in the several states,

we find differences of opinion, diversity of views, and inharmonious conclusions.

This follows necessarily from the fact that the courts of each state act independently of the courts of other states. While all are called upon to construe the same laws in controversies between individuals arising out of rights asserted in public mineral lands, and to a limited degree in their several jurisdictions are auxiliary to the land department in administering these laws, yet no one state is bound by the rules announced by another. Results are reached on independent lines of reasoning. A rule of interpretation announced in one state is directly negatived in another; in still another, the rule is accepted in a modified form. Such questions are essentially federal in their nature, and will remain so until the supreme court of the United States finally decides them. But until such ultimate determination is reached, each state is at liberty to construe these laws according to the dictates of its own reason and judgment. Hence the lack of uniformity in the adjudicated law. We shall encounter this unsatisfactory state of affairs in attempting to solve many of the serious problems arising out of the application of these laws to the varied conditions existing in different sections of the mining regions, and we cannot hope in all instances to arrive at correct results. But where we encounter these conflicts of opinion in courts of equal responsibility and learning, we do not think our duty to the profession permits us to rest with a mere statement of the conflicting cases. It will be our endeavor to reach the correct rule, even if in doing so we are compelled to go to the original sources of the law. We are not permitted to arbitrarily announce approval of the decisions of one state or the disapproval of those of another. This would not add to the weight of the decision which meets with our concurrence, nor detract from the value of the one with which we disagree; and unless we are able to found our judgment in logical reasoning, our conclusions will be of no moment. With these preliminary suggestions, we proceed with our

investigations, subdividing the questions involved into different elements, for the purpose of convenient treatment, without regard to the order in which we have heretofore suggested the inquiries involved.

**§ 232. The effect of naturalization of an alien upon a location made by him at a time when he occupied the status of an alien.**—Let us first consider what effect the act of naturalization has upon the estate, if any, acquired by an alien by virtue of a discovery and location of public mineral lands, in all respects valid, except as affected by the alienage of the locator. Let us examine the adjudicated cases on this and analagous subjects, commencing with the rulings of the land department. We note the decisions of the executive department, arranged in chronological order:—

"Naturalization has a retroactive effect, so as to be "deemed a waiver of all liability to forfeiture and a con- "firmation of the alien's former title."[1]

"A foreigner may make a mining location and dispose "of it, providing he becomes a citizen before disposing of "the mine."[2]

"Naturalization has a retroactive effect, so as to be "deemed a waiver of all liability to forfeiture and a con- "firmation of his former title."[3]

An alien having made a homestead entry, and subsequently filed his intention to become a citizen, it is held that, in the absence of an adverse claim, the alienage at the time of entry will not defeat the right of purchase.[4]

An alien can acquire no right to public land before filing a declaration of intention to become a citizen, and his subsequent qualification will not relate back so as to defeat an intervening right.[5]

[1] Cash Lode, 1 Copp's L. O. 97.
[2] Kempton Mine, *Id.* 178.
[3] *In re* Wm. S. Wood, 3 Copp's L. O. 69.
[4] Ole Krogstad, 4 L. D. 564.
[5] Titamore *v.* S. P. R. R., 10 L. D. 463. This was the case of a preemption filing within railroad indemnity limits.

In the case of Wulff *v.* Manuel,[1] Judge De Witt, speaking for the supreme court of Montana, in an able opinion, took the extreme view that an alien could not take title by *purchase* from a citizen locator, and therefore the subsequent naturalization (during a trial involving the alien's right to a patent in a suit upon an adverse claim) could not retroact in favor of such alien. We shall have occasion to refer particularly to this case and the reasoning of the distinguished judge when dealing with the nature of the title acquired and held by an *alien locator*. Undoubtedly, entertaining these views in the case of a purchase by an alien from a citizen locator, the supreme court of Montana would have announced in the hypothetical case under consideration that naturalization could not retroact in favor of an alien locator.

The supreme court of New York has held that naturalization gives the alien all the rights of a natural-born citizen; he thereby becomes capable of receiving property by descent, and of transmitting it in the same way. It also has a retroactive operation, and lands purchased by an alien who is afterwards naturalized may be held by him and transmitted by him in the same manner as lands acquired after naturalization.[2]

The same rule is recognized in Alabama.[3]

Judge Hallett announced his views that, in the absence of any intervening rights, upon declaring his intention to become a citizen of the United States, an alien locator may have the advantage of work previously done and of a record previously made by him in locating a mining claim on the public mineral lands.[4]

And the late Judge Sawyer held that if a locator, even though not a citizen, performed all the acts necessary to make a valid location, and did the work necessary to keep his claim good had he been a citizen, until he conveys to a

[1] 9 Mont. 279.
[2] Jackson *ex dem.* Doran *v.* Green, 7 Wend. 333.
[3] Harvey *v.* State, 40 Ala. 689.
[4] Cresus M. & M. Co. *v.* Colo. L. & M. Co., 19 Fed. 78.

citizen, such citizen grantee, taking possession and control, keeping up the monuments and markings, and performing the necessary conditions to keep the claim good, acquires a good and valid right to the claim as against those asserting rights subsequent to such conveyance.[1]

The supreme court of the United States has frequently held that if an alien holding under a purchase becomes a citizen before "office found," that the act of naturalization retroacts to the original acquirement of title, and perfects the title in the alien.[2]

In accordance with this doctrine, that tribunal has held, reversing the supreme court of Montana, that in the case of a purchase by an alien from a qualified locator, the subsequent naturalization retroacted in his favor, removed the infirmity, and entitled him to a patent.[3] The case in which this rule was established involved the right to a patent, the action being instituted under section twenty-three hundred and twenty-six of the Revised Statutes, in which form of action citizenship of the applicant for patent was necessarily involved.

As to the effect of subsequent naturalization upon the title of an original alien locator, while the interest acquired by such location remains in the alien, the supreme court has as yet not determined.

We will reserve the conclusions to be deduced from the foregoing review of authorities until we shall have discussed other important questions arising out of the alienage of locators or purchasers from citizens. Almost all these problems are intimately blended, and it is difficult to isolate them or treat them independently. Our conclusions will be found grouped in section two hundred and thirty-four.

[1] North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 315.

[2] Wulff v. Manuel, 9 Mont. 279, (citing Osterman v. Baldwin, 6 Wall. 122; Craig v. Radford, 3 Wheat. 594; Fairfax v. Hunter, 7 Cranch, 607; Governeur v. Robertson, 11 Wheat. 322).

[3] Manuel v. Wulff, 152 U. S. 505.

**§ 233. What is the legal status of a title to a mining claim located and held by an alien who has not declared his intention to become a citizen?**—In the hands of a citizen locator, the estate acquired by a perfected valid location is property in the highest sense of the term; it may be conveyed, mortgaged, taxed, sold on execution, is descendible to heirs, and may be the subject of devise. It is an estate acquired by purchase. Washburn, in his treatise on real property, says:—

"In one thing all writers agree, and that is, in consid-
"ering that there are two modes only, regarded as classes,
"of acquiring title to land—namely, *descent* and *purchase*,—
"purchase including every mode of acquisition known to
"the law, except that by which an heir on the death of an
"ancestor becomes substituted in his place as owner by the
"act of the law."[1]

"Purchase [said Lord Coke] includes every other method
"of coming to an estate but merely that by an inheritance,
"wherein the title is vested in a person, not by his own act
"or agreement, but by single operation of law."[2]

Purchase denotes any means of acquiring an estate out of the common course of inheritance.[3]

"Certainly, [said the supreme court of Montana,] no one
"would contend that when a person locates mining ground
"he acquires a right to the same by descent. He must
"acquire it, then, by purchase."[4]

But the same court held in a case where an alien purchaser from a citizen locator was endeavoring to obtain a patent (having been naturalized during the trial and prior to judgment), that the parallel of the alien heir claiming by descent and the alien miner claiming under the mining laws was complete as to the principle under consideration, and that such alien was not entitled to hold the estate purchased. In fact, he took nothing.[5] This

[1] 3 Washburn on Real Property, 4.
[2] Co. Litt. 18, cited in 2 Black. Com. 241; 2 Bouvier's Law Dict. 403.
[3] 2 Black. Com. 242.
[4] Meyendorf *v.* Frohner, 3 Mont. 282, 320.
[5] Wulff *v.* Manuel, 9 Mont. 279.

doctrine, however, was denied by the supreme court of the United States.[1]

An estate cast by descent upon one having inheritable blood might certainly be conveyed by purchase to an alien, who might hold until office found. Why should not the estate acquired by an alien from a citizen locator by purchase be subject to the same rule?

Nothing is better settled under the common law than that an alien could take by purchase and hold until deprived of his estate by action of the sovereign, in proceedings called "inquest of office."[2]

Said the supreme court of the United States:—

"By the common law an alien can not acquire real "property by operation of law, but may take it by act of "the grantor and hold it until office found; that is, until "the fact of alienage is authoritatively established by a "public officer, upon an inquest held at the instance of the "government. The proceedings which contain the finding "of the fact upon the inquest of the officer is technically "designated in the books of law as 'office found.' It "removes the fact upon which the law divests the estate "and transfers it to the government from the region of "uncertainty, and makes it a matter of record. It was "devised, according to the old law-writers, as an authentic "means to give the king his right by solemn matter of "record, without which he, in general, could neither take "nor part with anything; for it was deemed a part of the "liberties of England, and greatly for the safety of the "subject, that the king may not enter upon or seize any "man's possession upon bare surmises without the interven-"tion of a jury. By the civil law some proceedings equiv-"alent in its substantive features was also essential to take "the fact of alienage from being a matter of mere surmise "and conjecture and to make it a matter of record. Such "a proceeding was usually had before the local magistrate "or council, and might be taken at the instance of the gov-"ernment or upon the denouncement of a private citizen."[3]

[1] Manuel v. Wulff, 152 U. S. 505.

[2] Taylor v. Benham, 5 How. 233; Fairfax v. Hunter, 7 Cranch, 603, 618; 2 Kent's Com. 54; 1 Washburn on Real Property, 48; People v. Folsom, 5 Cal. 373; Territory v. Lee, 2 Mont. 124, 129; Racouillat v. Sansevain, 32 Cal. 376; De Merle v. Matthews, 26 Cal. 455.

[3] Philipps v. Moore, 100 U. S. 208, 212.

Said the same court, in a previous case, speaking through Justice Johnson:—

"That an alien can take by deed and can hold until "office found, must now be regarded as a positive rule of "law, so well established that the reason of the rule is little "more than a subject for the antiquary. It, no doubt, "owes its present authority, if not its origin, to a regard "to the peace of society and a desire to protect the indi- "vidual from arbitrary aggression. . . . But there is "one reason assigned by a very judicious compiler which "for its good sense and applicability to the nature of our "government makes it proper to introduce it here. I copy "it from Bacon. 'Every person,' says he, 'is supposed a "'natural-born subject that is resident in the kingdom and "'that owes a local allegiance to the king till the contrary "'be found by office.' This reason, it will be perceived, "applies with double force to the resident who has acquired "of the sovereign himself, whether by purchase or by favor, "a grant of freehold."[1]

If the government can, by direct conveyance to an alien, vest in him a title to the absolute fee without doing a vain thing, why may not an alien acquire a more limited estate, subject to an inquiry as to his qualifications, when he seeks a conveyance of the ultimate fee?

In Governeur's Heirs *v.* Robertson,[2] from which we have heretofore quoted, the grant in question was by the commonwealth of Virginia to Brantz, an alien, his title being assailed by a subsequent grantee from the same commonwealth. The question argued and intended to be exclusively presented was whether a patent for land to an alien was not an absolute nullity. It was there said that the king is a competent grantor in all cases in which an individual may grant, and any person *in esse* and not *civiliter mortuus* is a competent grantee, *femes covert*, infants, aliens, persons attainted of treason or felony, and many others are expressly enumerated as competent grantees.

In cases of alien locators, the objection suggests itself that the government does not *grant;* there is no act done

[1] Doe *ex dem.* Governeur's Heirs *v.* Robertson, 11 Wheat. 332.

[2] 11 Wheat. 332, 355.

or performed by it prior to the issuance of a patent. The alien accepts an invitation which was not extended to him, but was exclusively confined to others, and attempts by his own act to create the relationship of grantor and grantee.

The reply to this is: A citizen obtains the grant by his own act; that is, by complying with the provisions of the law laid down by the paramount proprietor. The lands are the property of the government. It alone has the power to object and inquire into the qualifications of the locator. "With a regard to the peace of society and a "desire to protect the individual from arbitrary aggres- "sion," the government reserves to itself the right to inquire into these qualifications. For this purpose, at least, the presumption indulged in by Bacon, quoted by the supreme court of the United States (*supra*), "that every "person is supposed a natural-born subject that is resident "in the kingdom and that owes allegiance to the king, till "the contrary be found by office," as well as those mentioned in a preceding section,[1] may be invoked for the purpose of preserving the estate from invasion, "upon base "surmises without the intervention of a jury."

It has been authoritatively determined by the supreme court of the United States, that the estate created by a perfected mining location and transferred to an alien is not analagous to an estate created by descent; in other words, that it is not an estate created by operation of law.[2]

We think we are justified in asserting that the following principles have been established by the weight of authority:—

(1) That a location made by an alien, if otherwise valid, creates in him an estate which can be divested only at the instigation of the government in a proceeding to which it is either directly or indirectly a party;

(2) That such estate when vested in a citizen is as complete as if originally acquired by him by location, and no one, not even the government, can assail his title.

[1] See, *ante*, § 227. [2] Manuel v. Wulff, 152 U. S. 505.

While the supreme court of the United States was extremely guarded in its decision in Manuel *v.* Wulff (*supra*), and avoided any intimation that a transfer from an alien locator to an alien would be considered as vesting any estate, yet its use of the term "qualified locator" was simply a statement of the fact in that particular case, as there was no controversy over the qualification of the locator. He was an admitted citizen. It was not necessary, nor did the court propose, inferentially or otherwise, to rule upon a state of facts not before it.

But the circuit court of appeals of the eighth circuit has distinctly held, in a case where an alien was one of the locators, that mining rights acquired by such alien by his location constitute no exception to the general rule, that the right to defeat a title on the ground of alienage is reserved to the government alone.[1]

And Judge James H. Beatty, in a recent case tried before him as circuit judge, ninth circuit, thus charged the jury in an action of trespass:—

"As a general rule, it is true that citizens only of the "United States can locate mining claims; but it has been "held by the supreme court,[2] which is, of course, our guide, "that this is a question that can be asserted or claimed "only by the government. In a contest between indi- "viduals, as in this case, which is an action of ejectment, "that question does not arise; but when a party applies "for a patent, the government is interested, and in a case "of that kind the citizenship of the parties must be shown "before the party would be entitled to a patent. But this "is not an action for a patent. It is an action of ejectment "for the possession of that ground, and I instruct in this "case that that question can not be considered. It is only "for the government to make that objection on the ground "of non-citizenship."[3]

In the case of Cræsus M. & M. Co. *v.* Colorado L. & M. Co.[4] it was contended that any one, citizen or alien, might

[1] Billings *v.* Aspen M. Co., 51 Fed. 338, 341; S. C., on rehearing, 52 Fed. 250.

[2] We infer that the case of Manuel *v.* Wulff, 152 U. S. 505, is referred to.

[3] Little Emily M. & M. Co. *v.* Couch (unreported).

[4] 19 Fed. 78.

make a location, and the competency of the latter can not be questioned except by the government; that a location made by an alien who had not declared his intention to become a citizen should be maintained until the government avoids it.

But Judge Hallett declined to pass upon the question, as the alien locator had become naturalized prior to the acquisition of any intervening rights.

When we come to analyze the decisions of other tribunals in the quest of apt analogies, we find much conflict of opinion. We deem it important to review them.

Judge Sawyer, in the ninth circuit court, held that if a citizen and an alien jointly locate a claim, not exceeding the amount of ground allowed by law to one locator, such location is valid as to the citizen, and a conveyance from both of such locators to a citizen gives a valid title.[1]

The supreme court of Nevada has intimated that a mining claim located by an alien might be relocated and held by a citizen.[2]

The same court also announced that an alien should be protected in the possession of the public lands the same as a citizen;[3] but, in the light of its other rulings, there is but little doubt that it entertained the view that a location made by an alien was not protected from a peaceful entry by a citizen for the purpose of relocating, and that such relocation would connect the relocator with the government title.

That an alien may purchase an unpatented mining claim, and has full and complete right to convey the same, his estate being valid against every person but the government, has been determined in several of the states.[4]

A contrary rule was at one time asserted by the supreme court of Montana, that court holding that a possessory title of mineral land, founded on a valid location, and held by

[1] North Noonday M. Co. *v.* Orient M. Co., 6 Saw. 299.

[2] Golden Fleece G. & S. M. Co. *v.* Cable Cons., 12 Nev. 313.

[3] Courtnay *v.* Turner, 12 Nev. 345.

[4] Ferguson *v.* Neville, 61 Cal. 356; Gorman *v.* Alexander, 2 S. Dak. 557; Territory *v.* Lee, 2 Mont. 124.

compliance with local mining laws may be transferred from one to another, so long as it does not pass into the hands of one incapable of acquiring complete title, in which latter case the grant reverts to the government, and the land becomes subject to relocation.[1]

But the doctrine of this case was denied by the supreme court of the United States.[2]

In a case where alien Chinese were in possession of public mineral lands in Oregon, Judge Deady issued an injunction, at the suit of citizens who had located such lands while in the occupancy of the Chinese; but it does not appear from the report of the case that the Chinese claimed to be in possession under any location made by them or others through whom they entered. In addition, some stress was laid upon the inhibition of the constitution of that state, that "No Chinaman not a resident of the state at the adop- "tion of this constitution shall ever hold any real estate or "mining claim, or work any mining claim therein."

In California, the question is incidentally discussed in several cases, brought under the provisions of section twenty-three hundred and twenty-six of the Revised Statutes, to determine a right to a patent. We quote from the opinion of that court:—

"It would seem to follow that as the right to possession "and the right to a patent are made to depend upon citizen- "ship, the complaint which forms the basis upon which "these rights are supported should show the plaintiffs to "possess those qualifications without which the judgment "they seek and the consequences to flow from that judg- "ment cannot be reached. Where a right is conferred upon "a particular class of persons, or by reason of possessing "some special qualification or status, he who claims such a "right must show himself to belong to the class designated "or to possess the qualification prescribed or the status "mentioned as the basis of the right."

But the court was careful to add:—

"We must not be understood as holding that in all actions "in relation to mining claims it is necessary for plaintiffs

[1] Tibbitts v. Ah Tong, 4 Mont. 536. [2] Manuel v. Wulff, 152 U. S. 505.

"to aver citizenship. We are discussing the requirements "of a complaint in the special case provided by the act "of congress to determine the right of possession of a "mining claim under the laws of congress, in which the "successful party becomes entitled on the judgment-roll "to apply for patent — a case in which the parties must "connect themselves with the title of the government, and "show compliance with the acts of congress, and our con- "clusions are limited to such action."[1]

The action provided for by section twenty-three hundred and twenty-six of the Revised Statutes is undoubtedly equivalent in its legal effect to "inquest of office." Each party is called upon to establish his qualifications to receive patent, and the question of citizenship is a material one. In this class of actions, the courts have generally insisted that citizenship of the litigating parties must be alleged, and, of course, proved.[2]

In ordinary actions, some courts hold that this is not necessary.[3] Others hold that in all classes of actions such citizenship must be averred.[4] Still others dispense with the necessity of alleging, but insist upon its being proved.[5]

The supreme court of the United States has decided that an objection to the alienage of a locator can not be taken for the first time in the appellate court.[6] As this was a suit upon an adverse claim, citizenship should have been alleged in the pleadings.

Judge Sawyer has decided that the citizenship of a locator through whom a party litigant claimed must be

[1] Lee Doon v. Tesh, on rehearing in bank, 68 Cal. 43. For opinion rendered by department, see 6 Pac. 97.

[2] Jackson v. Dines, 13 Colo. 90; McFeters v. Pierson, 15 Colo. 201; Lee Doon v. Tesh, 68 Cal. 43; Keeler v. Trueman, 15 Colo. 143; Rosenthal v. Ivps, 2 Idaho, 244.

[3] McFeters v. Pierson, 15 Colo. 201; Lee Doon v. Tesh, 68 Cal. 43; Thompson v. Spray, 72 Cal. 528; Moritz v. Lavelle, 77 Cal. 10.

[4] Bohanon v. Howe, 2 Idaho, 417; Ducie v. Ford, 8 Mont. 233.

[5] Altoona Q. M. Co. v. Integral Q. M. Co., 45 Pac. 1047 (Cal.).

[6] O'Reilly v. Campbell, 116 U. S. 418. See, also, Jackson v. Dines, 13 Colo. 90.

shown in an action of trespass;[1] and this rule was followed by the supreme court of the state of California.[2]

§ 234. **Conclusions.**— Out of the chorus of discordant sounds it is difficult to evolve harmony.

We think, however, that, considering the underlying principles which should govern the construction and administration of the law, the weight of authority, as well as motives of public policy, we are justified in deducing the following conclusions on the subject of alienage as affecting titles to unpatented mining claims on the public domain:—

(1) An alien may locate or purchase a mining claim, and until "inquest of office" may hold and dispose of the same in like manner as a citizen;

(2) Proceedings to obtain patents are in the nature of "inquest of office," and in such proceedings citizenship is a necessary and material fact to be alleged and proved;

(3) In all other classes of actions between individuals with which the government has no concern, citizenship is not a fact in issue; it need be neither alleged nor proved;

(4) Naturalization of an alien at any time subsequent to either location or purchase is retroactive and enables him to proceed to patent. The antecedent bar to patent by reason of his alienage is removed.

These conclusions are not altogether palatable, but we consider that they are forced upon us by the logic of the law.

There is only one limitation upon these conclusions which may be plausibly asserted, and that is this: A qualified locator may relocate a claim in the possession of an alien who has not declared his intention to become a citizen, if such relocation may be made without force or violence and prior to the naturalization of the alien, as the

[1] North Noonday M. Co. *v.* Orient M. Co., 6 Saw. 299.

[2] Anthony *v.* Jillson, 83 Cal. 296; Altoona Q. M. Co. *v.* Integral Q. M. Co., 45 Pac. (Cal.) 1047.

alien might be deemed a mere occupant without color of title, and the rules announced in the article on "occupancy" might apply.[1] The relocator is then in a position to contest the alien's right to a patent. He would have the status of an adverse claimant, without which he would have no standing in court. The alienage of the original locator would not avail the subsequent citizen locator so as to permit the court to award the claim to him for that reason; but the latter would be enabled through the patent proceedings, which are the equivalents of "inquests of office," to have alienage established, and thus clear the records. But in other actions, such as trespass, ejectment, and the like, disconnected with patent proceedings, and to which the government is neither directly nor indirectly a party, the alien locator would be entitled to rest upon the presumption as to his citizenship, and the fact that only the government could complain. We are loath to believe that a location by an alien is, under all circumstances, such a segregation of the tract from the body of the public domain as will inhibit a relocation by a qualified locator who enters peaceably and in good faith for that purpose.

## ARTICLE III. GENERAL PROPERTY RIGHTS OF ALIENS IN THE STATES.

§ 237. After patent, property becomes subject to rules prescribed by the state.

§ 238. Constitutional and statutory regulations of the precious-metal-bearing states on the subject of alien proprietorship.

**§ 237. After patent, property becomes subject to rules prescribed by the state.**—The rights of aliens to acquire, hold, and transmit real property in the states, after the title to such property has passed out of the general government, are regulated exclusively by the constitution and laws of the several states.

[1] See, *ante*, art. x., §§ 216-218.

The mining laws contain the express provision that nothing in them shall be construed to prevent the alienation of title conveyed by a patent to any person whatever.[1]

As we have heretofore observed,[2] property in mines, once vested absolutely in the individual, becomes subject to the same rules of law as other real property within the state. The federal law remains a muniment of title, but beyond this it possesses no potential force. Its purpose has been accomplished, and, like a private vendor, the government loses all dominion over the thing granted. To determine, therefore, what disabilities, if any, are imposed upon aliens as to property in the states, held in absolute private ownership after the government has absolutely parted with its title, the constitution and laws of the several states must be consulted.

**§ 238. Constitutional and statutory regulations of the precious-metal-bearing states on the subject of alien proprietorship.**—The tendency in almost all the precious-metal-bearing states, and those within the purview of this treatise, has been in the line of a liberal policy on the subject of alien ownership. For the purpose of convenient reference, we note the present status of aliens in the several states.

*California.*—Aliens, either resident or non-resident, may take, hold, and dispose of property, real or personal.[3] A non-resident foreigner may take by succession, but must claim the estate within five years from the death of the decedent to whom he claims succession.[4]

*Colorado.*—Resident aliens may acquire, inherit, possess, enjoy, and dispose of property, real and personal, as native-born citizens.[5]

[1] Rev. Stats., § 2326.

[2] See, *ante*, § 22.

[3] Civil Code, § 671; Estate of Billings, 65 Cal. 593; Lyons v. State, 67 Cal. 380; Carrasco v. State, *Id.* 385; State v. Smith, 70 Cal. 153.

[4] Civil Code, § 1404.

[5] Const., art. ii., § 27; Mills' Annot. Stats. 1891, ch. iii., § 99, p. 421.

*Idaho.*— An act of the legislature of this state provides as follows: —

"That any person, whether citizen or alien (except as "hereinafter provided), natural or artificial, may take, hold, "and dispose of mining claims and mining property, real "or personal, tunnel rights, millsites, quartz-mills and "reduction works, used or necessary or proper for the reduc- "tion of ores, and water rights used for mining or milling "purposes, and any other lands or property necessary for "the working of mines or the reduction of the products "thereof; *provided*, that Chinese, or persons of Mongolian "descent not born in the United States, are not permitted "to acquire title to land or any real property under the "provisions of this act."[1]

The rule as to other classes of real estate is different.[2]

*Montana.*— Aliens and denizens have the same right as citizens to acquire, purchase, possess, enjoy, convey and transmit, and inherit mines and mining property, and milling, reduction, concentrating, and other works, and real property necessary for or connected with the business of mining and treating ores and minerals.[3]

*Nebraska.*— No distinction is made between resident aliens and citizens, in reference to the possession, enjoyment, or descent of property.[4] But non-resident aliens and corporations not incorporated under the laws of the state are prohibited from acquiring title to or taking or holding any lands or real estate by descent, devise, purchase, or otherwise. Exception is made in favor of a widow and heirs of aliens who acquired lands prior to the adoption of the constitution. These may hold by devise or descent for a period of ten years; but within that period they must be sold to a *bona fide* purchaser, or suffer escheat.[5]

*Nevada.*— Any non-resident alien, person or corporation, except subjects of the Chinese empire, may take, hold, and enjoy any real property, or any interest in lands, tenements,

[1] Idaho Stats., 1890-91, p. 118.
[2] *Id.* 108.
[3] Const., art. iii., § 25.
[4] Const., art. i., § 25.
[5] Comp. Stats. Neb. 1893, ch. lxxiii. § 70.

or hereditaments within the state of Nevada, as fully, freely, and upon the same terms and conditions as any resident, citizen, person, or domestic corporation.[1]

*North Dakota.*— Any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this state.[2]

*Oregon.*— "No Chinaman, not a resident of the state at "the adoption of this constitution, shall ever hold any "real estate or mining claim, or work any mining claim "therein."[3]

Aliens may acquire and hold lands or interest therein, by purchase, devise, or descent, the same as if they were native-born citizens. Foreign corporations not prohibited by the constitution from carrying on business in the state may acquire, hold, use, and dispose of all real estate necessary or convenient to carry into effect the objects of its organization, and also any interest in real estate, by mortgage or otherwise, as security for moneys due or loans made by such corporation.[4]

*South Dakota.*— The constitution of this state provides that:—

"No distinction shall ever be made by law between resi- "dent aliens and citizens in reference to the possession, "enjoyment, or descent of property."[5]

Legislation as to non-resident aliens is permissive, but there is no statute on the subject. Hence non-resident aliens occupy the status of citizens or resident aliens, with reference to the acquisition and enjoyment of property.

*Washington.*— It is provided by the laws of this state that—

"Any alien, except such as by the laws of the United "States are incapable of becoming citizens of the United "States, may acquire and hold lands, or any right thereto

[1] Gen. Stats. Nev. 1885, § 2655, p. 689.
[2] Rev. Code 1895, § 3277, p. 722.
[3] Const., art. xv., § 8.
[4] Hill's Annot. Stats. 1892, § 2988.
[5] Const., art. vi., § 14.

"or interest therein, by purchase, devise, or descent, and "he may convey, mortgage, and devise the same, and if he "die intestate, the same shall descend to his heirs; and in "all cases such lands shall be held, conveyed, mortaged, "or devised, or shall descend in like manner and with like "effect as if such alien were a citizen of this state or of the "United States."[1]

*Wyoming.*— There is no distinction between aliens and citizens, with reference to property rights.[2]

*Utah.*— While Utah was still a territory, it was subject to the alien act of congress. There is nothing in its recently adopted constitution or its laws discriminating between citizens and aliens on the question of property rights. The territorial statute regulating the right of aliens to take by succession, requiring them to claim their inheritance within five years,[3] is still in force, by virtue of its constitution.[4]

## ARTICLE IV. GENERAL PROPERTY RIGHTS OF ALIENS IN THE TERRITORIES.

§ 242. Power of congress over the territories.
§ 243. The alien act of March 3, 1887, and the territorial limit of its operation.
§ 244. General scope of the alien act — Opinion of Attorney-General Garland.

**§ 242. Power of congress over the territories.**— The power of congress over the territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States.[5]

[1] Hill's Stats. and Codes 1891, vol. i., § 2955.
[2] Const., art. i., § 29.
[3] Laws 1884, p. 77, § 20.
[4] Art. xxiv., § 2.
[5] Justice Bradley, in Mormon Church v. United States, 136 U. S. 1, 42.

As was said by Chief Justice Marshall,—

"Perhaps the power of governing a territory belonging "to the United States, which has not by becoming a state "acquired the means of self-government, may result neces- "sarily from the facts that it is not within the jurisdiction "of any particular state, and is within the power and juris- "diction of the United States. The right to govern may "be the inevitable consequence of the right to acquire terri- "tory. Whichever may be the source whence the power "is derived, the possession of it is unquestioned."[1]

And by Chief Justice Waite,—

"Congress may not only abrogate laws of the territorial "legislatures, but it may itself legislate directly for the local "government. It may make a void act of the territorial "legislature valid, and a valid act void. In other words, it "has full and complete legislative authority over the people "of the territories and all the departments of the territorial "governments. It may do for the territories what the peo- "ple under the constitution of the United States may do "for the states."[2]

These propositions are elementary and self-evident.[3]

**§ 243. The alien act of March 3, 1887, and the territorial limit of its operation.**—Congress having this unquestioned power to establish rules of property in the territories, on March 3, 1887, passed an act entitled "An act to restrict "the ownership of real estate in the territories to Ameri- "can citizens,"[4] the first two sections of which are as follows:—

"SEC. 1. That it shall be unlawful for any person or "persons not citizens of the United States, or who have not "lawfully declared their intention to become such citizens, "or for any corporation not created by or under the laws "of the United States or of some state or territory of the "United States, to hereafter acquire, hold, or own real estate "so hereafter acquired, or any interest therein, in any of "the territories of the United States, or in the District of

[1] American Ins. Co. v. Canter, 1 Peters, 511, 542.
[2] National Bank v. Co. of Yankton, 101 U. S. 129, 133.
[3] Mormon Church v. United States, 136 U. S. 1, 43.
[4] 24 Stats. at Large, 476.

"Columbia, except such as may be acquired by inheritance "or in good faith in the ordinary course of justice in the "collection of debts heretofore created; *provided*, that the "prohibition of this section shall not apply to cases in "which the right to hold or dispose of lands in the United "States is secured by existing treaties to the citizens or "subjects of foreign countries, which rights, so far as they "may exist by force of any such treaty, shall continue to "exist so long as such treaties are in force, and no longer.

"SEC. 2. That no corporation or association more than "twenty per centum of the stock of which is or may be "owned by any person or persons, corporation or corpora- "tions, association or associations, not citizens of the United "States, shall hereafter acquire, or hold or own any real "estate hereafter acquired in any of the territories of the "United States or of the District of Columbia."

By section four the attorney-general is directed to enforce the forfeitures provided for by the act, by bill in equity or other proper process.

Whatever legislation theretofore existed in any of the territories upon the subject of alienage, it became inoperative and ineffectual, and thenceforward had no potential existence. Since the passage of this act, all of the then organized territories except New Mexico and Arizona have been admitted into the union. Unquestionably, the alien act is in force in these territories, and will so remain until it is repealed or they are admitted to statehood. Does the act apply to Alaska?

The act prohibits persons not citizens or who have not lawfully declared their intention to become such, and corporations not created by or under the laws of some state or territory of the United States, from hereafter acquiring, holding, or owning real estate so hereafter acquired, or any interest therein, in any of *the territories of the United States or in the District of Columbia.*

Was Alaska a territory at the time this act was passed, within the meaning of the law? Popularly, it has never been so considered. By the act of July 27, 1868,[1] it was created a customs district, and called the *District of Alaska.*

[1] 15 Stats. at Large, 240.

It has been referred to in some of the legislation of congress as an *unorganized territory*.[1] By the act passed March 17, 1884, entitled "An act providing a civil government "for Alaska,"[2] it is created a civil, judicial, and land district, and throughout the entire act it is referred to and denominated as a *district*. This act does not clothe the "district" with legislative functions. It establishes a temporary seat of government at Sitka, and authorizes the appointment of a governor, district judge, and minor officers. The general laws of the state of Oregon in force at the date of the passage of the act are declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of the act or the laws of the United States. It is expressly provided that nothing contained in the act should put in force in said district the general land laws of the United States. But the laws relating to mining claims and rights incident thereto were declared thenceforward to be in force in said district. These laws, as we have heretofore observed,[3] embody a provision that nothing therein contained should be construed to prevent the alienation of a title conveyed by a patent for a mining claim to any person whatever.[4]

This was the political status of Alaska when the alien act was passed in 1887, and is substantially its status at the present time. Was it included within the designation "territories" mentioned in the alien act? We are of opinion that it was not. We think we are materially aided in this view by a decision of the supreme court of the United States with reference to that portion of Indian territory now known as Oklahoma, prior to its organization into a territory. The decision referred to was based upon the following state of facts: —

On February 9, 1889, congress passed an act[5] providing —

"That every person who shall carnally and unlawfully "know any female under the age of sixteen years, or who

[1] Rev. Stats., ch. iii., p. 342.
[2] 23 Stats. at Large, 24.
[3] See, *ante*, § 237.
[4] Rev. Stats., § 2326.
[5] 25 Stats. at Large, 658.

"shall be accessory to such carnal and unlawful knowledge "before the fact in the District of Columbia or other place, "*except the territories*, over which the United States has ex- "clusive jurisdiction, . . . shall be guilty of a felony."

The accused was charged with having committed the offense within that part of Indian territory commonly known as Oklahoma. He was tried and convicted, and applied to the supreme court of the United States for a writ of *habeas corpus*, his counsel contending that Oklahoma was a *territory* within the exception of the act of congress, and that the trial court was without jurisdiction. The supreme court, in denying the writ, thus expressed its views:—

"We think the words 'except the territories' have refer- "ence exclusively to that system of organized government "long existing within the United States by which certain "regions of the country have been erected into civil gov- "ernments. These governments have an executive, a legis- "lative, and a judicial system. They have the powers "which all these departments of government have exer- "cised, which are conferred upon them by act of congress, "and their legislative acts are subject to the disapproval of "the congress of the United States. . . . It is this class "of governments, long known by the name of territories, "that the act of congress excepts from the operations of "this statute. . . . Oklahoma was not of this class of "territories. It had no legislative body. It had no gov- "ernment. It had no established or organized system of "government for the control of the people within its lim- "its, as the territories of the United States have, and "always have had. We are, therefore, of opinion that the "objection taken on this point by the counsel for the "prisoner is unsound."[1]

Suppose the crime in question had been committed in Alaska. Is there any reason for holding that a valid conviction could not have been had, for lack of jurisdiction?

It seems to us that the inference is logically deducible that the alien act under consideration is not applicable to Alaska, and that after patent the patentee may transfer his title to "any person whatever." Of course, as to unpatented

[1] *In re* Lane, 135 U. S. 443, 447.

mines, the rule is the same in all sections of the country, states or territories, organized and unorganized. One not a citizen, or not having declared his intention to become such, strictly speaking, may not locate a mining claim anywhere upon the public domain, as already explained in a preceding article.[1]

As to Oklahoma, it became an organized territory by act of congress, passed subsequent to the enactment of the alien laws.[2]

It might be well doubted if these laws became operative upon the formal creation of the territory, *propria vigore*. The language of the first section might be construed to include only such territories as were then organized. The legislature of Oklahoma has legislated only upon the right of aliens to take by succession.

In New Mexico, there does not seem to have been any legislation prior to the passage of the alien act of congress.

In Arizona, at the time that act was passed a territorial law was in existence which provided that any alien might acquire by purchase or operation of law, and possess, hold, own, and dispose of any mines or minerals within the territory.[3]

The passage of the alien act, however, superseded this; and in the revision of the laws of Arizona the former territorial act was omitted.

In these two last-named territories the congressional act is, of course, in full force.

§ 244. **General scope of the alien act — Opinion of Attorney-General Garland.** — Shortly after the passage of the alien act, the president of the United States submitted to Attorney-General Garland the following inquiries with reference to the alien act, for his official investigation and opinion: —

(1) Was the act intended to and does it apply to mines?

[1] See, *ante*, § 231.

[2] May 2, 1890, 26 Stats. at Large, 81.

[3] Laws 1885, 40.

(2) Can aliens lawfully acquire, own, and hold shares or stock issued by an American corporation which is the owner of mineral lands in the territories?

(3) Would the advancement of money by aliens for the purpose of developing mining properties be lawful under the act?

(4) Can aliens lawfully contract with American owners for working mines or making any proper use of mineral lands for a term of years?

The conclusions reached by the attorney-general were thus stated by him:—

(1) As mines are real estate, or inheritable interests in real estate, the act does apply to them;

(2) As stock in a corporation is personalty, an alien can lawfully have, own, and hold shares of stock issued by an American corporation which was at the date of the passage of the act the owner of mineral lands in territories; but if the holding of aliens exceeds twenty per cent., such corporation can neither acquire, hold, nor own, nor hereafter acquire, real estate while more than twenty per cent. of stock is held and owned by aliens;

(3) Under the act, the advancement of money hereafter by aliens for the purpose of developing mining property is lawful; but no interest in the real estate can be acquired by such advancement, nor would an alien have the right to purchase the real estate nor any interest therein on a loan made since the passage of the act, even if sold on his own security or lien;

(4) Aliens may lawfully contract with American owners to work mines, by personal contracts for hire, or by *bona fide* leases for a reasonable time.[1]

The foregoing opinion, emanating from the head of the department of justice, is entitled to great weight. The conclusions are logically drawn, with, perhaps, one exception. The attorney-general expressed the view that a leasehold

[1] 14 Copp's L. O. 126, 127.

was not an interest in property, but should be treated as a chattel real, and that a lease for years was not "real "estate," within the meaning of the law.

This rule is not in harmony with the decisions of many of the States. But, be that as it may, there can be no question but that alien individuals and corporations may contract with American mine-owners to work and develop mining properties, and receive any proportion of the output which may be agreed upon as compensation for services rendered and expenditures made in connection with the venture. Contracts of the character called "tribute," or "beneficiating," contracts, do not create an interest in property.

As was said by the supreme court of California,—

"Such a contract does not create the relation of landlord "and tenant, but fixes a rule of compensation for services "rendered. It is in all its essential features a contract for "labor to be performed, and to be paid for by a share of "the profits realized from such labor."[1]

"Tribute," or "beneficiating," contracts are clearly not within the inhibition of the law.

As to alien ownership of shares of stock in a domestic corporation owning real estate in the territories, it would seem, from a consideration of the authorities cited in a previous section, that citizenship of such stockholders is presumed.[2]

If such presumption is not in this particular instance a conclusive one, it certainly is *prima facie*, and the burden of proof would rest upon the government, in case "inquest "of office" should be sought.

In applications for patent by corporations for mining claims in the territories, the land department requires, in addition to the certificate of incorporation, an affirmative showing that no more than twenty per cent. of the stock is held by aliens. Stockholders of a corporation are those

[1] Hudepohl *v.* Liberty Hill Cons. M. Co., 80 Cal. 553; Stuart *v.* Adams, 89 Cal. 367.

[2] See, *ante*, § 226.

registered upon its books as such. It is not likely that such registry would show the political status of the stockholder. They may be all citizens in the original instance. And as the stock passes from hand to hand by indorsement, the corporation itself will not be able to trace it. Nor is it necessary that it should. Its acts are controlled entirely by the registered stock. Those in whose names the stock is recorded on the books of the corporation are the only stockholders recognized by the law. So far as the practical operation of the law in this respect is concerned, it is a dead letter.

Of course, aliens and corporations would, in any event, hold until "office found." We are not aware of a single instance where the government has intervened and sought to enforce the forfeitures provided for by the act.

With the admission of the remaining organized territories into the union, which will undoubtedly occur in the near future, the alien act of congress will become obsolete.

# TITLE IV.

## STATE LEGISLATION AND LOCAL DISTRICT REGULATIONS SUPPLEMENTING THE CONGRESSIONAL MINING LAWS.

CHAPTER

I. STATE LEGISLATION SUPPLEMENTAL TO THE CONGRESSIONAL MINING LAWS.

II. LOCAL DISTRICT REGULATIONS.

# CHAPTER I.

## STATE LEGISLATION SUPPLEMENTAL TO THE CONGRESSIONAL MINING LAWS.


§ 248. Introductory.

§ 249. Limits within which state may legislate.

§ 250. Scope of existing state and territorial legislation—Subjects concerning which states and territories may unquestionably legislate.

§ 251. Subjects upon which states have enacted laws the validity of which is open to question.

§ 252. Drainage, easements, and rights of way for mining purposes.

§ 253. Provisions of state constitutions on the subject of eminent domain.

§ 254. Mining as a "public use."

§ 255. Rights of way for pipe-lines for the conveyance of oil and natural gas.

§ 256. Lateral and other railroads for transportation of mine products.

§ 257. Physical and industrial conditions as affecting the rule of "public utility."

§ 258. The rule in Nevada.

§ 259. The rule in Arizona.

§ 260. The rule in Georgia.

§ 261. The rule in Pennsylvania.

§ 262. The rule in West Virginia.

§ 263. The rule in California.

§ 264. Conclusions.


**§ 248. Introductory.**—As preliminary to the analysis and general exposition of the law regulating the manner in which mining rights on the public mineral lands may be held, enjoyed, and perpetuated, it is appropriate that we define with reasonable certainty the limit and extent of legislative power conceded to the several states and territories by the express or implied sanction of the general government. We have heretofore shown that the federal system of mining law is composed of three elements:—

(1) The legislation of congress;

(2) The legislation of the various states and territories

supplementing congressional legislation, and in harmony therewith;

(3) Local rules and customs, or regulations established in different localities, not in conflict with federal legislation or that of the state or territory wherein they are operative.[1]

We have traced the evolution of this system through the different periods of our national history, from the embryotic stage, which had its genesis in the local rules and customs of the mining camps of the west, to the development of higher forms of law. While in this progressive development the primitive forms have not altogether disappeared, they have been relegated from the position of controlling importance to that of mere subordinate and subsidiary functions. It is entirely unnecessary to here retrace the steps by which the present results were obtained. In the early chapters of this treatise,[2] we have endeavored to present such an historical review as will suffice for all practical purposes and enable the student to acquaint himself with the process of crystallization which has given us as a resultant the existing unique system. We are immediately concerned with the present practical operation of this system, and need not here stop by the wayside to indulge in historical reminiscence.

We are now to consider the general nature and scope of state and territorial legislation supplemental to the congressional mining laws, a minor subsidiary element in the system, but in its particular sphere important.

**§ 249. Limits within which state may legislate.** — When it is recognized that the government simply occupies the status of a landed proprietor, holding the paramount title to its public domain, with the sole right of disposal upon such terms and conditions and subject to such limitations as it may from time to time prescribe,[3] and that

[1] See, *ante*, § 81.

[2] See, *ante*, title II., chs. i-vi., §§ 28-81.

[3] See, *ante*, § 81.

the congressional mining laws are but a statement of such terms, conditions, and limitations, it follows necessarily that neither individuals nor states have the power to control, modify, or nullify any of such terms, conditions, or limitations.

If, by compliance with congressional law, an estate in public lands is granted, the state may not destroy or impair it.[1] If no such estate in such lands is created by or under the authority of federal law, the state has no power to create or transfer it. After an estate is once granted, and a right of property becomes vested, it is subject to the general laws of the state the same as any other property; but we now speak only of the terms, conditions, and limitations under which estates, either equitable or legal, are carved out of the public lands by the act of the paramount proprietor.

If the state may prescribe any additional or supplemental rules, increasing the burdens or diminishing the benefits granted by the federal laws in lands of the public domain, it is simply because the government, as owner of the property, sanctions, expressly or by implication, the exercise of such powers.

At one period of the national history, the states assumed the right to confer possessory rights in the public lands upon its citizens. The national government acquiesced in the assumed power for a number of years. It might have repudiated this intervention by the state, and dispossessed the occupants; but having failed to do so, certain possessory privileges were acquired, to the extent and under such circumstances that the government became, morally and in good conscience, bound to recognize them.[2]

This it did gracefully. But this was before the government, by legislative enactment, adopted any general laws expressly providing for the sale or disposal of its mineral lands in the precious-metal-bearing states. The legislative

[1] Except in the exercise of the right of eminent domain, which involves the payment of compensation. See, *post*, § 253 *et seq.*

[2] See, *ante*, § 56.

era succeeded the period of passive recognition, and with the passage of laws providing for the method of vesting legal or equitable estates in the public lands, the right of the states to legislate in this direction was no longer recognized, except to the extent that such power was conceded by the congressional laws.

State statutes in reference to mining rights upon the public domain must, therefore, be construed in subordination to the laws of congress, as they are more in the nature of regulations under these laws than independent legislation.[1]

State and territorial legislation, therefore, must be entirely consistent with the federal laws. The right to supplement federal legislation conceded to the state may not be arbitrarily exercised; nor has the state the privilege of imposing conditions so onerous as to be repugnant to the liberal spirit of the congressional laws. On the other hand, the state may not by its legislation dispense with the performance of the conditions imposed by the national law, nor relieve the locator from the obligation of performing in good faith those acts which are declared by it to be essential to the maintenance and perpetuation of the estate acquired by location. Within these limits, the state may legislate. Beyond them the state should not be permitted to go.

**§ 250. Scope of existing state and territorial legislation — Subjects concerning which states and territories may unquestionably legislate.**— Many of the states and territories have enacted codes, more or less comprehensive, supplementing congressional laws, while others have but few provisions. In the appendix will be found the legislation of each state and territory now in force.

That a correct understanding of the general scope of the existing state and territorial legislation may be gleaned, we enumerate the subjects covered by such laws, indicating which states and territories have legislated upon such subjects, first considering those concerning which such legislation is unquestionably proper, within reasonable limits.

[1] Eberle *v.* Carmichael (New. Mex.), 42 Pac. 95.

(1) *Length of lode claims.*—

Colorado,[1] Oregon,[4]
North Dakota,[2] Washington.[5]
South Dakota,[3]

While it is evident that under the congressional act the states and territories may limit the number of linear feet on a lode, or vein, which may be embraced within a single location to less than fifteen hundred feet, no state or territory has attempted any such restriction. Those states which have legislated at all upon the subject, simply repeat the general language of section twenty-three hundred and twenty of the Revised Statutes. Of course, this does not add any force to the federal enactment; nor does it detract from it. It is altogether harmless. Throughout the mining regions the unit of a lode location as to length is fifteen hundred feet.

(2) *Width of lode claims.*—

Colorado,[6] North Dakota,[8]
Idaho,[7] South Dakota,[9]

[1] Same as federal law; limit, fifteen hundred feet. Mills' Annot. Stats., § 3148.

[2] Same as federal law; limit, fifteen hundred feet. Rev. Pol. Code 1895, § 1426.

[3] Same as federal law. Pol. Code Dak. 1887, § 1997. Adopted by act of legislature — Laws 1890, ch. cv., § 1, p. 254.

[4] Same as federal law. Hill's Annot. Stats. (Ore.) 1892, § 3827.

[5] Same as federal law. Hill's Annot. Stats. (Wash.), § 221.

[6] In Gilpin, Clear Creek, Boulder, and Summit counties, seventy-five feet on each side of the center of the vein; in all other counties, one hundred and fifty feet on each side of the center of the vein or crevice, unless enlarged by vote of electors of a county at a general election. Mills' Annot. Stats., § 3149.

[7] May extend to three hundred feet on each side of the center of the vein. Rev. Stats., § 3100, as amended, Laws 1895, p. 25, § 1.

[8] One hundred and fifty feet on each side of the center of vein, unless enlarged to not more than three hundred feet by majority of votes in a county, cast at a general election. Rev. Pol. Code 1895, § 1427.

[9] Same as North Dakota. Pol. Code Dak. 1887, § 1998. Adopted by South Dakota — Laws 1890, ch. cv., § 1, p. 254.

| | |
|---|---|
| Oregon,[1] | Washington,[3] |
| Utah,[2] | Wyoming.[4] |

There can be no doubt about the power of state legislatures to limit the width of lode claims to any reasonable number of feet on each side of the center of the vein less than three hundred, and in the absence of any action in that behalf by the state, the local district organizations may regulate the subject.[5]

As to the provision of the statutes in Colorado and North and South Dakotas authorizing the counties to determine upon a greater width than that fixed by the state law, by a majority of the legal votes cast at a general election, Mr. Morrison, in his "Mining Rights,"[6] says that he knows of no instance where any such attempt has been made by any of the counties to avail themselves of the privilege. He also doubts the constitutionality of the law. If such action should be taken, and the result accepted and acted upon, it might have the force of a local regulation which does not acquire validity by mere adoption, but from customary obedience and acquiescence of the miners.[7]

(3) *Posting notices of location.*—

| | |
|---|---|
| Arizona,[8] | Idaho,[10] |
| Colorado,[9] | Montana,[11] |

[1] Same as federal statute. Hill's Annot. Stats. (Ore.) 1892, § 3827.

[2] Same as federal statute. Comp. Laws 1888, vol. ii., p. 138, § 2790. Adopted by Utah, as a state, on its admission.

[3] Not more than three hundred feet on each side of the middle of the vein. Local rules may not restrict to less than fifty feet. Hill's Annot. Stats. (Wash.) § 2211.

[4] Not to exceed three hundred feet. Local rules may not limit to less than one hundred and fifty feet. Laws 1888, p. 87, § 14.

[5] North Noonday M. Co. *v.* Orient M. Co., 6 Saw. 305; Jupiter M. Co. *v.* Bodie M. Co., 7 Saw. 104.

[6] Morr. Min. Rights, 8th ed. 20.

[7] North Noonday M. Co. *v.* Orient M. Co., 6 Saw. 299, 307; Jupiter M. Co. *v.* Bodie M. Co., 7 Saw. 96, 106; Harvey *v.* Ryan, 42 Cal. 626. See *post*, § 271.

[8] Laws 1895, p. 53, § 3.

[9] Placers: Mills' Annot. Stats., § 3134. Lodes: *Id.* § 3152.

[10] Lodes: Rev. Stats., § 3101, as amended — Laws 1895, p. 24, § 2.

[11] Pol. Code 1895, § 3610.

New Mexico,[1] Oregon,[4]
North Dakota,[2] Wyoming.[5]
South Dakota,[3]

(4) *Contents of notices and certificates of location.*—

Arizona,[6] New Mexico,[10]
Colorado,[7] North Dakota,[11]
Idaho,[8] South Dakota,[12]
Montana,[9] Wyoming.[13]

Where state or territorial laws require a location notice, certificate, or declaratory statement to be recorded, the act of congress provides what such record must contain.[14] While states and territories may enlarge these requirements, they may not dispense with any of them.

(5) *Recording notices and certificates of location.*—

Arizona,[15] Montana,[18]
Colorado,[16] Nevada,[19]
Idaho,[17] New Mexico,[20]

[1] Comp. Laws 1884, § 1566.
[2] Rev. Pol. Code 1895, § 1430.
[3] Pol. Code Dak. 1887, § 2001. Adopted by South Dakota — Laws 1890, ch. cv., § 1.
[4] Hill's Annot. Stats. (Ore.), § 3828.
[5] Lodes: Laws 1888, p. 88, § 17. Placers: Laws 1888, p. 89, § 22.
[6] Laws 1895, p. 53, §§ 1, 2.
[7] Placers: Mills' Annot. Stats., § 3136. Lodes: *Id.* § 3151.
[8] Rev. Stats., § 3101, as amended — Laws 1895, p. 26, § 2; Rev. Stats., § 3102.
[9] Pol. Code 1895, § 3610.
[10] Comp. Laws 1884, § 1566.
[11] Rev. Pol. Code 1895, § 1428.
[12] Pol. Code Dak., § 1900. Adopted by South Dakota — Laws 1890, ch. cv., § 1.
[13] Laws 1890-91, p. 179, § 1. Placers: Laws 1888, pp. 89-90, § 22.
[14] Rev. Stats., § 2324.
[15] Rev. Stats, 1887, p. 412, § 2349; Laws 1895, p. 53, § 3.
[16] Placers: Mills' Annot. Stats., § 3136. Lodes: *Id.*, § 3150. Tunnel Claims: *Id.*, § 3140.
[17] Lodes: Laws 1895, p. 27, § 4; p. 30, § 14.
[18] Pol. Code 1895, §§ 3612, 3613.
[19] Stats. Nev. 1885, p. 92, § 300.
[20] Comp. Laws 1884, § 1566.

North Dakota,[1]
South Dakota,[2]
Oregon,[3]
Utah,[4]
Washington,[5]
Wyoming.[6]

(6) *Authorizing amended locations and amended location certificates.*—

Arizona,[7]
Colorado,[8]
Idaho,[9]
New Mexico,[10]
North Dakota,[11]
South Dakota,[12]
Wyoming.[13]

(7) *Marking of boundaries and defining the character of posts and monuments.*—

Arizona,[14]
Colorado,[15]
Idaho,[16]
Montana,[17]
New Mexico,[18]
North Dakota,[19]
South Dakota,[20]
Wyoming.[21]

[1] Rev. Pol. Code 1895, § 1428.
[2] Pol. Code Dak. 1887, § 1999. Adopted by South Dakota — Laws 1890, ch. cv., § 1.
[3] Hill's Annot. Laws (Ore.), § 3831.
[4] Comp. Laws 1888, vol. ii., p. 139, §§ 2794, 2795. Adopted by Utah on its admission as a state.
[5] Hill's Annot. Stats. (Wash.), §§ 2214, 2215, 2216.
[6] Laws 1890-91, 179.
[7] Laws 1895, p. 54, § 7.
[8] Mills' Annot. Stats., § 3160.
[9] Laws 1895, p. 27, § 5.
[10] Laws 1889, p. 43, § 4.
[11] Rev. Pol. Code 1895, § 1437.
[12] Comp. Laws Dak. 1887, § 2008. Adopted by South Dakota — Laws 1890, ch. cv., § 1.
[13] Laws 1888, p. 85, § 7.
[14] Laws 1895, p. 53, § 4.
[15] Placers: Mills' Annot. Stats., § 3136. Lodes: *Id.*, § 3153.
[16] Lodes: Rev. Stats., § 3101, as amended — Laws 1895, p. 25, *et seq.*
[17] Pol. Code 1895, § 3611.
[18] Laws 1889, p. 42, § 2.
[19] Rev. Pol. Code 1895, § 1431.
[20] Comp. Laws Dak. 1887, § 2002. Adopted by South Dakota — Laws 1890, ch. cv., § 1.
[21] Laws 1888, p. 88, § 17.

(8) *Fixing time within which location shall be completed after discovery.*—

Arizona,[1]
Colorado,[2]
Idaho,[3]
Montana,[4]
New Mexico,[5]
North Dakota,[6]
South Dakota,[7]
Wyoming.[8]

(9) *Providing for the manner of relocating abandoned claims.*—

Arizona,[9]
Colorado,[10]
Idaho,[11]
Montana,[12]
New Mexico,[13]
North Dakota,[14]
South Dakota,[15]
Wyoming.[16]

(10) *Amount of annual work.*—

Arizona,[17]
Colorado,[18]
New Mexico,[19]
North Dakota,[20]

[1] Laws 1895, p. 54, § 6.
[2] Placers: Mills' Annot. Stats. § 3136. Lodes: *Id.*, § 3155.
[3] Lodes: Laws 1895, p. 26, *et seq.*, §§ 2, 3, 4.
[4] Pol. Code 1895, § 3612.
[5] Comp. Laws 1884, § 1566.
[6] Rev. Pol. Code 1895, § 1428.
[7] Comp. Laws Dak. 1887, §§ 1999, 2004. Adopted in South Dakota — Laws 1890, ch. cv., § 1.
[8] Lodes: Laws 1890-91, p. 179, §§ 1, 2. Placers: Laws 1888, pp. 89, 90, § 22.
[9] Laws 1895, p. 55, § 11.
[10] Mills' Annot. Stats., § 3162.
[11] Laws 1895, p. 28, § 7.
[12] Pol. Code 1895, § 3615.
[13] Laws 1889, p. 42, § 3.
[14] Rev. Pol. Code, § 1439.
[15] Comp. Laws Dak. 1887, § 2010. Adopted by South Dakota — Laws 1890, ch. cv., § 1.
[16] Laws 1888, p. 89, § 21.
[17] Re-enacts the federal law. Laws 1895, p. 54, § 8.
[18] Placers: Mills' Annot. Stats., § 3137, declared in conflict with federal law. Sweet *v.* Webber, 7 Colo. 443, 450.
[19] Fixing value of day's labor at four dollars for eight hours. Comp. Laws 1884, § 1568.
[20] Same as the federal law. Rev. Pol. Code, § 1438.

South Dakota,[1] Washington,[3]
Oregon,[2] Wyoming.[4]

No state has a right to decrease the amount of labor which the congressional law requires to be done annually on a mining claim. The law clearly implies that the states and territories, or the district organizations, in the absence of state or territorial legislation, may increase the amount of such labor.[5] The statutory declaration, as in New Mexico, that a day's work of eight hours is of the value of four dollars, and must be so computed in estimating the amount of annual labor performed on a mining claim, is of questionable propriety. Mr. Morrison is of the opinion that such provisions "amount to absolutely nothing."[6]

(11) *Authorizing the recording of affidavits of performance of annual labor.*—

Arizona,[7] Montana,[11]
California,[8] New Mexico,[12]
Colorado,[9] Wyoming.[13]
Idaho,[10]

(12) *Prescribing manner of organizing mining districts.*—

Wyoming.[14]

[1] Same as the federal law. Comp. Laws Dak., § 2009. Adopted by South Dakota — Laws 1890, ch. cv., § 1.

[2] Provides for work to amount of fifty dollars per claim, to be performed within one year from date of location. Hill's Annot. Stats. (Ore.) 1892, § 3830.

[3] One hundred dollars each year; but year dates from date of location. Hill's Annot. Stats. (Wash.), § 2213.

[4] Placers: One hundred dollars per annum on claims consisting of one hundred and sixty acres; on claims of less than one hundred and sixty acres, sixty-two and a half cents per acre. Laws 1888, pp. 90, 91, § 23.

[5] Rev. Stats., § 2324.

[6] Morr. Min. Rights, 8th ed. 67.

[7] Laws 1895, p. 54, § 9.

[8] Laws 1891, ch. clv., p. 219.

[9] Mills' Annot. Stats., § 3161; Laws 1889, 261.

[10] Laws 1895, p. 27, § 6.

[11] Pol. Code, 1895, § 3614.

[12] Prince's Supplement, 673.

[13] Placers: Laws 1888, p. 90, § 23.

[14] Laws 1888, p. 84, § 1.

(13) *Authorizing survey of claim to be made by deputy mineral surveyor, and when recorded to become a part of the location certificate and become prima facie evidence as to all facts therein contained.—*

Montana.[1]

(14) *Manner of locating tunnel claims and length allowed on discovered lodes.—*

Colorado,[2] Montana.[3]

(15) *Requiring sinking of discovery shaft or its equivalent prior to completion of location.—*

Arizona,[4] New Mexico,[8]
Colorado,[5] North Dakota,[9]
Idaho,[6] South Dakota,[10]
Montana,[7] Wyoming.[11]

Secretary Teller expressed a doubt whether a state legislature has the right to attach this condition to the appropriation of mineral land,[12] although Commissioner Williamson held that such requirement is not in conflict with the congressional laws.[13] The state courts have uniformly enforced this class of provisions: and there being no authoritative ruling denying the right to the state to so legislate, these conditions may be assumed to be valid.

[1] Pol. Code 1895, § 3616.
[2] Mills' Annot. Stats. §§ 3140-3141.
[3] Comp. Stats. Mont. 1887, §§ 1487-1491.
[4] Laws 1895, p. 53, §§ 3, 5.
[5] Mills' Annot. Stats., §§ 3152, 3154, 3155.
[6] Laws 1895, p. 27, § 3.
[7] Pol. Code 1895, § 3611.
[8] Laws 1889, p. 42, § 1; Comp. Laws 1884, § 1571.
[9] Rev. Pol. Code 1895, §§ 1430, 1432, 1433.
[10] Comp. Laws Dak. 1887, §§ 2001, 2003. Adopted by South Dakota—Laws 1890, ch. cv., § 1.
[11] Laws 1888, p. 88, §§ 17, 18; Laws 1890-91, p. 189.
[12] Wight *v.* Tabor, 2 L. D. 738, 742; S. C. on review, *Id.* 743.
[13] *In re* Alfred H. Hale, 7 Copp's L. O. 115.

While it is manifest that the states and territories may legislate within a reasonable limit upon the foregoing subjects, we do not intend that it should be inferred that all of the legislation hereinbefore noted is absolutely in harmony with the letter and spirit of the national law. It is not our purpose at the present time to deal with individual state and territorial legislation analytically. When we deal with the requirements of a valid location, the conditions required to perfect and perpetuate it, we shall note, under each appropriate head, the nature and force of such legislation. We are now presenting generally the subjects upon which, to some extent, states and territories are permitted to legislate.

**§ 251. Subjects upon which states have enacted laws the validity of which is open to question.**— It is extremely difficult to draw the line between what is proper supplemental state legislation and what is not. But there are some subjects upon which there has been state and territorial legislation, which legislation is either clearly obnoxious to the federal law or open to criticism as being ineffectual, by reason of its being a mere reiteration of the provisions of the Revised Statutes. We note the following instances which illustrate this:—

(1) *Laws giving a locator the right to all lodes which have their top or apex within the location, and defining the extralateral right.*—

North Dakota,[1] Washington,[3]
South Dakota,[2] Wyoming.[4]

(2) *Rights of parties in cases of lodes crossing or uniting.*—

Colorado.[5]

[1] Rev. Pol. Code 1895, § 1434.
[2] Comp. Laws Dak. 1887, § 2005. Adopted by South Dakota—Laws 1890, ch. cv., § 1.
[3] Hill's Annot. Stats. (Wash.), § 2212.
[4] Laws 1888, p. 89, § 20.
[5] Mills' Annot. Stats., § 3142.

(3) *Prohibiting the proprietor of a mining claim from pursuing his vein on its strike beyond vertical planes drawn through surface boundaries.*—

Colorado,[1] South Dakota.[3]
North Dakota,[2]

These three classes of legislation clearly trench upon the power of congress. These subjects can only be regulated by the federal law, as they attempt to define and limit the character of the estate granted by the government. We do not understand that any of these provisions conflict with the federal law. But their re-enactment by the states gives them no force. If in harmony with the federal law, they are unnecessary; if obnoxious to it, they are void.

(4) *Verification of location certificates by oath.*—

Idaho,[4] Montana.[5]

In Wenner *v.* McNulty, the supreme court of Montana expressed its doubt of the right of the then territory to impose the additional burden upon the locator of verifying the notice of location by oath, and stated that this rule trenched very closely upon the federal law.[6] But in O'Donnell *v.* Glenn,[7] the court squarely upheld the law. In a still later case, Judge De Witt, speaking for the court, conceived that there were doubts about the validity of the rule, but declined to overrule O'Donnell *v.* Glenn and sustained the doctrine of that case. This ruling was followed in cases since decided by that court.[8] It was raised in the federal courts, but was not passed upon.[9]

[1] Mills' Annot. Stats., § 3157.
[2] Rev. Pol. Code 1895, § 1435.
[3] Comp. Laws Dak. 1887, § 2006. Adopted by South Dakota — Laws 1890, ch. cv., § 1.
[4] Rev. Stats., § 3104, as amended — Laws 1895, p. 29, § 13.
[5] Declaratory statement on oath. Pol. Code 1895, § 3612.
[6] 7 Mont. 30, 37.
[7] 8 Mont. 248, 252.
[8] McCowan *v.* Maclay, 16 Mont. 235; Berg *v.* Koegel, 40 Pac. 605.
[9] Preston *v.* Hunter, 67 Fed. 996.

(5) *Providing methods for forfeiting estate of delinquent co-owner.*—

Arizona,[1] Colorado,[3]
California,[2] Nevada.[4]

The act of congress on this subject[5] is open to the criticism that it attempts to deprive a person of property without due process of law. Ordinarily, forfeitures may only be adjudged by courts of competent jurisdiction, after a full investigation as to the facts. In any event, as was said by Judge De Witt, speaking for the supreme court of Montana, the statute must be strictly construed.[6]

If the act of congress is insufficient to divest the title of the co-owner, we do not see how the state may supplement it by laws which do not contemplate the institution of judicial proceedings. If the federal law is sufficient, there is no necessity for state legislation. We do not think that this subject is within the legitimate scope of state or territorial legislation. A state might create a lien in favor of the co-owner who pays more than his proportion of the annual expenditures, and authorize proceedings to foreclose that lien; but to sanction a forfeiture through the method of *ex parte* proceedings is repugnant to the spirit of the law. It *may* be accomplished under the federal law. But we deny the right of the state to legislate, except within the lines herein suggested.

(6) *Specifying the character of deposits which may be located under the placer laws.*—

Montana.[7]

While all the substances named in the Montana act fall within the definition of the term "mineral," as we under-

[1] Laws 1891, 140.
[2] Stats. 1891, ch. clv., p. 219.
[3] Mills' Annot. Stats., § 3137.
[4] Stats. 1887, p. 136, §§ 1-3.
[5] Rev. Stats., § 2324.
[6] Brandy v. Mayfield, 15 Mont. 201.
[7] Building-stone, limestone, marble, clay, and other mineral substances having a commercial value. Pol. Code 1895, § 3610.

stand it,[1] making legislation of this character unnecessary, yet the state has no right by its legislature to construe federal laws. A provision like the foregoing would be eminently proper in a congressional law, and if enlarged and adopted by congress, it would have the effect of removing the ambiguities and uncertainties now existing. But we cannot understand how it is within the power of a state to dictate to the national government what substances it shall dispose of under its mineral laws.

**§ 252. Drainage, easements, and rights of way for mining purposes.**— By section twenty-three hundred and thirty-eight of the Revised Statutes, it is enacted that—

"As a condition of sale, in the absence of necessary "legislation by congress, the local legislation of any state "or territory may provide rules for working mines, involv- "ing easements, drainage, and other necessary means to "their complete development, and those conditions shall "be fully expressed in the patent."

Arizona[2] and Colorado[3] have enacted laws providing for and regulating drainage of mines; and in the following territories and states we find local legislation prescribing methods of obtaining easements and rights of way for mining purposes and providing for condemnation proceedings:—

| | |
|---|---|
| Arizona,[4] | Nevada,[9] |
| California,[5] | New Mexico,[10] |
| Colorado,[6] | North Dakota,[11] |
| Idaho,[7] | South Dakota,[12] |
| Montana,[8] | Wyoming.[13] |

[1] See, *ante*, § 98.
[2] Rev. Stats. 1887, §§ 2352–2557.
[3] Mills' Annot. Stats., §§ 3172–3180.
[4] Laws 1881, 167.
[5] Code Civ. Proc., as amended 1895, § 1238.
[6] Mills' Annot. Stats., § 3158.
[7] Acts 1877, 1881.
[8] Pol. Code 1895, §§ 3630–3640; Code Civ. Proc., § 2211.
[9] Comp. Laws, § 120; Stats. 1887, pp. 102, 103, § 1.
[10] Laws 1889, 347.
[11] Comp. Laws Dak. 1887, §§ 2016–2028.
[12] Same as North Dakota.
[13] Laws 1888, p. 84, § 5.

This class of legislation, in the states at least, is not, strictly speaking, supplemental to the federal law. It is more in the nature of independent legislation, the validity and operative force of which is to be determined from a consideration of the limitation upon legislative action prescribed by the organic laws of the respective states.

In the case of the People *ex rel.* Aspen M. & S. Co. *v.* District Court, considered by the supreme court of Colorado,[1] it was urged that section twenty-three hundred and thirty-eight of the Revised Statutes imposed upon mineral lands acquired under the mining laws conditions which could not be ignored by the states; that they amounted practically to a burden charged upon the land and a limitation of the estate conveyed. Therefore, that these provisions were above and beyond state legislation upon the subject of eminent domain; that the state could not by its constitution abridge or curtail the privileges sanctioned by the law of congress; and that the doctrine of public "utility" in no way controlled this class of easements.

The contention, however, was not sustained. The supreme court of Colorado was of the opinion that, so far as the territories were concerned, congress might authorize the organization of a local government, with authority to enact laws, or it might legislate directly for the government of the territory. But upon the admission of a territory into the union as a sovereign state, the right of local self-government passes to the state.[2] The power of legislation thereafter resides in the people of the state, and is absolute and uncontrolled save as to the enumerated powers reserved to the national government by the federal constitution and the restraints upon state legislation imposed by that instrument. Other limitations upon the powers of the legislative department of a state are to be found in the state constitution. One of the powers of state sovereignty which may be exercised in the regulation and control of private property is termed the right of eminent domain. The

[1] 11 Colo. 147.

[2] See, also, Woodruff *v.* North Bloomfield G. M. Co., 18 Fed. 774-775.

exercise of this power within the states by the federal government extends only to appropriations by the United States for sites for post-offices, court-houses, forts, arsenals, light-houses, custom-houses, and other public uses.

"The foregoing principles, [said the supreme court of "Colorado], declaratory of the sovereign powers pertaining "to the federal and state governments respectively, do not "sustain the broad proposition of counsel that congress "may ignore state constitutions and authorize local legis- "latures, regardless of state constitutions, to pass laws "providing rules for the working of mines and involving "easements upon mineral lands. It is the solemn duty of "the courts of a state to enforce the state constitution as "the paramount law, whenever an act of the state legisla- "ture is found to be clearly in conflict therewith. Assum- "ing that the state constitution is a valid instrument, the "authority of congress to authorize the state legislature to "pass laws upon any subject in conflict therewith cannot "be admitted. But congress has not assumed to exercise "such a power. The rules and easements intended to be "authorized by the fifth section of the congressional act of "July 26, 1866, [now embodied in § 2338, Rev. Stats.] "were evidently such as should be enacted in accordance "with the fundamental law of the state or territory. "Considered with reference to the territories, the section "is unobjectionable in any view of the question, since, as "we have seen, the power of congress to govern them is "absolute. . . . As applicable to state governments, "the provision may be regarded as authorizing them to "supplement the act of congress with necessary and proper "rules and requirements, to be observed by citizens who have "availed or might avail themselves of the privilege given "to explore, occupy, and mine the mineral lands of the "public domain with a view to acquiring title thereto. In "so far as the provisions of the act may be regarded as "conferring power upon the state legislature, to regulate "the manner of using and operating mining claims, with "a view to the protection of the rights of the several claim- "ants, and to render available their respective locations, "by imposing restraints on the mode of operating and "using them, including necessary easements over the same, "it would seem from the authorities cited that the states "already possessed this power. Being comparatively a

[1] Now embodied in § 2338, Rev. Stats.

"new question, however, at the date of the passage of the "congressional act, this and the other permissive clauses "were properly and wisely inserted. The opinion of Mr. "Justice Field, in Jennison *v.* Kirk (98 U. S. 453–460), upon "other portions of this act, shows that the intention of "congress by the insertion of provisions of this character "was not to grant easements upon mining claims, but to "sanction such as might be regularly granted by the local "authorities, and in order that they might be perpetuated as "property rights after the title had passed from the govern-"ment. This precaution prevents any controversy in the "future as to the power of either territory or state to im-"pose easements on these lands while they belong to the "United States.

"From these principles and considerations, we arrive "at the conclusion, that, unless a state statute imposing an "easement upon mining claims is in accord with the state "constitution, it can not be enforced by our courts."

The case under consideration arose out of an attempt to condemn a right of way for a tramway across the lands of another, to enable the Aspen Mining and Smelting Company to transport ores from its mines to the sampling works in the town of Aspen, under a statute which provided that all mining claims now located, or which may be hereafter located, shall be subject to the right of way for any tramway, whether now in use or which may hereafter be laid across any such location, to be be condemned as in case of land taken for public highways when the consent of the owner cannot be obtained.[1]

The constitution of the state limited the power of the legislative department to the taking of private property for public use, and for the following *private* uses: "For "private ways of necessity and for reservoirs, drains, "flumes, or ditches for agricultural, mining, milling, do-"mestic, or sanitary purposes."[2]

The court held that, as tramways were not within the sanction of the constitution, the act of the legislature in question was void.

[1] Gen. Stats. Colo., 1887, § 2407.
[2] Const., art. ii., §§ 14, 15.

From a consideration of this case, the doctrine of which is in harmony with the views announced by Judge Cooley, the most eminent of all writers on constitutional law,[1] it cannot be doubted that the validity of the laws of the several states purporting to provide for securing easements and rights of way over the lands of others, for purposes connected with the industry of mining, must be determined regardless of the federal laws, and in the light of the respective state constitutions. The exercise by the state of its sovereign right of eminent domain cannot be interfered with by the United States.[2]

**§ 253. Provisions of state constitutions on the subject of eminent domain.**— As preliminary to a discussion of the general features of state legislation on this subject, we think it not inappropriate to present an epitome of the constitutional provisions of the several states where laws of this class have been enacted, so far as such provisions are germane.

**California.**—

"Private property shall not be taken or damaged for public "use without just compensation having been first made to, or "paid into court for, the owner, and no right of way shall be "appropriated to the use of any corporation other than muni- "cipal until full compensation therefor be first made in money "or ascertained or paid into court for the owner, irrespective "of any benefit for any improvement proposed by such cor- "poration, which compensation shall be ascertained by a jury, "unless a jury be waived, as in other civil cases in a court of "record, as shall be prescribed by law."[3]

"The exercise of the right of eminent domain shall never "be so abridged or construed as to prevent the legislature "from taking the property and franchises of incorporated com- "panies and subjecting them to public use, the same as the "property of individuals."[4]

[1] Cooley's Const. Limit., 6th ed., 645.
[2] Mississippi & Rum River Boom Co. *v.* Patterson, 98 U. S. 403.
[3] Const. Cal., art. i., § 14. [4] *Id.*, art xii., § 8.

"The use of all water now appropriated, or that may here-
"after be appropriated, for sale, rental, or distribution, is
"hereby declared to be a public use, and subject to the regula-
"tion and control of the state, in the manner to be prescribed
"by law."[1]

**Colorado.**—

"That private property shall not be taken for private use
"unless by consent of the owner, except for private ways of
"necessity, and except for reservoirs, drains, flumes, or ditches
"on or across the land of others, for agricultural, mining,
"milling, domestic, or sanitary purposes."[2]

"That private property shall not be taken or damaged, for
"public or private use, without just compensation. Such
"compensation shall be ascertained by a board of commission-
"ers, of not less than three freeholders, or by a jury when
"required by the owner of the property, in such manner as
"may be prescribed by law, and until the same shall be paid
"to the owner, or into court for the owner, the property shall
"not be needlessly disturbed, or the proprietary rights of the
"owner therein divested; and whenever an attempt is made
"to take private property for a use alleged to be public, the
"question whether the contemplated use be really public,
"shall be a judicial question, and determined as such without
"regard to any legislative assertion that the use is public."[3]

**Idaho.**—

"The necessary use of lands for the construction of reservoirs
"or storage basins, for the purpose of irrigation, or for rights
"of way for the construction of canals, ditches, flumes, or pipes,
"to convey water to the place of use, for any useful, beneficial,
"or necessary purpose, or for drainage; or for the drainage of
"mines or the working thereof, by means of roads, railroads,
"tramways, cuts, tunnels, shafts, hoisting works, dumps, or
"other necessary means to their complete development, or any
"other use necessary to the complete development of the ma-
"terial resources of the state, or the preservation of the health
"of its inhabitants, is hereby declared to be a public use, and
"subject to the regulation and control of the state.

[1] Const. Cal., art. xiv., § 1. [2] Const. Colo., art. ii., § 14. [3] *Id.*, art. ii., § 15.

"Private property may be taken for public use, but not "until a just compensation, to be ascertained in a manner "prescribed by law, shall be paid therefor." [1]

**Montana.**—

"Private property shall not be taken or damaged for public "use without just compensation having been first made to, or "paid into the court for, the owner." [2]

"The use of all water now appropriated, or that may here- "after be appropriated, for sale, rental, distribution, or other "beneficial use, and the right of way over the lands of others, "for all ditches, drains, flumes, canals, and aqueducts neces- "sarily used in connection therewith, as well as the sites for "reservoirs necessary for collecting and storing the same, "shall be held to be a public use. Private roads may be "opened in the manner to be prescribed by law; but in every "case the necessity of the road, and the amount of all damage "to be sustained by the opening thereof, shall be first deter- "mined by a jury, and such amount, together with the "expenses of the proceeding, shall be paid by the person to be "benefited." [3]

**Nevada.**—

. . . "Nor shall private property be taken for public use "without just compensation having been first taken or se- "cured, except in cases of war, riot, fire, or great public peril, "in which case compensation shall be afterward made." [4]

**North Dakota.**—

"Private property shall not be taken or damaged for public "use without just compensation having been first made to, "or paid into court for, the owner, and no right of way shall "be appropriated to the use of any corporation other than "municipal, until full compensation therefor be first made in "money, or ascertained and paid into court for the owner, "irrespective of any benefit from any improvement proposed "by such corporation, which compensation shall be ascer- "tained by a jury, unless a jury be waived." [5]

[1] Const. Idaho, art. i., § 14.
[2] Const. Mont., art. iii., § 14.
[3] *Id.*, art. iii., § 15.
[4] Const. Nev., art. i., § 8.
[5] Const. N. Dak., art. i., § 14.

**South Dakota.**—

"Private property shall not be taken for public use, or "damaged, without just compensation, as determined by a "jury, which shall be paid as soon as it can be ascertained, "and before possession is taken. No benefit which may "accrue to the owner as a result of an improvement made "by any private corporation shall be considered in fixing "the compensation for property taken or damaged. The fee "of land taken for railroad tracks or other highways shall "remain in such owners, subject to the use for which it is "taken."[1]

**Utah.**—

"Private property shall not be taken or damaged for a "public use without just compensation."[2]

**Wyoming.**—

"Private property shall not be taken for private use un- "less by consent of the owner, except for private ways of "necessity, and for reservoirs, drains, flumes, or ditches on or "across the lands of others, for agricultural, mining, milling, "domestic, or sanitary purposes, nor in any case without due "compensation."[3]

"Private property shall not be taken or damaged for public "or private use without just compensation."[4]

It will thus be seen that private property may be subjected to burdens for certain specified purposes that may be classified as private, in Colorado, Idaho, Montana, and Wyoming. In these states, it would seem that, within the limitations prescribed by the respective constitutions, the local legislatures may act, although some of the uses are not essentially public. The legislation in the remaining states,—*i. e.* California, Nevada, North Dakota, and South Dakota,—and in the other states, for purposes not within the specified limitations, must necessarily be confined to such uses as are essentially public in their nature.

[1] Const. S. Dak., art. vi., § 13.
[2] Const. Utah, art. i., § 22.
[3] Const. Wyo., art. i., § 32.
[4] *Id.*, art. i., § 33.

**§ 254. Mining as a "public use."**—An exhaustive discussion of the law of eminent domain is hardly within the scope of this treatise, but it is necessary to deal with it to some extent.

We assume that the organic law of a state may properly provide for the condemnation of private property for private use. Such constitutional provisions, wherever they exist, form exceptions to the general rules of law upon the subject of eminent domain. Our future presentation of the law is alone applicable to states where such class of provisions do not exist, and to such uses which do not fall within the above exceptions or limitations.

Mr. Lewis, in his work on the "Law of Eminent Domain," states that, apart from constitutional considerations, it is not essential in order to constitute an act of eminent domain that the use for which property is taken should be of a public nature. It is sufficient that the use of the particular property is necessary to enable individual proprietors to cultivate and improve their land to the best advantage, or to develop certain natural and exceptional resources incident thereto, such as a water privilege or a mine. In such cases, the public welfare is promoted, though indirectly, by the increased prosperity which necessarily results from developing the natural resources of the country.[1]

This is an exceedingly optimistic view of the rule, not concurred in by other writers. Mr. Mills thus states his conclusions upon the subject of condemnation for private use:—

"The use to which property is condemned must be "public. As between individuals, no necessity, however "great, no exigency, however imminent, no improvement, "however valuable, no refusal, however unneighborly, no "obstinacy, however unreasonable, no offers of compensa- "tion, however extravagant, can compel or require a man "to part with one inch of his estate."[2]

Judge Cooley says:—

"It is conceded on all hands that the legislature has no "power, in any case, to take the property of one individual

[1] Lewis on Eminent Domain, § 1. [2] Mills on Eminent Domain, § 22.

"and pass it over to another, without reference to some "use to which it is to be applied for public benefit."[1]

Only a few of the state constitutions in terms prohibit the taking of private property for private use. All the courts, however, agree that this can not be done.[2]

As was said by the supreme court of New Jersey,—

"There is no prohibition in the constitution of this state, "or in any of the state constitutions that I know of, against "taking private property for private use. But the power "is nowhere granted to the legislature. The constitution "vests in the senate and general assembly the legislative "or law-making power. They may make laws, the rules "prescribed to govern our civil conduct. They are not "sovereign in all things; the executive and judicial power "is not vested in them. Taking the property of one man "and giving it to another is not making a law or rule of "action; it is not legislation, it is simply robbery."[3]

While this may be true, the rule announced is based upon a taking for a purely private purpose, unaccompanied by any supposed indirect public benefit.

As to what constitutes a "public use" is a difficult question. It is impossible for us to supply a definition sufficiently comprehensive to cover all possible cases. Nor is it necessary that we should do so. The question as to whether a given use is or is not public, is a judicial one. The legislature can not so determine that the use is public as to make the determination conclusive upon the courts; but the presumption is in favor of the public character of a use declared to be public by the legislature; and unless it is seen at first blush that it is not possible for the use to be public, the courts can not interfere.[4]

[1] Cooley's Const. Limit., 6th ed., 651.

[2] Lewis on Eminent Domain, § 157, and cases cited in note.

[3] Coster v. Tide Water Co., 18 N. J. Eq. 54, 63.

[4] Mills on Eminent Domain, § 10; Lewis on Eminent Domain, § 158.

The rule is different in Colorado, whose constitution provides that the question is to be determined without regard to any legislative assertion. Const. Colo., art. ii., § 15.

**§ 255. Rights of way for pipe-lines for the conveyance of oil and natural gas.**—In the application of these principles to the class of state legislation under consideration, we find that the decisions of the courts are not altogether uniform. The power of eminent domain has been exercised for pipe-lines for the conveyance of oil and natural gas.[1]

But these uses are just as much public in their nature as supplying water to municipalities. Fuel and light are just as essential commodities as water, and their general distribution to the public for domestic, manufacturing, or industrial purposes is of unquestioned "public utility."

**§ 256. Lateral and other railroads, for transportation of mine products.**—The mining interests in certain localities have been deemed sufficiently important to justify statutes enabling a mine-owner to condemn rights of way from his mine to the nearest available thoroughfare, by means of what are termed "lateral railroads." But the laws authorizing the construction and maintenance of such railroads over the lands of another provide that all persons who may have occasion to do so may utilize them, thus making the use, at least, *quasi* public.[2]

A railroad company organized under a law making it a common carrier of passengers and freight may, of course, condemn land for its roadbed.[3] And the fact that the road terminates at a mine, and is used for transporting the mined product, does not alter the public character of the use.[4]

But, in respect to the transportation of mine products, it has been held that a mine-owner can not condemn land for a railroad to be used exclusively for the product of his

[1] Randolph on Eminent Domain, § 47; West Va. Trans. Co. *v.* Volcanic C. Co., 5 W. Va. 382; Johnston *v.* Gas Co., 5 Cent. Rep. 564; Carothers' Appeal, 118 Pa. 468.

[2] Randolph on Eminent Domain, § 47; Hibernia R. R. Co. *v.* De Camp, 77 N. J. 518; New Cent. C. Co. *v.* George's Creek C. Co., 37 Md. 537; Phillips *v.* Watson, 63 Iowa, 28; Brown *v.* Corey, 43 Pa. St. 495.

[3] Contra Costa R. R. *v.* Moss, 23 Cal. 323.

[4] Colorado E. Ry. Co. *v.* Union Pac. Ry. Co., 41 Fed. 293.

own mine.[1] Such use is a mere private one, to which the law of eminent domain is inapplicable.[2]

This was the rule announced as to tramways by the supreme court of Colorado, heretofore discussed;[3] also, by the supreme court of Pennsylvania,[4] and the supreme court of West Virginia.[5]

**§ 257. Physical and industrial conditions as affecting the rule of "public utility."**— Mr. Randolph, in his work on eminent domain,[6] says:—

"The magnitude of the interests involved seems to have "been in some cases the determining factor in upholding "the necessity for condemnation.[7]

"This seems to account for the distinction drawn by "Chief Justice Shaw between a single mill and a great mill "power—the latter a public use,[8] and the former not.[9]

"Whatever merit there is in this particular distinction, "there is doubtless some, albeit an indefinable force of prin- "ciple. One might admit the publicity of lateral railroads "and irrigation works in states containing great mineral "deposits and vast tracts of arid land,[10] and deny the neces- "sity of these works in states where mineral wealth and "desert land are so insignificant as to render the public "gain by their development absurdly disproportionate to "the private benefit.

"There is some force in the suggestion that 'what shall "'be considered a public use may depend somewhat on "'the situation and wants of the community for the time "'being.'"[11]

[1] Randolph on Eminent Domain, § 47; Stewart's Appeal, 56 Pa. 413; McCandless's Appeal, 70 Pa. 210; Sholl *v.* German C. Co., 118 Ill. 427.

[2] People *v.* Pittsburg R. R., 53 Cal. 694.

[3] People *ex rel.* Aspen M. Co. *v.* District Court, 11 Colo. 147.

[4] Edgewood R. R.'s Appeal, 79 Pa. St. 257.

[5] Valley City S. Co. *v.* Brown, 7 W. Va. 191.

[6] Randolph on Eminent Domain, § 52.

[7] Great Falls Mfg. Co. *v.* Fernald, 47 N. H. 444.

[8] Hazen *v.* Essex Co., 12 Cush. 475.

[9] Murdock *v.* Stickney, 8 Cush. 113.

[10] See, Oury *v.* Goodwin, 26 Pac. 376. This case very ably presents the question as applied to water-ways for irrigation purposes, in many of its aspects. The opinion is replete with authorities, and presents the law logically.

[11] Scudder *v.* Trenton Del. Falls Co., 1 N. J. Eq. 694.

§ 258. **The rule in Nevada.**—The state of Nevada enacted a law which provided that—

"The production and reduction of ores are of vital "necessity to the people of this state; are pursuits in which "all are interested, and from which all derive a benefit; so "the mining, milling, smelting, or other reduction of ores "are hereby declared to be for the public use, and the "right of eminent domain may be exercised therefor."[1]

We have already noted the provisions of the Nevada constitution on this subject.

An action was brought under this statute to condemn a strip of land to enable the Dayton Mining Company to transport over it the wood, lumber, timbers, and other materials required by it in the conduct of its business of mining. The district court declined to act upon the application on the ground that the statute in question was unconstitutional and void.

A writ of mandate was applied for, to compel the district court to act, upon which application the supreme court of the state admitted that private property could not be taken for private use; that the declaration by the legislature was not conclusive upon the courts, and that the sole question to be determined was whether the use was a public one. Upon this the court, speaking through Chief Justice Hawley, said:—

"The reasons in favor of sustaining the act under con- "sideration are certainly as strong as any that have been "given in support of the mill-dam, or flowage acts, as well "as some of the other objects heretofore mentioned. Min- "ing is the greatest of the industrial pursuits in this state. "All other interests are subservient to it. Our mountains "are almost barren of timber, and our valley lands could "never be made profitable for agricultural purposes, except "for the fact of a home market having been created by the "mining developments in different sections of the state. "The mining and milling interests give employment to "many men, and the benefits derived from this business are "distributed as much, and sometimes more, among the "laboring classes than with the owners of the mines and

[1] Stats. 1875, 111.

"mills. The mines are fixed by the laws of nature, and are "often found in places almost inaccessible. For the purpose "of successfully conducting and carrying on the business "of 'mining, milling, smelting, or other reduction of ores,' "it is necessary to erect hoisting works, to build mills, to "construct smelting furnaces, to secure ample grounds for "dumping waste rock and earth; and a road to and from "the mine is always indispensable. The sites necessary "for these purposes are oftentimes confined to certain "fixed localities. Now, it so happens, or at least is liable "to happen, that individuals, by securing a title to the "barren lands adjacent to the mines, mills, or works, have "it within their power, by unreasonably refusing to part "with their lands for a just and fair compensation, which "capital is always willing to give without litigation, to "greatly embarrass, if not entirely defeat, the business of "mining in such localities. In my opinion, the mineral "wealth of this state ought not to be left undeveloped for "the want of any quantity of land actually necessary to "enable the owner or owners of mines to conduct and carry "on the business of mining. Nature has denied to this "state many of the advantages which other states possess, "but, by way of compensation to her citizens, has placed "at their doors the richest and most extensive silver de-"posits ever yet discovered. The present prosperity of the "state is entirely due to the mining developments already "made, and the entire people of the state are directly "interested in having the future developments unob-"structed by the obstinate action of any individual or "individuals."[1]

A like doctrine was affirmed by the same court in a later case, where a mine-owner sought to condemn the land of another for the purpose of sinking a shaft thereon.[2]

This decision presents the question of "public use," as applied to the class of state legislation under consideration, in the most favorable light for the mining industry. In its diction it is a classic: in its logic it is persuasive, considering the local conditions existing in that state.

§ 259. **The rule in Arizona.**—The supreme court of Arizona, by a parallel line of reasoning, reached the same

[1] Dayton M. Co. *v.* Seawell, 11 Nev. 394.
[2] Overman S. M. Co. *v.* Corcoran, 15 Nev. 147.

conclusions as to the validity of the laws of that territory authorizing the condemnation of land for the purpose of a canal or ditch for irrigating purposes. Said that court:—

"May a state or territory, in view of its natural advantages and resources and necessities, legislate in such a way, exercising the power of eminent domain, that these advantages and resources may receive the fullest development for the general welfare, the laws being general in their operation? This territory is vast in extent, and rich in undeveloped natural resources. Mountains and deserts are not an inviting prospect when viewed by a stranger in transit. But the mountains abound in the precious metals, gold and silver, 'the jewels of sovereignty'; and the deserts may be made to 'bloom and blossom as the rose.' The one great want is water. With this resource of nature made available, the mountains and the deserts may be made to yield fabulous wealth, and Arizona become the home of a vast, prosperous, and happy people. But with water in this territory 'cribbed, cornered, and confined,' it will continue and remain the mysterious land of arid desert plains, and barren hillsides, and bleak mountain peaks. The legislature of the territory, seeing what was apparent to all, adopted at an early day a policy—'a general and important public policy.' That policy was to protect against private ownership and monopoly the one thing indispensable to the growth, development, and prosperity of the territory,—the element that would serve to uncover the gold and silver hidden in the hills and mountains, and transform the desert into a garden. . . . The wisdom of this policy, under the physical conditions existing in the territory, must be apparent to every one."[1]

**§ 260. The rule in Georgia.**—The supreme court of Georgia upheld an act of the state legislature creating a private corporation and empowering it to condemn lands for the purpose of enabling it to work its mines for gold or other valuable minerals, by the hydraulic process, thus stating its reasons:—

"Gold and silver is the constitutional currency of the country, and to facilitate the production of gold from the

[1] Oury *v.* Goodwin, 26 Pac. 376, 382.

"mines in which it is imbedded for the use of the public, "is for the public good, though done through the medium "of a corporation or individual enterprise.

"The increased production of gold from the mines of "Lumpkin county by the means as provided for in the de- "fendant's charter must necessarily be for the public good, "inasmuch as it will increase for the use of the public a "safe, sound constitutional circulating medium, which is "of vital importance to the permanent welfare and pros- "perity of the people of the State of Georgia, as well as of "the people of the United States."[1]

We cannot perceive upon what principle, particularly in states like Georgia, the industry of mining should be considered of "public utility" any more than the cultivation of the soil and the raising of cotton, sugar-cane, cereals, or any other product so essential to the use of mankind. There may be some plausibility for the rule as announced in Nevada, based, as it is, upon the peculiar conditions existing in that state. But certainly the reasons given by the supreme court of Georgia are neither logical nor persuasive.

§ 261. **The rule in Pennsylvania.**— An act of the legislature of Pennsylvania[2] provided for a right of way across or under rivers or other streams of this commonwealth, for the better and more convenient mining of anthracite coal. The supreme court of that state held the act to be unconstitutional and void, as conferring authority to take private property for private use.[3]

In the case of Edgewood R. R. Co.'s appeal,[4] the same court refused to permit a condemnation of land for a railroad which was a mere appurtenant to a mine, thus stating its views:—

"The commonwealth transfers to its citizens her power "of eminent domain only when some existing public need "is to be supplied or some present public advantage is to

[1] Hand G. M. Co. v. Parker, 59 Ga. 419, 424.
[2] Purd. Dig. 1967.
[3] Waddell's Appeal, 84 Pa. St. 90.
[4] 79 Pa. St. 257, 269.

"be gained. She does not confer it with a view to contin-
"gent results, which may or may not be produced, and
"may or may not justify the grant, as a projected specula-
"tion may prove successful or disastrous."

§ 262. **The rule in West Virginia.**— In West Virginia an act was passed providing that any person owning land having timber upon it, or containing coal, ore, or other minerals, who desires to obtain a subterranean or surface right of way by railroad or otherwise, under, through, or over land belonging to another, for the purpose of mining for such minerals, or conveying such timber or minerals to market, or for the purpose of draining any coal or mineral lands under, through, or over lands belonging to another, might institute proceedings for the condemnation of such lands for such purposes.[1]

Under this act, the Valley City Salt Co., owning some thirty acres of coal land, sought to condemn a subterranean right of way through the land of another, for the purpose of extracting and transporting its coal. The supreme court of West Virginia held that the intended use was strictly private in its nature, and that the right of eminent domain could not be exercised for any such purpose.[2]

§ 263. **The rule in California.**— The supreme court of California has, in several instances, had under consideration a statute of that state which provides that the right of eminent domain may be exercised in behalf of certain enumerated *public* uses, including "tunnels, ditches, flumes, "pipes, and dumping-places for working mines; also, out-"lets, natural or otherwise, for the flow, deposit, or conduct "of tailings or refuse matter from the mines."[3]

In the case of Consolidated Channel Co. *v.* C. P. R. R.,[4] the attempt was made by the plaintiff, as the owner of a gold mine, to condemn a right of way for the purpose of

[1] Code W. Va., ch. xliii., §§ 44, 45.
[2] Valley City Salt Co., 7 W. Va. 191.
[3] Code Civ. Proc., § 1238.
[4] 51 Cal. 269.

W

constructing a ditch and flume, to carry off the tailings from the mine.

"It is clear, [said the court,] that the object sought is "the appropriation of the private property of the defendants "to the private use of plaintiff. The proposed flume is to "be constructed solely for the purpose of advantageously "and profitably washing and mining plaintiff's mining "ground. It is not even pretended that any person other "than the plaintiff will derive any benefit whatever from "the structure when completed. No public use can possi-"bly be subserved by it. It is a private enterprise, to be "conducted solely for the personal profit of the plaintiff, "and in which the community at large have no concern. "It is clear that this case does not come within the meaning "of that clause of the constitution which permits the tak-"ing of private property for a public use. . . . It would "be difficult to suppose a case more completely within the "exception stated, and in which the absence of all possible "public interest in the purposes for which the land is "sought to be condemned is more clear and palpable, than "in the case at bar."

In Lorenz *v.* Jacobs,[1] the same court held that the right of eminent domain could not be exercised in favor of the owners of mining claims, to enable them to obtain water for their own use in working such claims, though the intention may also be to supply water to others for mining and irrigating purposes.

In the case of Amador Queen M. Co. *v.* Dewitt,[2] the plaintiff undertook to condemn the right of way through defendant's ground, for the purpose of a tunnel to enable plaintiff to extract ore from its mine and transport it to its mill, defendant's land intervening between plaintiff's mine and its mill. The federal statute was invoked, as in the Colorado case of The People *ex rel.* Aspen M. & S. Co. *v.* District Court (*supra*). But the court held that the language of the Revised Statutes of the United States contained no reservation of such right in favor of plaintiff, and that the mine of defendant was his private property, the use for which it was sought to be condemned was a private use, and the proceeding could not be maintained.

[1] 63 Cal. 73. [2] 73 Cal. 482.

§ 264. **Conclusions.**[1]—While in states and territories surrounded by such physical and industrial conditions as exist in Nevada and Arizona, judicial discretion may, with some show of reason, be exercised in favor of the rule that mining in the hands of individuals is a "public use." Yet such a rule elsewhere is against the logic of the law and the weight of authority.

We may appropriately close this discussion by quoting from the opinions of two distinguished courts as to what constitutes a public use:—

"No question has ever been submitted to the courts "upon which there is a greater variety and conflict of "reasoning and results than that presented as to the mean- "ing of the words 'public use,' as found in the different "state constitutions regulating the right of eminent do- "main. The reasoning is in many of the cases as unsatis- "factory as the results have been uncertain. The beaten "path of precedent, to which courts when in doubt seek "refuge, here furnishes no safe guide to lead us through "the long lane of uncertainty to the open highway of pub- "lic justice and of right. The authorities are so diverse "and conflicting that, no matter which road the court may "take, it will be sustained, and opposed, by about an equal "number of the decided cases. In this dilemma, the "meaning must, in every case, be determined by the com- "mon sense of each individual judge who has the power "of deciding it."[2]

"What, then, constitutes a public use, as distinguished "from a private use? The most extended research will not "likely result in the discovery of any rule or set of rules "or principles of certain and unusual application by which "this question can be determined in all cases. Eminent "jurists and distinguished writers upon public law do not "express concurrent or uniform views upon this subject. It "is a question, from its very nature, of great practical, per- "haps of insuperable, difficulty, to determine the degree of "necessity or the extent of public use which justifies the

[1] In the state of New York mining is of "public utility," for the reason that the ownership of the precious metals is in the state by virtue of its sovereignty, and the fundamental theory is analogous to the doctrine of the civil law. See, *ante*, §§ 19, 11.

[2] Dayton G. & S. M. Co. v. Seawell, 11 Nev. 394.

"exercise of this extraordinary power upon the part of a "state, by which the citizen, without his will, is deprived "of his property."[1]

[1] Valley City Salt Co. v. Brown, 7 W. Va. 191, 195.

## CHAPTER II.

### LOCAL DISTRICT REGULATIONS.


§ 268. Introductory.
§ 269. Manner of organizing districts.
§ 270. Permissive scope of local regulations.
§ 271. Acquiescence and observance, not mere adoption, the test.
§ 272. Regulations, how proved—Their existence a question of fact for the jury; their construction a question of law for the court.
§ 273. Regulations concerning records of mining claims.
§ 274. Penalty for non-compliance with district rules.
§ 275. Local rules and regulations before the land department.


§ **268. Introductory.**—In the beginning the miners made the laws governing the mining industry, unhampered by congressional or state legislation. In their district assemblages they adopted regulations which covered most of the exigencies of the situation, and frequently much more. They amended, altered, and repealed their rules at will, as changed conditions suggested the necessity, propriety, or convenience. Some of these regulations were wise, and others were otherwise. That these early prospectors were pioneers of extreme western civilization in America, and assisted in laying the foundation of great states, is undoubted. For this they deserve, and have received, full meed of praise. But that they originated a system which is deserving of perpetuation for all time is open to serious question. That there is any reason at the present time for permitting local district regulations of any character, we deny. If congress will not remodel the national mining laws in such a way as to prohibit legislation by local assemblages, the several states and territories should so cover the ground as to render mining districts as law-

making factors not only unnecessary — for that they already are,— but impossible. In a previous chapter,[1] we have traced the origin and noted the general character of district rules and miners' customs during the period when they constituted the American common law of mines. The change in governmental policy wrought by the act of July 26, 1866, and the subsequent legislation crystallizing into the existing system, have circumscribed the limits within which such rules and customs may have controlling force, and they now constitute but a small part in the scheme of mining jurisprudence. When we further consider that in most of the precious-metal-bearing states the legislatures have enacted mining codes of a more or less comprehensive nature, leaving but little to be regulated by district rules, we are forced to recognize the fact that the tendency is towards the absolute elimination of miners' regulations and customs as elements controlling mining rights. Nevertheless, in some states legislation is meager, and the subjects with which district organizations may deal are limited only by the laws of congress. In all of the states and territories, some vestige of power still resides in these local mining communities. Local rules may still be adopted, if they do not contravene congressional or state legislation.[2]

It therefore becomes necessary to deal with them to a limited extent, to consider the field in which they may legitimately be made operative, the manner of their adoption, the manner of proving their existence, and the rules of construction to be applied to them.

§ 269. **Manner of organizing districts.** — With the exception of the state of Wyoming,[3] no attempt has ever been made to prescribe the manner of creating mining districts. They generally come into existence without much formality. Any new discovery attracts prospectors. Usu-

[1] Ch. iii., §§ 40–46.

[2] Erhardt *v.* Boaro, 113 U. S. 527; Jackson *v.* Roby, 109 U. S. 440; Rosenthal *v.* Ives, 12 Pac. 904; Dutch Flat W. Co. *v.* Mooney, 12 Cal. 534; Flaherty *v.* Gwinn, 1 Dak. 509; Wolfley *v.* Lebanon M. Co., 4 Colo. 112.

[3] Laws 1888, 84.

ally the advance guard is limited in number; but however few, they are sufficient to organize full-fledged districts, and equip them with "rules and regulations" on short notice. The geographical limits are defined, a recorder is elected, and the district is ready for business. When the first or any subsequent set of rules requires amendment, modification, or abrogation, the miners convene at some appointed place, usually upon notice posted, and thus the legislative machinery is set in motion. As we shall see later, the courts do not closely scrutinize methods by which these rules are adopted. This was the primitive way, and for a time served a useful purpose, simply because the necessities of the case demanded and justified it.

Judge W. H. Beatty gives some very excellent reasons for the total abolition of the system: —

"In districts, [said that distinguished jurist,] where "the rules are in writing, where they have been some time "in force, and generally recognized and respected, the "law may be tolerably well settled. But there is often a "question whether the rules have been regularly adopted "or generally recognized by the miners of a district. There "may be two rival codes, each claiming authority and each "supported by numerous adherents; evidence may be offered "of the repeal or alteration of rules, and this may be rebut- "ted by evidence that the meeting which undertook to effect "the repeal was irregularly convened or was secretly con- "ducted in some out-of-the-way corner, or was controlled "by unqualified persons; customs of universal acceptance "may be proved which are at variance with the written "rules; the boundaries of districts may conflict, and within "the lines of conflict it may be impossible to determine "which of two codes of rules is in force; there may be an "attempt to create a new district within the limits of an "old one; a district may be deserted for a time, and its "records lost or destroyed; and then a new set of locators "may reorganize it and relocate the claims. This does not "exhaust the list of instances within my own knowledge "in which it has been a question of fact for a jury to de- "termine what the law was in a particular district. Other "instances might be cited, but I think enough has been "said to prove that local regulations, being of no use, ought "to be abolished."[1]

[1] Report of Public Land Commission, 338.

§ 270. **Permissive scope of local regulations.**—As to the subjects concerning which district organizations may prescribe rules, or which in any way may be controlled by local customs in the absence of state legislation, Judge W. H. Beatty, then chief justice of the supreme court of Nevada, now chief justice of the supreme court of California, in his testimony given before the public land commission,[1] gave it as his opinion that under the existing laws of congress the miners *may*, in the absence of state legislation,—

*First*—Restrict themselves to smaller claims than the the maximum allowed by acts of congress;

*Second*—Require claims to be more thoroughly marked than would be absolutely necessary to satisfy the terms of the law;

*Third*—Require more work than the law requires;

*Fourth*—Provide for the election of a recorder and the recording of claims.

This is in consonance with section twenty-three hundred and twenty-four of the Revised Statutes.

As to the first three points, said the judge, it may be safely assumed that no such regulations will be adopted in any district hereafter organized. As to the fourth, under existing legislation, local rules are worse than useless. The monuments on the ground do well and completely what the notice and record do only imperfectly and in part.

But the fact remains that miners *may* make rules, that they *do* organize districts, perhaps as a matter of precedent and habit, and with vague notions as to the legitimate scope within which they may act. Much of the adjudicated law upon this subject is now obsolete, and a critical review of the decisions applicable to the primitive conditions is neither necessary nor justifiable. A few illustrations as to what local districts might *not* do may not be out of place.

[1] Report of Public Land Commission, 397.

It was always exacted that a local rule should be reasonable.[1] A local mining custom or regulation adopted after the location of a claim could not be given in evidence to limit the extent of a claim previously located.[2] But where changes were made in local rules with reference to amount of work to be done to perpetuate rights, or providing methods by which such work was condoned, prior locators were called upon to comply with the new regulations as a condition to the continuance of their rights.[3]

Rights held and sanctioned by general laws could not be divested by mere local rules and neighborhood customs.[4] Nor could rules and customs authorize acts amounting to a public nuisance.[5]

Prior to 1860, in California and Nevada, a written instrument was not required to transfer a mining claim. During that period evidence of local customs permitting such transfer by parol, accompanied by delivery of possession, was admissible.[6] But since that date conveyances in writing are necessary throughout the mining regions.[7]

Perfected mining locations are now considered as property in the highest sense of the term, and the rules applicable to other real estate govern their transfer. Neither such transfer nor its recordation is now subject to regulation by local customs.

Where a state or territory has passed laws on any given

[1] King v. Edwards, 1 Mont. 235; Flaherty v. Gwinn, 1 Dak. 509.

[2] Table Mountain T. Co. v. Stranahan, 31 Cal. 387; Roach v. Gray, 16 Cal. 383.

[3] Strang v. Ryan, 46 Cal. 33.

[4] Waring v. Crow, 11 Cal. 367, 372; Dutch Flat W. Co. v. Mooney, 12 Cal. 234.

[5] Woodruff v. North Bloomfield M. Co., 9 Saw. 441.

[6] Jackson v. Feather River W. Co., 14 Cal. 19; Table Mountain T. Co. v. Stranahan, 20 Cal. 199; Gatewood v. McLaughlin, 23 Cal. 178; Patterson v. Keystone M. Co., *Id.* 575, 30 Cal. 360; Antoine Co. v. Ridge Co., 23 Cal. 219, 222; Hardenbergh v. Bacon, 33 Cal. 356, 381; Goller v. Fett, 30 Cal. 421; Folger v. Coward, 35 Cal. 652; Gore v. McBrayer, 18 Cal. 582; King v. Randlett, 33 Cal. 318; Kinney v. Con. Virginia M. Co., 4 Saw. 382, 452; Union S. M. Co. v. Taylor, 100 U. S. 37; Lockhardt v. Rollins, 2 Idaho, 503.

[7] Garthe v. Hart, 73 Cal. 541; Moore v. Hamerstag, 109 Cal. 122; Hopkins v. Noyes, 4 Mont. 550.

subject within the privilege granted by the federal laws, to that extent, at least, the districts are powerless. Where a state or territory, by its general law, has only partially exercised its privilege of supplemental legislation, district regulations may, in turn, supplement such legislation within the field not covered by state or territorial laws, if within the sanction of the federal laws.

**§ 271. Acquiescence and observance, not mere adoption, the test.**—As heretofore observed, it is not necessary that any rules or regulations should be adopted. Compliance with the federal law and state legislation, if any, is sufficient.[1] But when adopted, and acquiesced in, if not in conflict with federal or state legislation, they have the force of positive law,[2] and substantial compliance with them is essential to a perfect mining title.[3]

As a rule, courts will not inquire into the regularity of the modes by which miners adopt their local rules, unless fraud or some other like cause be shown. It is enough that they agree upon their laws, and that they are recognized as the rules.[4]

Local regulations do not acquire operative force by mere adoption, but from customary obedience and acquiescence of the miners following the enactment;[5] and they become void whenever they fall into disuse or are generally disregarded.[6]

A custom to be binding ought to be so well known, understood, and recognized in the district that locators should have no reasonable ground for doubt as to what is required.[7]

[1] Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312.

[2] Mallett v. Uncle Sam M. Co., 1 Nev. 203; Gropper v. King, 4 Mont. 367; Rush v. French, 1 Ariz. 99; Gird v. California Oil Co., 60 Fed. 531, 535; McCormick v. Varnes, 2 Utah, 355.

[3] Gleeson v. Martin White M. Co., 13 Nev. 443; Becker v. Pugh, 18 Colo. 243; King v. Edwards, 1 Mont. 235; Sullivan v. Hense, 2 Colo. 424; Donahue v. Meister, 88 Cal. 121.

[4] Gore v. McBrayer, 18 Cal. 583, 589.

[5] North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 307; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 95, 106; Harvey v. Ryan, 42 Cal. 626.

[6] North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 307; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 95, 106.

[7] Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 106, 111.

**§ 272. Regulations, how proved—Their existence a question of fact for the jury; their construction a question of law for the court.**—Judicial notice cannot be taken of the rules, usages, and customs of a mining district, and they should be proved at the trial, like any other fact, by the best evidence that can be obtained respecting them.[1] The record books of the district into which written rules are transcribed are, of course, the best evidence as to such rules, and if lost or destroyed, secondary evidence is admissible.[2] But this record will not prove itself. It must be produced by the proper officer, and its authenticity as such established.[3]

Where copies of district rules are sought to be introduced in evidence, it is necessary that it should appear that they come from the proper repository, and that such custodian was empowered to give certified copies, and that such were copies of the laws prevailing and in force in the district.[4]

All of the written rules making up the body of the local law constitute one entire instrument; and it is necessary to a fair understanding of any one part that the whole should be inspected.[5]

Parol evidence of a mining custom cannot be given when there are written rules or regulations of the mining district in force on the same subject.[6] But if the proof renders it doubtful as to whether or not the written rules are in force, both the written laws and parol evidence of the mining customs may be offered in evidence.[7]

The existence of a custom relating to a subject not covered by the written laws, such as posting a notice on a claim, as an act indicating appropriation, may, of course, be shown.[8]

[1] Sullivan *v.* Hense, 2 Colo. 424.
[2] *Id.* 425; Campbell *v.* Rankin, 99 U. S. 261.
[3] Roberts *v.* Wilson, 1 Utah, 292.
[4] Harvey *v.* Ryan, 42 Cal. 626; Roberts *v.* Wilson, 1 Utah, 292.
[5] English *v.* Johnson, 17 Cal. 108, 119; Roberts *v.* Wilson, 1 Utah, 292.
[6] Ralston *v.* Plowman, 1 Idaho, 595.
[7] Colman *v.* Clements, 23 Cal. 245.
[8] Harvey *v.* Ryan, 42 Cal. 626.

Rules and regulations once proven to have been adopted and acquiesced in, a presumption arises that they continue in force until something appears showing that they have been repealed or have fallen into disuse, and another practice has been generally adopted and acquiesced in.[1]

The mere violation of a rule by a few persons only would not abrogate it, if still generally observed. The disregard and disuse must become so extensive as to show that in practice it has become generally disused.[2] Such fact may be proved by a series of circumstances and conditions in the district.[3]

The existence of mining customs may be proved, however recent the date or short the duration of their establishment. The common law doctrine as to customs in such cases does not govern.[4]

Whether a given rule or custom is in force at any given time, is a question of fact to be determined by the jury.[5] But the court must construe the rule;[6] and it shall be so construed as to harmonize with the entire body of the mining law,[7] including all other rules in force in the district.[8]

There is no distinction between the effect of a "custom," or usage, the proof of which must rest in parol, and a "regulation," which may be adopted at a miners' meeting, and embodied in a written local law.[9]

[1] North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 308; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 107; Riborado v. Quang Pang Co., 2 Idaho, 131.

[2] North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 308.

[3] Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 112; Flaherty v. Gwinn, 1 Dak. 509.

[4] Smith v. North American M. Co., 1 Nev. 357, 359.

[5] North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 307; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 112; King v. Edwards, 1 Mont. 235; Poujade v. Ryan, 21 Nev. 449; Golden Fleece v. Cable Cons. M. Co., 12 Nev. 312; Sullivan v. Hense, 2 Colo. 424; Harvey v. Ryan, 42 Cal. 626.

[6] Fairbanks v. Woodhouse, 6 Cal. 434; Ralston v. Plowman, 1 Idaho, 595.

[7] Leet v. John Dare M. Co., 6 Nev. 218.

[8] English v. Johnson, 17 Cal. 108, 119; Roberts v. Wilson, 1 Utah, 292.

[9] Harvey v. Ryan, 42 Cal. 626, 628; North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 307; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 106; Doe v. Waterloo M. Co., 70 Fed. 455, 459; Flaherty v. Gwinn, 1 Dak. 509.

Some of the courts have held that a discoverer has a reasonable time to perfect his location after discovery, in the absence of a state statute or local rule fixing the time.[1] In such cases, it is said, the court may consider evidence of a general custom upon this subject prevalent in different sections of the mining regions as to what constitutes a reasonable time, following the principle announced in early days as to what was a reasonable extent of ground embraced in a mining location, in the absence of any local rule fixing it.[2]

**§ 273. Regulations concerning records of mining claims.**—The mining laws of congress do not require any notice or certificate of location to be recorded. In the absence of some state or territorial law, or local rule or custom, providing for such record, it is unnecessary,[3] and proof of recording, without some regulation or custom requiring it, is irrelevant and inadmissible.[4]

If a notice is required, by either state law or local rules, to be recorded, it must contain all the requisites prescribed by section twenty-three hundred and twenty-four of the Revised Statutes.[5]

The popular understanding of the requirements of the mining law is, that notices of location should be recorded somewhere. This has led to an almost universal custom in

[1] Doe *v.* Waterloo M. Co., 70 Fed. 455; Gleeson *v.* Martin White M. Co., 13 Nev. 443; Golden Fleece M. Co. *v.* Cable Cons. M. Co., 12 Nev. 312, 329.

[2] Table Mountain T. Co. *v.* Stranahan, 20 Cal. 199.

[3] Haws *v.* Victoria Copper Co., 160 U. S. 303; North Noonday M. Co. *v.* Orient M. Co., 6 Saw. 299, 311; Jupiter M. Co. *v.* Bodie Cons. M. Co., 7 Saw. 96, 111, 114; Southern Cross M. Co. *v.* Europa M. Co., 15 Nev. 383; Anthony *v.* Jillson, 83 Cal. 296; Gregory *v.* Pershbaker, 73 Cal. 109; Thompson *v.* Spray, 72 Cal. 528; Souter *v.* Maguire, 78 Cal. 543; Freezer *v.* Sweeney, 8 Mont. 508; Carter *v.* Bacigalupi, 83 Cal. 187; Fuller *v.* Harris, 29 Fed. 814; Allen *v.* Dunlap, 33 Pac. 675; Gird *v.* California Oil Co., 60 Fed. 531; Moore *v.* Hamerstag, 109 Cal. 122. *Contra:* Secretary Hoke Smith, Rose Lode Claims, 22 L. D. 83.

[4] Golden Fleece M. Co. *v.* Cable Cons. M. Co., 12 Nev. 312.

[5] Hammer *v.* Garfield M. & M. Co., 130 U. S. 291; Gleason *v.* Martin White M. Co., 13 Nev. 443; North Noonday M. Co. *v.* Orient M. Co., 6 Saw. 299, 312; Jupiter M. Co. *v.* Bodie Cons. M. Co., 7 Saw. 96, 112; Poujade *v.* Ryan, 21 Nev. 449.

states where there are at present no laws or regulations on the subject of recording all such notices in the county recorder's office of the several counties. The county recorder's books, showing records of such claims in any considerable number, are competent evidence, as tending to establish such custom and its general observance.[1] But such custom, to be binding, ought to be so well known, understood, and recognized in the district that locators should have no reasonable ground for doubt as to what was required as to the place of record.[2] When such a custom has been generally followed and acquiesced in, it gives the record validity, and entitles it, or certified copies of it, to be introduced in evidence; but a failure to record would not work a forfeiture of the claim, or make it subject to relocation.[3]

Where such custom has become recognized and generally observed, the records of the county recorder, besides tending to establish a regulation sanctioning the recording of mining claims, also furnish evidence of a persuasive character, tending to show in many instances that local written regulations at one time formally adopted, and never formally repealed, have fallen into disuse. Instances of this character are found in several of the mining counties of California, and undoubtedly elsewhere. Prior to the passage of the act of May 10, 1872, written regulations adopted at a miners' meeting limited the width of lode claims to one hundred feet on each side of the lode, and provided for recording with a district recorder. After the passage of this act, it seems that, almost uniformly, location notices were recorded with the county recorder; and from such records it appeared that the new locations invariably claimed the statutory limit of three hundred feet on each side of the center of the vein. There can be no doubt that these records should be considered as competent evidence tending to establish the fact that the local rules had become obsolete, and were no longer of controlling force.

[1] Pralus v. Pacific G. & S. M. Co., 35 Cal. 30.

[2] Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 111.

[3] See *post*, § 274.

**§ 274. Penalty for non-compliance with district rules.** — While it has been frequently said that a forfeiture may be worked for failure to comply with local rules,[1] the supreme court of California at an early date announced the doctrine that —

"The failure to comply with any one of the mining "rules and regulations of the camp is not a forfeiture of "title. It would be enough to hold the forfeiture as a "result of the non-compliance with such of them as make "a non-compliance a cause of forfeiture."[2]

This doctrine was acquiesced in, in a later case, decided by the same court,[3] and reaffirmed at a still later date by the same tribunal, in the following terms: —

"The objection taken to this instruction is that it di- "rects the jury to find for the defendants, if they find "from the evidence that the plaintiff had failed to comply "with certain regulations, without accompanying the same "with a further charge as to whether these rules and regu- "lations declared a forfeiture as the result of such non-com- "pliance. The failure of a party to comply with a mining "rule or regulation can not work a forfeiture, unless the "rule itself so provides. There may be rules and regula- "tions which do not provide that a failure to comply with "their provisions shall work a forfeiture. If so, a failure "will not work a forfeiture; hence, in charging the jury upon "a question of forfeiture, the charge should be narrowed "to such rules as expressly provide that a non-compliance "with their provisions shall be cause of forfeiture."[4]

These decisions of the California court were accepted by the supreme court of Arizona,[5] and by the late Judge Sawyer, circuit judge of the ninth circuit.[6]

The supreme court of Montana, however, while conceding that the decisions in California generally deserve great

[1] Mallett *v.* Uncle Sam M. Co., 1 Nev. 203; Oreamuno *v.* Uncle Sam M. Co., 1 Nev. 179; St. John *v.* Kidd, 26 Cal. 264; Depuy *v.* Williams, 26 Cal. 310.

[2] McGarrity *v.* Byington, 12 Cal. 427.

[3] English *v.* Johnson, 17 Cal. 108, 117.

[4] Bell *v.* Bed Rock T. & M. Co., 36 Cal. 214.

[5] Johnson *v.* McLaughlin, 4 Pac. 130, 132; Rush *v.* French, 1 Ariz. 99.

[6] Jupiter M. Co. *v.* Bodie Cons. M. Co., 7 Saw. 95, 117. See, also, Flaherty *v.* Gwinn, 1 Dak. 509, 511.

weight upon the subject of mining, expresses the opinion that upon this particular point they are far from satisfactory, and declines to follow them.[1]

The existing mining laws, however, relieve to a large extent the embarrassments which might flow from a conflict of opinion on this subject, particularly with reference to the performance of annual labor and the result of noncompliance with the terms of the law. As to other matters within the scope of local regulation which may be considered of minor importance, we think the California rule, as was said by the supreme court of Arizona, "is a safe and conservative rule of decision, tending to the permanency and security of mining titles."[2]

Forfeitures have always been deemed in law odious, and the courts have universally insisted upon their being clearly established before enforcing them.[3]

We shall have occasion to again consider this subject in another portion of this treatise, in connection with the perpetuation of estates acquired by location.

**§ 275. Local rules and regulations before the land department.**— In proceedings to obtain patents under the mining laws, it devolves upon the land department, in the absence of adverse claims, and suits brought to determine them, to decide what rules and regulations are in force in a given district, and its decision upon the subject is final.[4]

As a rule, the land department has followed closely the doctrines announced by the courts in the mining regions, in applying and construing local customs and regulations. In suits upon adverse claims, where most of the questions arise, the local courts determine the facts and apply the law, and their judgment is a guide to the land department

[1] King v. Edwards, 1 Mont. 235, 241.

[2] Johnson v. McLaughlin, 4 Pac. 130, 133.

[3] Hammer v. Garfield M. & M. Co., 130 U. S. 291; Mt. Diablo M. & M. Co. v. Callison, 5 Saw. 439; Belcher Cons. M. Co. v. Deferari, 62 Cal. 160; Quigley v. Gillett, 101 Cal. 462; Johnson v. Young, 18 Colo. 625; Book v. Justice M. Co., 58 Fed. 106.

[4] Parley's Park M. Co. v. Kerr., 130 U. S. 256, 262.

in the issuance of patents. We do not encounter in the decisions of this department much that is instructive at the present time, as applied to existing conditions.

# TITLE V.

## OF THE ACQUISITION OF TITLE TO PUBLIC MINERAL LANDS BY LOCATION, AND PRIVILEGES INCIDENT THERETO.


CHAPTER

I. INTRODUCTORY — DEFINITIONS.

II. LODE CLAIMS OR DEPOSITS "IN PLACE."

III. PLACERS AND OTHER FORMS OF DEPOSIT NOT "IN PLACE."

IV. TUNNEL CLAIMS.

V. COAL LANDS

VI. SALINES.

VII. MILLSITES.

VIII. EASEMENTS.

# CHAPTER I.

## INTRODUCTORY — DEFINITIONS.


ARTICLE I. INTRODUCTORY.
II. "LODE," "VEIN," "LEDGE."
III. "ROCK IN PLACE."
IV. "TOP," OR "APEX."
V. "STRIKE,"—"DIP," OR "DOWNWARD COURSE."


## ARTICLE I. INTRODUCTORY.


§ 280. Introductory.
§ 281. Division of the subject.
§ 282. Difficulties of accurate definition.


§ 280. **Introductory.** — In the preceding chapters of this treatise we have endeavored to determine what lands are subject to appropriation under the mining laws, to outline the general nature of the legal system which sanctions such appropriation, and to designate the persons who may or may not under this system acquire, hold, and enjoy rights upon the mineral lands of the public domain. We are now to consider the manner in which such rights may be acquired, and the acts necessary to be done and performed as a condition precedent to such acquisition.

§ 281. **Division of the subject.** — Some of the requirements of the law are general in their nature, and apply with equal force to all classes of mineral deposits. Others, by reason of the nature of the thing to be appropriated, or on account of a difference in governmental policy respecting it, are essentially of special application to individual groups. The embarrassments surrounding the

arrangement of the subject for the purpose of philosophical, or even methodical, treatment are not to be underestimated. The body of the mining law is complex and incongruous, illogically arranged, and inharmoniously blended. Perhaps the mere form in which the subject is presented is of minor importance, and may be left to the discretion of the author without furnishing justification for serious criticism. At the same time, some orderly method should be adopted by which the practitioner or student may find the state of the law from the author's standpoint, on any given branch, without reading the work from preface to appendix. A comprehensive index may lessen the evil flowing from a want of systematic arrangement, but this cannot wholly supply the necessity for grouping individual classes, and treating them separately, when their nature will permit. We think the object will be fairly accomplished by the division and distribution of the subject into the following heads:—

(1) Lode claims, or the appropriation of deposits "in "place";

(2) The appropriation of claims usually called "placers," and other forms of deposit not "in place";

(3) Tunnel claims;

(4) Coal lands;

(5) Salines;

(6) Millsites;

(7) Easements.

§ 282. **Difficulties of accurate definition.**— Before entering upon the formal discussion of the mode of acquiring mining rights upon the public domain, there are certain words and phrases of such frequent occurrence in the mining laws that some attempt at defining them is advisable. In analyzing these various laws and their judicial interpretation by the courts, we encounter numerous terms, but few, if any, of which are susceptible of exact definition. By

"exact definition" we mean one that contains every attribute which belongs to the thing defined, and excludes all others. While definitions are more or less essential, to avoid repetition and the necessity for frequent descriptive explanation of the sense in which such words and phrases are used and of the ideas they are intended to convey, it is not to be expected that absolute exactitude will be obtained. The circumstances surrounding the employment of the terms and the conditions to which they are to be applied are so variable that differentiation will be frequently found necessary. As Judge Hawley, one of the most experienced and distinguished judges in the mining states, said, that while there was no conflict in the decisions, yet the result is that some definitions have been given in some of the states that are not deemed applicable to the conditions and surroundings of mining districts in other states, or other districts in the same state.[1]

The old maxim, that definitions are always dangerous, because it is always difficult to prevent their being inaccurate, or their becoming so, finds ample justification when the attempt is made to define the words and phrases of a more or less technical character in the mining statutes. As Judge Field observed in the Eureka case,[2] it is difficult to give any definition of some of the terms as used and understood in the acts of congress which will not be subject to criticism. Many of these terms, said Judge Phillips, are not susceptible of arbitrary definition; nor are they capable of being defined by one set phrase so unvarying as to apply to every case, regardless of the differing conditions of locality and mineral deposit.[3] Even if such a result could be reached, "important questions of "law are not to be determined by a slavish adherence "to the letter of arbitrary definition."[4]

It is our purpose to present such definitions of the terms found in the mining statutes as have been formulated by

[1] Book *v.* Justice M. Co., 58 Fed. 106.
[2] Eureka Cons. M. Co. *v.* Richmond M. Co., 4 Saw. 302, 311.
[3] Cheesman *v.* Shreve, 40 Fed. 792.
[4] Duggan *v.* Davey, 4 Dak. 110, 140.

lexicographers and writers upon geological subjects, together with those approved by the various tribunals charged with the administration and judicial construction of these laws. It is possible that with this aggregation no individual case may arise which will suffer for lack of a suitable definition.

## ARTICLE II. "LODE," "VEIN," "LEDGE."

§ 286. English and Scotch definitions.
§ 287. As defined by the lexicographers.
§ 288. As defined by the geologists.
§ 289. Elements to be considered in the judicial application of definitions.
§ 290. The terms "lode," "vein," "ledge" legal equivalents.
§ 291. Classification of cases, in which the terms "lode," and "vein" are to be construed.
§ 292. Judicial definitions, and their application — The Eureka case.
§ 293. The Leadville cases.
§ 294. Other definitions given by state and federal courts.

**§ 286. English and Scotch definitions.** — We are indebted to Mr. Archibald Brown for the following:—

"A mineral lode, or vein, is a flattened mass of metallic "or earthy matter, differing materially in its nature from "the rocks or strata in which it occurs. Its breadth varies "from a few inches to several feet, and it extends in length "to a considerable distance, but often with great irregu- "larity of course. It is often perpendicular, or nearly so, "in its position, and descends in most cases to an unknown "depth. Sometimes the sides are parallel, and sometimes "they recede from each other so as to form large accumu- "lations, or, as they are called, bellies, of mineral matter; "and occasionally they approach each other so as almost, "if not wholly, to cause the vein to disappear. Veins "also traverse each other, and smaller ones ramify or "spring out from the larger."[1]

And to Mr. Ross Stewart for the following:—

"'Vein,' 'seam,' 'lode,' which appear to signify the "the same thing, viz: a layer or stratum of material of a "different nature from the stratification in which it occurs,

[1] Bainbridge on Mines, 4th ed. 7.

"are equivalent to the term 'mine,' when by it is under-
"stood an unopened mine."[1]

We do not find the term discussed in Collyer, Arundel, or Rogers. MacSwinney contents himself with definitions given by the lexicographers, without venturing to formulate one of his own.

**§ 287. As defined by the lexicographers.—**

*Century Dictionary:*—

"LODE. A metalliferous deposit, having more or less of
"a veinlike character; that is, having a certain degree of
"regularity, and being confined within walls. *Lode*, as used
"by miners, is nearly synonymous with the term *vein*, as
"employed by geologists. The word would not be used for
"a flat or stratified mass."

"VEIN. An occurrence of ore, usually disseminated
"through a gangue, or veinstone, and having a more or less
"regular development in length, width, and depth. A vein
"and a lode are, in common usage, essentially the same
"thing, the former being rather the scientific, the latter the
"miners', name for it."

"LEDGE. In mining, *ledge* is a common name in the Cor-
"dilleran region for the lode, or for any outcrop supposed to
"be that of a mineral deposit or vein. It is frequently
"used to designate a quartz vein."

*Webster's Dictionary:*—

"LODE. A metallic vein; any regular vein or course,
"whether metallic or not."

"LEDGE. A lode; a limited mass of rock, bearing valu-
"able mineral."

"VEIN. A narrow mass of rock intersecting other rocks,
"and filling inclined or vertical fissures not corresponding
"with the stratification; a lode; a dike;—often limited, in
"the language of miners, to a mineral vein or lode; that is,
"to a vein which contains useful minerals or ores.

"A fissure, cleft, or cavity, as in the earth or other sub-
"stance."

*Standard Dictionary:*—

"LODE. A somewhat continuous unstratified metal-
"bearing vein."

[1] Stewart on Mines, 3.

"VEIN. The filling of a fissure or fault in a rock, par-
"ticularly if deposited by aqueous solutions. When
"metalliferous, it is called by miners a *lode*. . . . A bed
"or shoot of ore parallel with the bedding."

"LEDGE. A metal-bearing rock-stratum; a quartz vein."

*Richardson's Dictionary:*—

"VEINS. Lineal streaks in mineral."

*Encyclopedia Britannica:*—

"VEINS. Fissures or cracks in the rocks which are
"filled with materials of quite a different nature from the
"rocks in which the fissures occur."

**§ 288. As defined by the geologists.**—

*Dana:*—

"VEINS are the fillings of fissures, or of open spaces
"made in any way, exclusive of those called *dikes*, which
"are due to intrusions of melted rock.[1] Where ores occur
"along a vein, it is, in miners' language, a *lode*."[2]

*Geike:*—

"Into the fissures opened in the earth's crust there
"have been introduced various simple minerals and ores,
"which, solidifying there, have taken the form of mineral
"veins.

"A true mineral vein consists of one or more minerals
"filling up a fissure, which may be vertical, but is usually
"more or less inclined, and may vary in width from less
"than an inch up to one hundred and fifty feet or more."[3]

*Le Conte:*—

"All rocks, but especially metamorphic rocks, in moun-
"tain regions are seamed and scarred in every direction, as
"if broken and again mended, as if wounded and again
"healed. All such seams and scars are often called by the
"general name of *veins*. True veins are accumulations,
"mostly in fissures, of certain mineral matters, usually in
"a purer and more sparry form than they exist in the
"rocks."[4]

[1] Dana's Manual of Geology, 4th ed. (1895), 327.
[2] *Id.* 331.
[3] Geike's Geology (1886), 275.
[4] Le Conte's Elements of Geology (1895), 234.

*Van Cotta:*—

As quoted in the Eureka case, Van Cotta defines a *lode* as a fissure in the earth's crust filled with mineral matter; an aggregation of mineral matter containing ore in a fissure.

**§ 289. Elements to be considered in the judicial application of definitions — Rules of interpretation.**— Dr. Raymond, one of the expert witnesses whose evidence is quoted and referred to in the Eureka case, thus states his views:—

"The miners made the definition first. As used by "miners, before being defined by any authority, the term "'lode' simply meant that formation by which the miner "could be led or guided. It is an alteration of the verb "'lead,' and whatever the miner could follow, expecting to "find ore, was his lode. Some formation within which he "could find ore, and out of which he could not expect to "find ore, was his lode."[1]

At the time the act of July 26, 1866, was passed, the first congressional enactment wherein the words "lode" and "vein" were used, the center of activity in the mining industry was found in the auriferous quartz belt of California, and the Comstock lode, in Nevada. Up to that time there is but little doubt that the experience of the western miner in lode mining was, with rare exceptions, confined to a class of deposits that would readily fall within the scientific definition of a "lode"; that is, "a fissure in the earth's crust "filled with mineral matter; an aggregation of mineral "matter containing ore in a fissure."

Dr. Raymond is of the opinion that the term was used by the miner in a more enlarged sense, because "cinnabar" was included in the category of minerals specified in the statute, and "cinnabar" occurs not in fissure veins, butas "impregnations and masses of ore distributed through "zones of rock."[2]

[1] Eureka case, 4 Saw. 302, 311.

[2] Monograph in Eureka-Richmond Case, Trans. Am. Inst. Min. Eng., vol. vi., 382. See, also, Dr. Raymond's testimony, quoted by the court in the Eureka case, 4 Saw. 302, 311.

When it is considered that up to the year 1866 the quicksilver product of the Pacific slope (and it does not occur elsewhere in the United States), was confined to three mines, two of which were then claimed under Mexican grants—the New Almaden, in Santa Clara county, California, and the New Idria (Panoche Grande), in Fresno county, California,—and that active search for cinnabar deposits was not inaugurated until 1874,[1] popular knowledge on the subject of the mode of occurrence was not particularly extended. It is more than likely that "cinnabar" was, in popular estimation, found in fissures, the same as gold and silver, and that the association of cinnabar with gold and silver in the act arose out of ignorance of the true character of its occurrence, rather than a deliberate attempt to classify it in the category of lodes, with a full knowledge as to the form in which it was found.[2] Be that as it may, the miner first applied the terms "lode" and "vein," and they had with him a definite meaning. Whether it accorded with scientific theories and abstractions is, at this late day at least, of no serious moment.

Speaking of the essential differences between the miner and the scientist on the subject of definitions, Dr. Foster, in his contribution to the "Quarterly Journal of the Geological "Society," on the Great Flat lode in Cornwall, quoted by Dr. Raymond in his monograph on the Eureka-Richmond case,[3] presents some suggestions on the subject of the definition of these terms which are worthy of repetition here:—

"The terms 'lode,' or 'mineral vein,' commonly regarded "as synonymous, are usually taken to mean the mineral "contents of a fissure. I have endeavored to show that

[1] Becker's Geology of the Quicksilver Deposits of the Pacific Slope, pp. 10, 11.

[2] The ignorance of many of the early miners of California on geological subjects is thus quaintly suggested by Mr. J. Ross Browne (Mineral Resources of the West, 1867):

"Many believed that there must be some volcanic source from which "the gold had been thrown up and scattered over the hills; and they "thought that if they could only find that place, that they would have "nothing to do but to shovel up the precious metal and load their mules "with it."

[3] Trans. Am. Inst. Min. Eng., vol. vi., p. 371, 381.

"the Great Flat lode is in the main a band of altered rock. "Much of the veinstone extracted from some of the largest "Cornish mines, such as Dolcoath, Cook's Kitchen, Tincroft, "Carn Brea, and Phœnix, for instance, closely resembles the "contents of the Great Flat lode, and was probably formed "in a similar manner; indeed, I question very much whether "at least half the tin ore of the country is not obtained "from tabular masses of stanniferous altered granite. If, "then, many of the important lodes of such classic ground "as Cornwall do not satisfy the common definition, one of "two things ought to be done: either the miner should "give up the term 'lode' for these repositories, or else the "meaning attached to the word by geologists should be "extended. I need hardly say that the first alternative is "not likely to be adopted; nor do I think it is one to be "recommended — for I believe that one and the same fissure "traversing killas and granite may produce two kinds of "lodes. . . . I should propose, therefore, that the term "'lode,' or 'mineral vein,' should include not only the con- "tents of fissures, but also such tabular masses of metallif- "erous rock, as those I have been describing. . . . If, "however, this course should be thought on the whole unde- "sirable, the geologist and miner must agree to differ in "their language, and some of the *lodes* of the latter will "have to be designated as tabular stockworks by men of "science."

We do not conceive that from a judicial standpoint it is a matter of vital importance that the miner and the scientist should harmonize their differences on the subject of mere definition. The danger lies in accepting the definitions of either, and attempting to apply them to conditions not within the reasonable contemplation of the law, or in attempting to deprive a locator of the benefit of his discovery, if the thing discovered can not be forced into the mold of arbitrary definition, either popular or scientific.

If in the construction of the terms used in the mining laws there is one evil to be avoided as great as the servile adherence to arbitrary definition, it is the blind application of a rule announced in one case, where local conditions may justify it, to other cases, where a similar application of the rule, by reason of modified or totally different conditions, would produce absurd results.

As was said by Judge Hawley, sitting as circuit judge in the case of Book *v.* Justice M. Co.,—

"Various courts have at different times given a definition of what constitutes a vein, or lode, within the meaning of the act of congress; but the definitions that have been given, as a general rule, apply to the peculiar character and formation of the ore deposits, or vein matter, and of the country rock, in the particular district where the claims are located."[1]

And in a later case:—

"The mining laws of the United States were drafted for the purpose of protecting the *bona fide* locators of mining ground and at the same time to make necessary provision as to rights of agriculturists and claimants of townsite lands. The object of each section and of the whole policy of the entire statute should not be overlooked. The particular character of each case necessarily determines the rights of the respective parties, and must be kept constantly in view, in order to enable the court to arrive at a correct conclusion. What is said in one character of cases may or may not be applicable in the other. Whatever variance, if any, may be found in the views expressed in the different decisions touching these questions arises from the difference in the facts and a difference in the character of the cases and the advanced knowledge which experience in the trial of the different kinds of cases brings to the court. . . . The definition of a lode must always have special reference to the formation and peculiar characteristics of the particular district."[2]

As was said by Judge Field, speaking of the act of July 23, 1866,—

The mining acts "were not drawn by geologists or for geologists. They were not framed in the interest of science, and consequently with scientific accuracy in the use of terms. They were framed for the protection of miners in the claims which they had located and developed, and should receive such a construction as will carry out this purpose."[3]

[1] 58 Fed. 106, 121.
[2] Migeon *v.* Montana Cent. Ry., 77 Fed. 249, 254.
[3] Eureka Case, 4 Saw. 302, 311.

§ 290. **The terms "lode," "vein," "ledge," legal equivalents.**— The act of July 26, 1866, used the term "vein, or "lode." The act of May 10, 1872, added the word "ledge," and all these terms occur in the Revised Statutes.

Of the three terms, the word "lode" is the more comprehensive. A lode may, and often does, contain more than one vein.[1] Instances have been known of a broad zone, generally recognized as a lode, itself having well-defined boundaries, but being traversed by mineralized fissure veins, each possessing such individuality as to be the subject of location.[2] A lode may or may not be a fissure vein, but a fissure vein is, in contemplation of law, a lode.

"Ledge" is more of a local term, at one time in common use in California and some parts of Nevada. It is mentioned in the act of May 10, 1872, and is incorporated into the Revised Statutes, but it is practically unrecognized in many mining localities.

Generally speaking, the terms are used interchangeably.[3] As observed by Dr. Raymond, "lode" is an alteration of the verb "lead." In many localities the word "lead" is used as synonymous with "lode." "Lead" is also applied in California to certain subterranean auriferous gravel deposits, which, however, can be acquired only under the placer laws,[4] according to the rules established by the land department. The terms "lode" and "vein" are always associated in the existing mining statutes, and are invariably separated by the disjunctive. For all practical purposes, they may be considered as legal equivalents. Unless the authority cited itself makes the distinction heretofore suggested, the definitions hereafter given apply equally to both words.

[1] United States v. Iron S. M. Co., 128 U. S. 673.

[2] Mt. Diablo M. & M. Co. v. Callison, 5 Saw. 439. See, also, Doe v. Waterloo M. Co., 54 Fed. 935.

[3] Iron S. M. Co. v. Cheesman, 8 Fed. 297, 301; Cheesman v. Shreve, 40 Fed. 787, 792; Morr. Min. Rights, 8th ed. 113.

[4] Gregory v. Pershbaker, 73 Cal. 109.

**§ 291. Classification of cases in which the terms "lode" and "vein" are to be construed.**— Judge Hawley, speaking for the circuit court of appeals in the case of Migeon *v.* Montana Cent. Ry.,[1] says:—

"There are four classes of cases where the courts have "been called upon to determine what constitutes a lode or "vein, within the intent and meaning of different sections "of the Revised Statutes:—

"(1) Between miners who have located claims on the "same lode, under the provisions of section twenty-three "hundred and twenty;

"(2) Between placer and lode claimants, under the pro- "visions of section twenty-three hundred and thirty-three;

"(3) Between mineral claimants and parties holding "townsite patents to the same ground;

"(4) Between mineral and agricultural claimants to "the same land."

To these we may add another:—

(5) Controversies between a lode miner, who has penetrated into and underneath lands adjoining in the development of what he has located under the law applicable to lode claims, and the adjoining or neighboring surface proprietor, whose claim to the underlying mineral deposits rests solely upon presumptions flowing from surface ownership.

In interpreting these terms the nature of the controversy is an undoubted element to be considered. In some classes of cases a more liberal rule is followed than would be justified in others. It is useless in our judgment to search for a judicial definition which would be absolutely applicable under every conceivable state of facts and in all classes of controversies.

**§ 292. Judicial definitions and their application — The Eureka case.**— It may be safely asserted that as to the terms "lode" and "vein," when applied to geological conditions existing in most mining localities, there is no essential difference between their definition as given by

[1] 77 Fed. 249, 254.

the scientist and that applied by the practical miner. But it is when we encounter certain classes of deposits, and meet with new and unique conditions, the existence of which was neither known nor contemplated when the "miners made the definitions," nor when congress enacted the mining laws, that the courts have been forced to admit that "what constitutes a lode, or vein, of mineral matter "has been no easy thing to define."[1]

The first reported case in which a judicial definition of any of these terms was attempted is the case of the Eureka M. Co. *v.* Richmond M. Co.,[2] one of the most famous of the mining cases ever considered by the courts. It was tried before three of the most eminent mining judges — Field, Sawyer, and Hillyer,— who had the benefit of the testimony of some of the most distinguished scientists of the period.

It was a case involving rights accruing under the act of 1866, and the following is the definition formulated:—

"We are of the opinion that the term (lode) as used in "the acts of congress is applicable to any zone or belt of "mineralized rock lying within boundaries clearly separa- "ting it from the neighboring rock. It includes . . . all "deposits of mineral matter found through a mineralized "zone, or belt, coming from the same source, impressed "with the same forms, and appearing to have been created "by the same processes."

The zone to which this definition was applied was of dolomitic limestone, a sedimentary deposit, broken, crushed, and fissured, resting on a foot-wall of quartzite, and having a hanging-wall of clay shale. The width of the zone varied from a few inches to four hundred and fifty feet. Its mean width was about two hundred and fifty feet. The hanging-wall had a dip of eighty to eighty-five degrees, while the foot-wall had an average inclination of forty-five degrees. Throughout this body of limestone, vugs, chambers, and large caverns were encountered, in the bottoms of which ore, — lead carbonates, carrying gold and silver,— was invari-

[1] Iron S. M. Co. *v.* Cheesman, 116 U. S. 529.

[2] 4 Saw. 302; Judge Field, in Iron S. M. Co. *v.* Mike & Starr G. & S. M. Co., 143 U. S. 394.

ably found. Overlying the hanging-wall was another zone of limestone, which differed from that lying on the quartzite, being plainly stratified, and contained neither ores nor caverns.

No one connected with the case contended that is was a fissure.[1]

While we are not concerned with the genesis of these ore deposits, it is a matter of common knowledge that the inclosing rock (limestone) being soluble, the caves, vugs, and chambers resulted from the chemical action of percolating waters creating space for the subsequent deposit of the ores.

Professor Le Conte, in his "Elements of Geology,"[2] gives a cross-section, exhibiting a homely illustration of the result of the erosive action of the water in rocks of this character, and cites the Mammoth Cave, in Kentucky, Wier's Cave, in Virginia, and Nicojack Cave, in Tennessee, as examples. Our apology for introducing these elements into the discussion is found in the admonition of the courts, referred to in a preceding section, that in applying a definition we must look to the facts, circumstances, and conditions of structural geology which justified its creation, before we can intelligently determine whether it should be applied to other cases.

We do not complain that the law was incorrectly applied in the Eureka case. But there is hardly a mining case of any considerable importance in which one side or the other does not attempt to apply the zone theory announced in this case to conditions wholly different from those encountered on Ruby Hill.

The Eureka case stands as a forensic classic; but its force as a precedent ought to be limited to cases where the conditions are parallel, or at least analogous.

The passage of the act of May 10, 1872, introduced new terms, and created new complications, which must be considered when dealing with the present state of the law.

[1] See monographs of W. S. Keyes and R. W. Raymond, Trans. Am. Inst. Min. Eng., vol. vi., pp. 344, 393.

[2] 3d ed. 76.

§ 293. **The Leadville cases.**[1]— We shall have occasion to analyze the group of cases arising out of the unique geological conditions existing at and in the vicinity of Leadville, Colorado, when we discuss the subject of "apex" in the succeeding article, presenting a cross-section which gives a fair illustration of the mode in which these so-called "veins" occur. As we shall there fully explain our understanding of these local conditions to which definitions have been applied, we confine ourselves presently to quotations from these various cases, most all of which refer to and apply to the Eureka case:—

In general, it may be said that a lode, or vein, "is a "body of mineral, or mineral-bearing rock, within defined "boundaries in the general mass of the mountain."[2]

"In this definition the elements are the body of mineral "or mineral-bearing rock and the boundaries. With either "of these things established, very slight evidence may "be accepted as to the existence of the other. A body "of mineral or mineral-bearing rock in the general mass "of the mountain, so far as it may continue unbroken and "without interruption, may be regarded as a lode, whatever "the boundaries may be. In the existence of such body, "and, to the extent of it, boundaries are implied. On the "other hand, with well-defined boundaries, very slight "evidence of ore within such boundaries will prove the "existence of a lode."[3]

"Such boundaries constitute a fissure; and if in such "fissure ore is found, although at considerable intervals, "and in small quantities, it is called a lode, or vein. . . .

"A continuous body of mineral or mineral-bearing "rock extending through loose, disjointed rocks, is a lode as "fully and certainly as that which is found in more regu-"lar formation."[4]

[1] For a full presentation and discussion of these cases, see Dr. Raymond's Law of the Apex.

[2] Judge Hallett, in Iron S. M. Co. *v.* Cheesman, 8 Fed. 299, 301, quoted by Justice Muller in Stevens & Leiter *v.* Williams, 1 McCrary, 480, 488.

[3] Quoted in Cheesman *v.* Shreve, 40 Fed. 787, 795.

[4] Judge Hallett, as quoted and approved in Iron S. M. Co. *v.* Cheesman, 116 U. S. 529; United States *v.* Iron S. M. Co., 128 U. S. 673. See, also, Hyman *v.* Wheeler, 29 Fed. 347, 353; Illinois S. M. Co. *v.* Raff, 34 Pac. (N. Mex.), 544.

"The thinness or thickness of the matter in particular "places does not affect its being a vein or lode. Nor does "the fact that it is occasionally found in the general course "of the vein or shoot, in pockets deeper down in the earth, "or higher up, affect its character as a vein, lode, or ledge."[1]

"By veins, or lodes, are meant lines or aggregations of "metal embedded in quartz or other rock in place. The "terms are found together in the statutes, and both are "intended to indicate the presence of metal in rock. Yet "a lode may, and often does, contain more than one vein."[2]

"With ore in mass and position in the body of the "mountain, no other fact is required to prove the existence "of a lode or the dimensions of the ore. As far as it pre- "vails, the ore is a lode; and it is not at all necessary to "decide any question of fissures, contacts, selvages, slicken- "sides, or other marks of distinction, in order to establish "its character."[3]

"It has sometimes been contended that the lode must "have a certain position in the earth: that is to say, it "must be more or less vertical, before this rule which is "given in the act of congress can be applied: but we have "heretofore held, and we are still of the opinion, that it "applies to all lodes which have an inclination below the "plane of the horizon, whatever it may be."[4]

In Stevens & Leiter *v.* Williams[5] is found the following by Judge Hallett:—

"As to the word 'vein,' or 'lode,' it seems to me that "these words may embrace any description of deposit "which is so situated in the general mass of the country, "whether it is described in any one way or another: that "is to say, whether, in the language of the geologist, we "say it is a bed, or a segregated vein, or gash vein, or true "fissure vein, or merely a deposit. . . . Whenever a "miner finds a valuable mineral deposit in the body of the "earth (in place) he calls that a lode, whatever its form "may be, and however it may be situated, and whatever "its extent in the body of the earth."

[1] Justice Miller, in Stevens & Leiter *v.* Williams (second trial), 1 Morr. Min. Rep. 573.

[2] United States *v.* Iron S. M. Co., 128 U. S. 673.

[3] Hyman *v.* Wheeler, 29 Fed. 347, 353; Cheesman *v.* Shreve, 40 Fed. 795.

[4] Leadville M. Co. *v.* Fitzgerald, 4 Morr. Min. Rep. 380.

[5] 23 Fed. Cases, No. 13, 414.

The same judge, in another case, held that an impregnation to the extent to which it may be traced as a body of ore is as fully within the broad terms of the act of congress as any other form of deposit.[1]

While the supreme court of the United States, in the cases of Iron S. M. Co. *v.* Cheesman,[2] United States *v.* Iron S. M. Co.,[3] and Reynolds *v.* Iron S. M. Co.,[4] had accepted the definition of a lode, or vein, announced by Judge Hallett, thus determining that the blanket deposits of Leadville were in law embraced within the definition of the terms "lode" and "vein," their position was vigorously assailed in the later case of Iron S. M. Co. *v.* Mike & Starr G. & S. M. Co.[5] This case was twice argued, a re-argument having been ordered, and the attention of counsel directed to the question, among others, as to what constituted a vein or lode within the meaning of sections twenty-two hundred and twenty and twenty-three hundred and thirty-three of the Revised Statutes. The action was brought by the plaintiff in error as the owner of the William Moyer placer to eject the defendant. The defense was "known lode" existing at the time of the application for the placer patent, called the Goodell lode. The verdict was for the lode claimant. Plaintiff appealed. The judgment was affirmed by the supreme court of the United States, in an opinion from which we quote:—

"There was an earnest inquiry . . . as to whether in "view of the disclosures made in this, as in prior cases, of "the existence of a body of mineral underlying a large area "of country in the Leadville mining district, whose general "horizontal direction, together with the sedimentary char- "acter of the superior rock, indicated something more of "the nature of a deposit, like a coal-bed, than of the verti- "cal and descending fissure vein in which silver and gold "are ordinarily found, it did not become necessary to hold "that the only provisions of the statute under which title "to any portion of this body of mineral or the ground in "which it is situated can be acquired are those with respect "to placer claims. . . .

[1] Hyman *v.* Wheeler, 29 Fed. 347, 353. [2] 128 U. S. 673. [3] 143 U. S. 394.
[4] 116 U. S. 529. [5] 116 U. S. 687.

"Our conclusions are that the title to portions of this "horizontal vein or deposit — "blanket vein," as it is gener- "ally called — may be acquired under the sections concern- "ing veins, lodes, etc. The fact that so many patents have "been obtained under these sections, and that so may appli- "cations for patent are still pending, is a strong reason "against a new and contrary ruling. That which has "been accepted as law, and acted upon by that mining "community for such a length of time, should not be "adjudged wholly a mistake and put entirely aside be- "cause of difficulties in the application of some minor "provisions to the peculiarities of this vein or deposit."

Judges Field, Harlan, and Brown dissented, but not as to the legal conclusions. They were of the opinion that the evidence was insufficient to establish the existence of a "known lode."

The embarrassing results flowing from this decision will be demonstrated when we discuss the question of apex and extralateral rights.

**§ 294. Other definitions given by state and federal courts.**—The supreme court of Montana has given the following definition:—

"In construing this language, regard must be had to "what in truth a lode, or lead, is, and when so tested the "problem seems easy of solution and free from doubt. A "lead, or lode, is not an imaginary line without dimen- "sions; it is not a thing without shape or form. But "before it can legally and rightfully be denominated a "lead, or lode, it must have length, and width, and depth; "it must be capable of measurement; it must occupy "defined space, and be capable of identification. Before "a quartz claim can be legally located, a lead, or lode, "containing gold or silver must be discovered; and before "such discovery can be called a discovery, at least one "well-defined wall,[1] or side, to the lode must be found. "What, then, is a quartz lode? It is a fissure, or seam, in "the country rock, filled with quartz matter, bearing gold "or silver. This fissure may be wide or narrow; it varies "in width from one inch, or even less, to one hundred feet,

[1] At the time this case was decided, a law existed in Montana making it a prerequisite to a valid location that the workings should disclose at least one wall.

"or much more. The sides of a lead are represented and "defined by the walls of the country rock, and these walls "must be discovered, and the lead identified thereby, be- "fore it can be located and held as a lead."[1]

Judge Hawley, sitting as circuit judge in the ninth circuit, after reviewing most of the adjudicated law upon the subject, thus expressed his views:—

"This statute was intended to be liberal and broad "enough to apply to any kind of a lode, or vein of quartz "or other rock bearing mineral, in whatever kind, charac- "ter, or formation the mineral might be found. It should "be so construed as to protect locators of mining claims "who have discovered rock in place, bearing any of the "precious metals named therein, sufficient to justify the "locators in expending their time and money in prospect- "ing and developing the ground located.[2] It must be borne "in mind that the veins and lodes are not always of the "same character. In some mining districts the veins, "lodes, and ore deposits are so well and clearly defined as "to avoid any questions being raised. In other localities "the mineral is found in seams, narrow crevices, cracks, or "fissures in the earth, the precise extent and character of "which can not be fully ascertained until expensive ex- "plorations are made, and the continuity of the ore and "existence of the rock in place, bearing mineral, is estab- "tablished. It never was intended that the locator of a "mining claim must determine all these facts before he "would be entitled, under the law, to make a valid loca- "tion. Every vein, or lode, is liable to have barren spots "and narrow places, as well as rich chimneys and pay "chutes, or large deposits of valuable ore. When the loca- "tor finds rock in place containing mineral, he has made a "discovery within the meaning of the statute, whether the "rock or earth is rich or poor, whether it assays high or "low. It is the finding of the mineral in the rock in "place, as distinguished from float rock, that constitutes "the discovery, and warrants the prospector in making a "location of a mining claim."[3] . . .

And in a later case, speaking for the circuit court of appeals,—

[1] Foote v. National M. Co., 2 Mont. 403.

[2] Quoted in Wyoming Cons. M. Co. v. Champion M. Co., 63 Fed. 540, 544.

[3] Book v. Justice M. Co., 58 Fed. 106, 120, commented on and reaffirmed in Cons. Wyoming M. Co. v. Champion M. Co., 63 Fed. 540, 544.

"When a locator of a mining claim finds rock in place "containing mineral in sufficient quantity to justify him "in expending his time and money in prospecting and "developing the claim, he has made a discovery within "the meaning of the statute, whether the rock or earth is "rich or poor, whether it assays high or low."[1]

In Hyman *v.* Wheeler,[2] Judge Hallett, after referring to the decisions in some of the Leadville cases, adds the following:—

"An impregnation to the extent to which it may be "traced as a body of ore is as fully within the broad terms "of the act of congress as any other form of deposit."

Some of the courts accept the liberal interpretation suggested by Dr. Raymond in the Eureka case—that a "lode is whatever a miner could follow and find ore."[3]

Others lean to the scientific definition—that it is a seam or fissure in the earth's crust, filled with quartz or other rock in place, carrying gold, silver, etc.[4]

In a case arising in Nevada, at Treasure Hill, where the formation is limestone, and the conditions were parallel to those existing in the Eureka case, the supreme court of that state held that the term "lode" might be applied to ore deposits in a succession of chambers connected by a seam, varying in width, and more or less barren, and with walls of different character.[5]

All cases seem to agree that neither the size[6] nor the richness of the ore[7] is an element of the definition.[8]

[1] Migeon *v.* Mont. Cent. Ry., 77 Fed. 249, 255.

[2] 29 Fed. 347, 353.

[3] Harrington *v.* Chambers, 1 Pac. 362, 375; Burke *v.* McDonald, 2 Idaho, 310; Shreve *v.* Copper Bell M. Co., 11 Mont. 309; Brownfield *v.* Bier, 15 Mont. 403.

[4] North Noonday M. Co. *v.* Orient M. Co., 6 Saw. 299, 309; Jupiter M. Co. *v.* Bodie Cons. M. Co., 7 Saw. 96, 107; Foote *v.* National M. Co., 2 Mont. 402; Stinchfield *v.* Gillis, 96 Cal. 33.

[5] Phillpotts *v.* Blasdel, 8 Nev. 62.

[6] Stinchfield *v.* Gillis, 96 Cal. 33; Stevens *v.* Leiter & Williams, 1 Morr. Min. Rep. 506; Jupiter M. Co. *v.* Bodie Cons. M. Co., 7 Saw. 96, 107; North Noonday M. Co. *v.* Orient M. Co., 6 Saw. 299, 309.

[7] Stinchfield *v.* Gillis, 96 Cal. 33; Book *v.* Justice M. Co., 58 Fed. 106; Migeon *v.* Mont. Cent. Ry., 77 Fed. 249.

[8] Golden Terra M. Co. *v.* Mahler, 4 Morr. Min. Rep. 390; Armstrong *v.*

As to whether a given deposit is a vein, or lode, is a question of fact.[1]

## ARTICLE III. "ROCK IN PLACE."

§ 298. Classification of lands containing valuable deposits.
§ 299. Use of term "in place" in the mining laws.
§ 300. The blanket deposits of Leadville.
§ 301. Judicial interpretation of the term "rock in place."

**§ 298. Classification of lands containing valuable deposits.**—The laws of the United States prescribing the terms upon which its lands containing valuable deposits, other than coal and salines, shall be sold, used, or occupied, have divided such lands into two distinct classes:—

(1) Those which contain veins, or lodes of quartz or of other rock in place;[2]

(2) Those containing placers and other forms of deposit other than those found "in place."[3]

To determine the proper manner of appropriating public lands containing such valuable deposits, it is necessary to first ascertain whether they are found in veins, or lodes of rock in place, or not. If of rock in place, a method is to be pursued differing from that applicable to other deposits, and the nature and extent of rights conferred by the appropriation of one class differ in some respects from those conferred by the other. It becomes necessary to arrive at an understanding of what is meant by "rock in "place."

Lower, 6 Colo. 333; Jupiter M. Co. *v.* Bodie Cons. M. Co., 7 Saw. 96, 108; North Noonday M. Co. *v.* Orient M. Co., 6 Saw. 299, 309.

[1] Bluebird M. Co. *v.* Largey, 49 Fed. 289; Bullion B. & C. M. Co. *v.* Eureka Hill M. Co., 5 Utah, 3; Illinois S. M. Co. *v.* Raff, 34 Pac. (New Mex.), 544.

[2] Rev. Stats., § 2320.

[3] *Id.*, § 2329. Justice Miller, in Stevens & Leiter *v.* Williams, 1 Morr. Min. Rep. 566, 572; Gen. Circ. Inst. July 15, 1870, Copp's Min. Dec. 316, 318.

**§ 299. Use of term "in place" in the mining laws.**—A vein, or lode, is necessarily "in place." The condition of being "in place" is one of its essential attributes. The term "quartz, or other rock in place," as used in section twenty-three hundred and twenty of the Revised Statutes, refers to its constituent elements, or the "filling" of veins and lodes. Experience has shown that mineral substances in veins, or lodes, are not always found in quartz. Sometimes the vein material is composed of the same character of rock as the inclosing walls—the nature of the occurrence of mineral being in the form of impregnations, penetrating the country rock, or the mineral may be but a replacement of the original rocks. So the statute recognizing that while the material of most veins consists of quartz, yet, as this is not universally true, the alternative, "or other rock in place," was introduced. As quartz in a vein is rock in place, the statute would have been equally as comprehensive if instead of saying "veins, or lodes of "quartz or other rock in place," it had simply said, "veins, "or lodes of rock in place."

The term "rock in place," occurs in all of the mining legislation of congress. There is nothing cabalistic in its use. It is simply the *in situ* of the geologist, and as explained by the commissioner of the general land office in the mining circulars issued by him, the term has always received the most liberal construction of which the language would admit. Every class of claims that either according to scientific accuracy or popular usage can be classed and applied for as a vein or lode may be patented under the law, as a vein or lode of rock in place.[1]

In this class the commissioner included all lands wherein the mineral matter is contained in veins or ledges occupying the original *habitat*, or location, of the metal or mineral, whether in true or false veins, in zones, in pockets, or in the several other forms in which minerals are found in the *original rock*.[2]

[1] Commissioner Drummond July 20, 1871, Copp's Min. Dec. 46.
[2] Copp's Min. Dec. 316, 319; 1 Copp's L. O. 11.

Petroleum is said to be "in place" when it occupies the undisturbed position in the earth between the inclosing rocks, where it was placed by natural processes; and so with subterranean salt water.[1]

Ordinarily, there should be but little difficulty in determining whether a given deposit is a vein or lode of rock in place or not. But circumstances have arisen which have provoked discussion as to what is meant by the term "in "place," and it has frequently occupied the attention of the courts.

§ 300. **The blanket deposits of Leadville.**— The blanket deposits at and in the vicinity of Leadville, Colorado, have given rise to most of the controverted questions on the subject of "lodes," "veins," "in place," "top," and "apex"; and the burden of solving many of these difficulties in the first instance fell to the lot of Judge Hallett. His decisions have furnished the text for other courts, in other jurisdictions, where analagous conditions have been to a limited extent encountered.

The conditions which created the necessity for a rule of interpretation to be applied to the term "in place" is thus stated by the distinguished judge:—

"Until the discovery of mineral deposits near Leadville "no controversy had arisen in Colorado as to whether a "lode, or vein, is in place within the meaning of the act of "congress.

"The mines opened in Clear Creek, Gilpin, Boulder, and "other counties, descend into the earth so directly that no "question could arise whether they were inclosed in the "general mass of the country; whatever the character of the "vein, and whatever its width, it was sure to be within the "general mass of the mountain; but the Leadville deposits "were found to be of a different character. In some of "them at least, the ore was found on the surface or covered "only by the superficial mass of slide, debris, detritus, or "movable stuff which is distinguishable from the general "mass of the mountain, while others were found beneath "an overlying mass of fixed and immovable rock which

[1] Williamson v. Jones, 39 W. Va. 231, 257.

"could be called a wall as well as that which was found "below them. It then became necessary to consider very "carefully the meaning of the words 'in place' in the act "of congress, in order to determine whether these deposits "were of the character described in that act."[1]

As the character of these deposits are frequently involved in the discussion of numerous phases of the mining law, we think it advisable to give a short account of the nature of their occurrence. Much has been written upon them, and the scientists are by no means harmonious as to the theory of their origin. On the question of structural geology, however, there is but little room for controversy. The records of geological history exposed in the mine workings are read by all alike; and there is a general consensus of opinion as to what is there found. Professor Emmons thus states the result of his investigations:—

"By far the most important of the ores of Leadville "and vicinity, both in quantity and quality, occur in the "blue-gray dolomitic limestone, known as blue or ore-"bearing limestone, and at or near its contact with the "overlying sheet of white porphyry. They thus constitute "a sort of contact sheet whose upper surface, being formed "by the base of the porphyry sheet, is comparatively regu-"lar and well defined, while the lower surface is ill-defined "and irregular, there being a gradual transition from ore "into unaltered limestone, the former extending to vary-"ing depths from the surface, and even occupying at times "the entire thickness of the blue limestone. This may be "regarded as the typical form of the Leadville deposits; "there are, however, variations from it, and also in the "character of the inclosing rock, which do not necessarily "involve any difference in origin or mode of formation. "As variations in form, the ore sometimes occurs in irregu-"larly shaped bodies, or in transverse sheets, not always "directly connected with the upper or contact surface of "the ore-bearing bed or rock. It also occurs at or near "the contact of sheets of gray or other porphyries with "the blue limestone, and less frequently in sedimentary "beds, both calcareous and silicious and in porphyry "bodies, sometimes on or near contact surfaces, sometimes "along joint or fault planes. . . . "

[1] Leadville M. Co. *v.* Fitzgerald, 4 Morr. Min. Rep. 381.

"The material of which they were composed was not a "deposit in a pre-existing cavity in the rock, but the "solutions, which carried them, gradually dissolved out "the original rock material and left the ore or vein mate-"rial in its place. . . .

"The mineral solutions or ore currents concentrated "along natural water channels, and followed by preference "the bedding planes at a certain geological horizon; but "they also penetrated the adjoining rocks through cross-"joints and cleavage planes."[1]

A glance at the geological atlas accompanying this monograph shows that in many portions of this mineral belt these deposits lie in a position approaching the horizontal, sometimes forming a basin, at others alternating in anticlinal and synclinal folds, shown in an emphasized form in figure 14.[2]

In places erosion has carried off the overlying porphyry, leaving the vein material lying between the bedding of limestone and superficial deposit of slide and detritus. The continuity of the vein material is frequently interrupted by faults and intrusive dikes as well as by a broken or "jumbled-up" condition of the country rock. This is substantially the character of deposits with which the courts are confronted in the application of the mining laws.

**§ 301. Judicial interpretation of the term "rock in "place."**— In some of Judge Hallett's decisions he speaks of the *lode* being "in place." Notably, in the case of Stevens & Leiter *v.* Williams,[3] where that distinguished jurist uses the following language: —

"As to the meaning of these words "in place," they "seem to indicate the body of the country which has not "been affected by the action of the elements; which may "remain in its original state and condition as distinguished "from the superficial mass which may lie above it. . . . "And when the act speaks of veins or lodes *in place*, it "means such as lie in fixed position in the general mass

[1] Geology and Mining Industry of Leadville, 375, 378.

[2] See, *post*, § 312.

[3] 1 Morr. Min. Rep. 558, 559, 560.

"of country rock or in the general mass of the mountain. "... Now, whenever we find a vein, or lode, in this "general mass of country rock we may be permitted to say "that it is *in place*, as distinguished from the superficial "deposit; and that is true, whatever the character of the "deposit may be — that is to say, as to whether it belongs to "one class of veins or another; it is *in place* if it is held in "the embrace, is inclosed by the general mass — of the "country."

. . . . . .

"It is not material as to the character of the vein matter "whether it is loose and disintegrated or whether it is "solid material. In these lodes the earth that is found in "them, the earthy matter which may be washed or treated "with water or steam, is often the most valuable part.

"It was never understood here or elsewhere, so far as "I know, that such earthy matter was not embraced in "the location because it was of that character. It is the "surrounding mass of country rock: it is that which "incloses the lode, rather than the material of which it is "composed, which gives it its character. So that, even if "it be true, as counsel have stated in the course of their "arguments, that this is mere sand, is a loose and friable "material, which can not be called rock, in the strict defi- "nition of the word — if that be true, it does not affect the "character of the lode. If it were all of that character, it "would still be a vein or lode *in place* if the wall on each "side, the part which holds the lode, is fixed and immov- "able."

And in Stevens *v.* Gill,[1] he says: —

"The act of congress speaks of veins or lodes *in place*, "by which, according to our interpretation, it is required "that the vein, or lode, shall be in the general mass of the "mountain. It may not be on the surface or covered only "by movable parts, called slide or *debris*. But if it is in "the general mass of the mountain, although the inclos- "ing rocks may have sustained fracture and dislocation in "the general movement of the country, it is in place."[2]

[1] 1 Morr. Min. Rep. 576, 580.

[2] See, also, Leadville M. Co. *v.* Fitzgerald, 4 Morr. Min. Rep. 281; Stevens & Leiter *v.* Murphey, 4 Morr. Min. Rep. 380.

The judge does not give the exact language of the statute, which is "veins, or lodes, *of* quartz or other rock in place."

Dr. Raymond, in his "Law of the Apex," calls attention to the misquotation. But it seems to us that, taken in connection with Judge Hallett's other rulings, his intent is manifest.[1]

In the second trial of the Stevens & Leiter case, Justice Miller charged the jury as follows:—

"By 'rock in place' I do not mean merely hard rock, "merely quartz rock, but any combination of rock, broken "up, mixed with mineral and other things, is rock in place, "within the meaning of the statute.

"I give that instruction [that the mineral must be of "quartz or other rock], but with the distinct understand- "ing that all this substance between the porphyry and "limestone that has been explained to you which contains "mineral — I mean which contains ore — is *rock in place*."[2]

And in Iron S. M. Co. *v.* Cheesman, Judge Hallett says:—

"Excluding the wash, slide, or *débris*, on the surface of "the mountain, all things in the mass of the mountain "are *in place*."

This was quoted and approved by the supreme court of the United States.[3]

The decisions of Judge Hallett and Justice Miller were quoted with approval in a case decided by the supreme court of Nevada, the facts of which and conclusions drawn from them are thus stated in the opinion of the court:—

"A certain formation which the defendant claimed to "be the ledge had been traced on its inclination outside "the plaintiff's boundaries, and a large amount of work "there done upon it. If this was the ledge, as the defend- "ant claimed, it tended to show that its apex was outside "those boundaries. According to the witnesses, it consisted "of broken limestone, boulders, low-grade ore, gravel, and "sand, which appeared to have been subjected to the action "of water. This was found at a depth of several hundred

[1] See, also, Judge Hallett's definitions of "vein," and "lode," *ante*, § 293.

[2] Stevens & Leiter *v.* Williams, 1 Morr. Min. Rep. 566, 569, 571.

[3] Iron S. M. Co. *v.* Cheesman, 116 U. S. 529, 537. See, also, Jones *v.* Prospect Mt. T. Co., 21 Nev. 339.

"feet, and where there seems to have been no question that "it was within the original and unbroken mass of the "mountain. So far as was shown, the rock on either side "was fixed, solid, and immovable. Mineral matter so "situated, no matter where it was originally formed or "deposited, is in place within the meaning of the law. "The manner in which mineral was deposited in the "places where it is found is at best but little more than a "matter of mere speculation, and to attempt to draw a "distinction based upon the mode, or manner, or time of "its deposit would be utterly impracticable and useless. "The question was long ago settled by the courts."[1]

A mere superficial deposit, although originally in place, the overlying rock having been eroded and replaced by *débris* or wash, is not in place.[2]

Auriferous cement gravel beds found in the channels of ancient rivers, lying upon bed-rock and covered with thick deposits of other gravel, the whole frequently capped with a lava of great thickness, would seem to be "in place" within the definitions heretofore given. But the land department,[3] as well as the courts,[4] treats them as deposits of rock not "in place," and requires them to be located under the laws applicable to placers.

## ARTICLE IV. "TOP," OR "APEX."

§ 305. The "top," or "apex," of a vein, as a controlling factor in lode locations.

§ 306. The term "top," or "apex," not found in the miner's vocabulary. Definitions of the lexicographers.

§ 307. Definitions given in response to circulars issued by the public land commission.

§ 308. Definition of Dr. Raymond.

§ 309. The ideal lode and its apex.

§ 310. Illustrations of a departure from the ideal lode — The case of Duggan *v.* Davey.

§ 311. The Leadville cases.

§ 312. Hypothetical illustrations based upon the mode of occurrence of the Leadville and similar deposits.

§ 313. The existence and *situs* of the "top," or "apex," a question of fact.

[1] Jones *v.* Prospect Mt. T. Co., 21 Nev. 339, 351.
[2] Tabor *v.* Dexter, 9 Morr. Min. Rep. 614.
[3] Copp's Min. Dec. 78.
[4] Gregory *v.* Pershbaker, 73 Cal. 109.

**§ 305. The "top," or "apex," of a vein as a controlling factor in lode locations.**— The importance of a correct definition of the terms "top," or "apex," or at least a proper application of their definitions to the varying geological conditions encountered in the administration of the mining laws, cannot be overestimated. The top, or apex, of the vein which is the subject of appropriation, is the prime factor in determining the extent of the rights acquired by a lode location. This is apparent when we consider the following requirements of the law:—

(1) No lode location is valid unless it includes, to some extent at least, within vertical planes drawn through the surface boundaries, the top, or apex, of a discovered vein;

(2) The right to pursue the vein on its strike ceases at the point where the apex of the vein passes beyond the surface boundaries or vertical planes drawn through them;

(3) The right to pursue the vein on its downward course out of and beyond vertical planes drawn through the side line, into and underneath the lands adjoining, when this right exists to any degree, can only be exercised to the extent that the top, or apex, of the located vein is found within the surface boundaries of the location, or within vertical planes drawn through them.

It is not our purpose to here discuss these elements. They will be fully considered under appropriate heads in other portions of this treatise. We enumerate them simply to demonstrate the necessity of an accurate understanding of what is meant by the terms "top," or "apex," and the care with which principles announced in one case are to be applied to another.

In the light of the rules announced in the previous articles, if a given mineral deposit is in place, it is a lode. If it is a lode in contemplation of law, it has a top, or apex. While it is not easy in all cases to determine where the apex, or top, is, yet it must exist, otherwise it cannot properly be located as a lode. It cannot be located under the placer laws, because these laws apply only to deposits

*not* in place, and before it can be legally located as a lode, the apex, or top, must be found. If a location is made on the side or on the dip, whoever discovers and properly locates the apex, will be entitled to enjoy the full rights accorded to regular valid lode locations, and the rights of those who have located on the side edge, or dip, must yield.

Most of the difficulties arising from the application of the definition of "top," or "apex," to individual instances are accounted for by the fact that the courts of last resort hold certain classes of blanket, or flat, deposits to be "lodes," thus creating the necessity of determining what is a top, or apex, as applied to such judicially constructed lodes. If it is a lode, it must have an apex; for without it no lode location can be properly made. If it is a lode, or vein, of quartz or other rock in place, it cannot be appropriated under the laws applicable to placers or mere superficial deposits. It is true that after a lode patent is issued, the existence of an apex within the patented ground will be conclusively presumed.[1] Yet it will not be presumed that any particular exposure of the vein is that apex. It must still remain a question of proof.

**§ 306. The terms "top," or "apex," not found in the miner's vocabulary—Definitions of the lexicographers.**—Prior to the passage of the act of July 26, 1866, the terms "vein" and "lode" formed a part of the miners' vocabulary. They were incorporated into local rules, and their signification was fairly understood throughout the mining regions. The first congressional law on the subject of mining on the public domain was but a crystallization of these rules;[2] and it was no more than natural that when the courts came to construe the terms which had thus found their way into legislative enactments, they should be interpreted according to the understanding of those who first made the definitions and applied them. In

[1] Iron S. M. Co. *v.* Campbell, 17 Colo. 267.

[2] Jennison *v.* Kirk, 98 U. S. 453; Broder *v.* Natoma W. Co., 101 U. S. 274; Chambers *v.* Harrington, 111 U. S. 274. See, *ante*, § 56.

addition to this, the terms "vein" and "lode" had a recognized scientific meaning which did not differ from the popular one, except as applied to novel and peculiar conditions.

But neither "top" nor "apex" found a place in the miner's glossary at any period in the history of the mining industry, either in the mining regions of the west or elsewhere; nor had they ever been recognized or applied by scientists for the purpose of designating any part of a vein, lode, or mineral deposit of any kind. Neither miner nor geologist is entitled to the credit for their appearance in the public statutes; nor are they to be held responsible for the perplexities and embarrassments surrounding their proper interpretation. Thus left without custom, precedent, or scientific definition to guide them, the only alternative left to the courts was to apply the ordinary rule of interpretation; that is, that words are to be construed according to the ordinary sense in which they are used and understood.[1] To ascertain what is the ordinary sense in which a word is used, we must appeal to the lexicographers.

We quote the definitions of "apex" found in the standard dictionaries:—

*Standard Dictionary:*—

"(1) The pointed or angular end, or highest point, as of "a pyramid, spire, or mountain; extreme point; tip; top.

"(2) The vertex of a plane or solid angle.

"(3) The highest point of a stratum; as a coal seam."

*Century Dictionary:*—

"(1) The tip, point, or summit of anything. In *geometry*, "the angular point of a cone or conic section. The angu- "lar point of a triangle opposite the base.

"(2) In *geology*, the top of an anticlinal fold of strata. "This term, as used in United States Revised Statutes, has "been the occasion of much litigation. It is supposed to "mean something nearly equivalent to outcrop; but pre- "cisely in what it differs from outcrop has not been, neither "does it seem capable of being, distinctly made out.

[1] Duggan *v.* Davey, 4 Dak. 110, 140.

*Webster's Dictionary:*—

"The tip, point, or summit of anything."

*Soulé's Synonyms:*—

"Top; summit; acme; zenith; pinnacle; highest point; "utmost height."

§ 307. **Definitions given in response to circulars issued by the public land commission.**—Under an act of congress passed March 3, 1879, a public land commission was appointed for the purpose of codifying the then existing laws relating to the survey and disposition of the public domain, and to make such recommendations as it might deem wise in relation to the best methods of disposing of the public lands. This commission consisted of J. A. Williamson, commissioner of the general land office; Clarence King, director of the geological survey; A. T. Britton, Thomas Donaldson, and J. W. Powell. For the purpose of informing themselves generally on conditions existing in the west, the commissioners issued a circular containing a series of questions, to which answers were received. These circulars were sent to mining engineers, surveyors, lawyers, judges, and practical miners. Under the head of "Lode Claims," the fourth question was:—

"*What do you understand to be the top, or apex, of a vein "or lode?*"

We select from the list of answers quoted by Dr. Raymond in his "Law of the Apex":—

"The highest point at which the ore or rock is found "'in place' or between the walls of the vein, and not a "'blow out,' or part of the ledge broken down outside the "walls."

"The croppings, or the exposed surface of the vein, or "lode."

"The highest point at which it approaches or reaches "the natural surface of the ground."

"The highest point of its outcrop in rock in place."

"That point at which the vein enters or emerges from "rock in place."

"The top, or apex, is generally understood to be that "part of the lode that is first discovered. A vertical lode "has its apex at the surface."

"Where the mineral-bearing crevice-matter is first met, "either on the surface, or, as in blind lodes, underground; "but wherever it is met, there begins the apex."

"The croppings, or highest point of the ledge appear- "ing above or discovered beneath the surface."

"The highest point of the center of the ledge."

"The outcrop in the highest geological level, whether "this is accidentally higher or lower than some outcrop "caused by denudation, or slip."

"Where it comes through or to the surface of the rock "in which it is incased, though it may be covered, and "sometimes is, with twenty or thirty feet of loose earth."

"That portion of the lode along its course which out- "crops to the surface, or, if 'blind,' which comes nearest "to the surface."

"Croppings."

"The line such vein would make in its intersection "with the surface, calculated from its true dip at each "point."

"The uppermost part of the ledge between the two walls, "although these may be missing."

"In case the vein outcrops at the surface, I would call "any portion of such outcrop the top, or apex. If the vein "does does not reach the surface, then the highest point "to which the vein, or lode, can be traced is the apex — "not necessarily the nearest point to the surface, but the "absolute highest point."

"The summit, comb, crest, or highest point on the ridge "of a vein, or lode."

"The upper edge; that part which is first reached or "passed, in developing a mine."

"The outcrop, or, in case of a blind ledge, that line of "the vein, or lode, which approaches the surface the "nearest."

"That portion of the vein that is visible in the country "rock when the loose dirt or earth has been removed.

"Some veins stand up above the country rock like a wall. "The top of such veins would be the highest part of such "wall above the ground or bed-rock."

"Its highest point at any given place."

"The outcrop."

"The point at surface where the ore is met with; either "superficially seen in the croppings, or just beneath the "surface."

"Either the outcrop or crevice between walls at the top "of bed-rock."

"The vein at the surface."

"Outcrops generally."

"The width of the vein, or lode, on the surface; but the "United States mining law means the top, or apex, to be "the width of the claim, six hundred by fifteen hundred "feet."

"The outcropping of the vein."

"Where it has been projected through the country rock "by an acting subterranean agency or force."

Judge Beatty, then chief justice of Nevada, gave the clearest and most comprehensive of all the definitions. It is as follows:—

"The top, or apex, of any part of a vein is found by "following the line of its dip up to the highest point at "which vein matter exists in the fissure. According to this "definition, the top, or apex, of a vein is the highest part of "the vein along its entire course. If the vein is supposed "to be divided into sections by vertical planes at right "angles to its strike, the top, or apex, of each section is the "highest part of the vein between the planes that bound "that section." . . .

"Of course, there are irregular mineral deposits depart- "ing widely in their characteristics from the typical or "ideal vein which seems to have been in the mind of the "framer of the act of 1872. To such deposits the forego- "ing definitions will not apply; and, in my opinion, great "difficulty will be experienced in any attempt to apply "the existing law to them."[1]

[1] Report of Public Land Commission, 399; Dr. Raymond on Law of the Apex, 28.

§ 308. **Definition of Dr. Raymond.**— Dr. Raymond, in his "Law of the Apex," with reference to these terms and their use in the act of May 10, 1872, says:—

"I have reason to believe that they were used instead of "the word 'outcrop,' in order to cover 'blind lodes,' "which do not crop out. The conception of an apex, "which is properly a point, was probably taken from the "appearance of a blind lode in a cross-section, where the "walls appear as lines and the upper edge as a point. The "term may also have been intended to cover the imaginary "case of an ore deposit which terminates upwards in a "point. We may, however, dismiss from consideration the "case of a simple point, and safely assume that the apex is "the same as a top, and is either a line or a surface."

The definition crystallized by him and found in his "Glossary of Mining and Metallurgical Terms,"[1] is, "the "end or edge of a vein nearest the surface."

We think this definition should be qualified to some extent. Our views will be found in the next section.

§ 309. **The ideal lode, and its apex.**— For the purpose of the application of principles and definitions, and furnishing a standard of comparison, we present in figure 4 a vertical cross-section of an ideal lode—such a lode, or vein, as the early miner undoubtedly had in mind when he "made the definitions" and applied the terms "lode" and "vein." This cross-section is intended to represent the

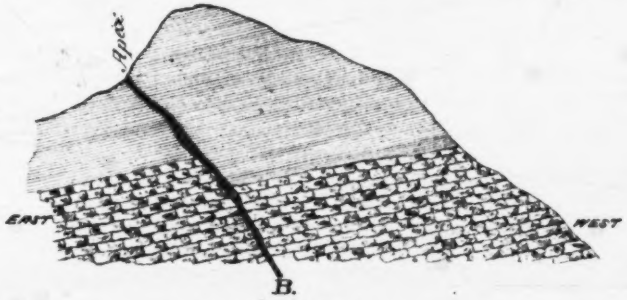



FIGURE 4.

[1] Trans. Am. Inst. Min. Eng., vol. ix., p. 102.

position of the vein in the inclosing rock, descending into the earth in a direction approximating the perpendicular or vertical, crossing in its downward course the planes of stratification, having well-defined foot and hanging-walls, and emerging at the surface at the point marked "apex," where is found a visible outcrop. This outcrop, we may assume, is exposed on the east slope of the hill, and continues to be traceable on the surface in a regular, defined course for an indefinite distance southerly at right angles to the "dip" or downward course. This hypothetical vein has all the attributes of a true fissure, and may be said to be an ideal vein or lode—one concerning which there can be no possible controversy, as it answers the definition of the judge, the scientist, and the practical miner. Is there any question as to where the apex of that vein is? or what is its strike or course and its dip or downward course? We think not. With the mountain in its normal condition, there is but one method of making a valid location covering that vein, and that is by inclosing the outcrop or apex within surface boundaries, presenting an ideal lode location, shown in the accompanying figure 5.

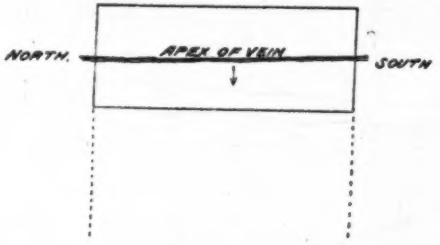



FIGURE 5.

There is no room for controversy over the rights flowing from such a location, either surface or underground, assuming that there are no other prior locations covering the apex of the same vein whose end-line planes might intersect those represented by the figure.

How should the apex of this vein be defined? It is not a point, because a point has neither length nor breadth. It is not a line, because a line has no dimension but length. It is but a succession of points. As that term is employed in the mining laws, an apex is unquestionably a surface which is a succession of lines.

The apex of this ideal vein within the location is a surface bounded by the walls of the vein and the end lines of the location. This surface is, of course, irregular. It may be higher at one place within the boundaries than it is in another; but mere elevation of the upper edge of the vein at different points within the location is of no moment. If the top of the mountain were ground down to a horizontal plane, the vein as exposed would be a plane surface; but, nevertheless, it would be an apex. The fact that the exposed edge of the vein is ragged, or that the surface of the outcrop is higher in one place above a given datum plane than it is in another, makes no difference in the principle.

If this upper edge does not outcrop so as to be visibly traceable on the surface, but is "blind," covered with detritus or a capping of country rock, it is still a surface bounded by the walls of the vein, and vertical planes drawn downward through the end lines. The plane of contact of the upper edge of the vein with the detritus or capping, intersected by the walls of the vein, would be the apex surface. We cannot conceive that an apex of a lode, within the meaning of the act of congress, can be anything but a surface, although we are aware that the supreme court of the United States has said that an apex is often a *line* of great length.[1] But it undoubtedly meant a surface, because in another portion of the same case it speaks of the "apex in its full width." Mathematically speaking, there is no width to a line. As was said by the supreme court of Montana, a lead, or lode, is not an imaginary line without dimensions; it is not a thing without

[1] Larkin v. Upton, 144 U. S. 19, 23.

shape or form. But before it can legally and rightfully be denominated a lead, or lode, it must have length, and width, and depth; it must be capable of measurement; it must occupy defined space, and be capable of identification.[1]

Of course, in speaking of the edge of the vein nearest to the surface, we mean the surface along the course of the vein, the upper edge, and not the lower edge, or side edge. As absolute horizontality does not exist in nature, save in the case of the level of the sea, every vein, lode, or deposit, whatever its form, has either an upper and lower edge, or a top and a bottom, as well as sides. It may be difficult to find them, or to determine their relative position, but they exist, in the nature of things.

To further illustrate, recurring again to figure 4: Suppose that, instead of the mountain being in its normal condition, the north face of the hill was abraded, cut down vertically, as you would cut a cheese, leaving the edge of the vein from the point marked "apex," to the bottom of the vein which may be assumed to be at B, exposed to the observer as we see it in the figure. In other respects, the vein preserves its position in the mountain as described. Will it be seriously contended that the exposure of the edge "apex" to B, constitutes an apex, because it appears at the surface on the perpendicular face of the hill? It has been so claimed. In the case of Duggan *v.* Davey, decided by the supreme court of Dakota, a case soon to be considered by us, it was stated by Professor Dickerman, a distinguished expert, in response to an inquiry as to what would be the apex of a vein cropping out at an angle of one degree from the vertical on a perpendicular hillside, and cropping out also at a right angle with that along the level summit of the hill (which is the case assumed by us with reference to figure 4), that in his opinion the whole line of the exposure from the bottom B upward to the point marked "apex" clear over the hill, as far as it extended, would be the apex of the vein. In other words, one part of the apex surface

[1] Foote *v.* National M. Co., 2 Mont. 403.

can be perpendicular, or at right angles to the other.[1] Of course, the court declined to follow him.

**§ 310. Illustration of a departure from the ideal lode —The case of Duggan v. Davey.**—One of the most interesting and instructive of all the adjudicated cases involving the interpretation of the terms "top," or "apex," is Duggan *v.* Davey,[2] decided by the supreme court of Dakota. The decision follows, in the main, the opinion given by the trial court. It is a lucid and masterly presentation of the law, and, as presented, affords us an opportunity to illustrate and explain by diagrams the position of the vein in the earth, its exposure on both top and side, the contention of the respective parties as to what constituted the apex, and the conclusions of the court deduced from the facts. It is one of the few cases which affords a full opportunity of explaining by simple methods the true definition of the term "top," or "apex," as well as the "strike" and "dip," and their relationship one to the other. Entertaining these views as to the importance of the case, we are justified in presenting it fully.

FIGURE 6.

Figure 6 is a perspective, showing an edge or outcrop of the vein exposed along the western face of Custer Hill, traversing it in a northerly and southerly direction, and an edge or outcrop traversing the northern slope in an easterly and westerly direction. We take the following description from the opinion of the trial court:—

[1] Duggan *v.* Davey, 4 Dak. 110, 140. [2] 4 Dak. 110.

The western slope of the hill presents a lateral face from south to north, along the line of the outcrop, of thirteen hundred feet. At its northern extremity it turns to the east, and its northern slope presents a lateral face from west to east of upwards of three thousand feet. Along its base and following it in this turn in the direction indicated is a small stream called Bare Butte creek. These slopes are quite steep, and extend from base to summit about twelve hundred to thirteen hundred feet. The whole country is hilly and broken, and the hill is only one of a series of similar elevations, with which it is more or less directly connected.

Beginning at or near the southern extremity of the western slope of Custer Hill, at a point (marked *x* on figure 6) half way up the slope, there is found an outcropping layer or stratum of reddish quartzite, or metamorphic sandstone, of several feet in thickness, overlaid by a body or stratum of limestone or dolomitic shale, of a thickness not definitely ascertained. From this point the croppings may be readily traced in several places by high reef-like ledges, jutting out boldly from the face of the hill along the western face to its northern extremity.

The general bearing of this line of croppings may be stated at N. 11° W., the distance twelve hundred and forty-three feet, and the angle of inclination upward from south to north, approximately, three degrees.

At the northern extremity of the hill this line of outcrop of quartzite, with its overlying limestone or dolomite, turns and extends along the northern slope with a downward inclination, thus gradually nearing the base of the hill until, at a distance of something over twenty-five hundred feet, it disappears beneath the bed of the creek.

The course of the outcrop along the northern slope of the hill is for a distance of nineteen hundred and fifty feet, N. 70° 30′ E., and the angle of declination eight degrees, from west to east.

The "vein" consists of the underlying quartzite, impregnated with iron and silver in various forms, the width of

the so-called vein material not being uniform. The richer ore deposits are usually found along the contact with the overlying limestone.

The entire line of outcrop on both slopes of Custer Hill appears to have been appropriated by different locations, but the controversies in the case under consideration arose out of claims located on the northern slope. We present

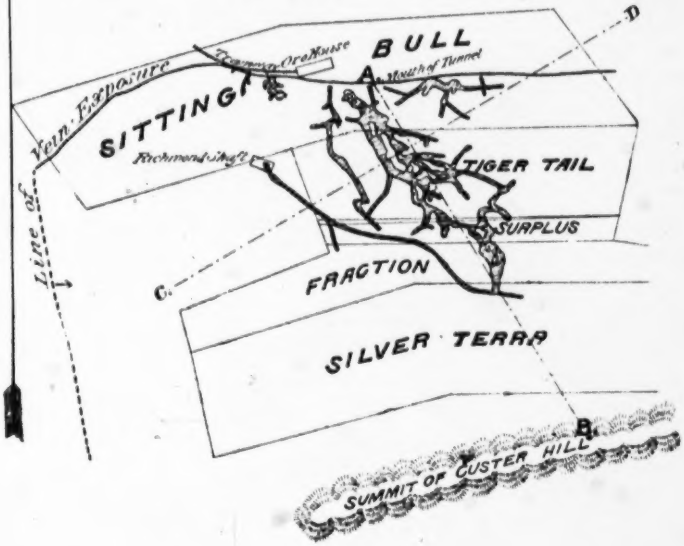



FIGURE 7.

in figure 7 a diagram showing the surface boundaries of the claims, the "vein exposure," and the underground workings, in horizontal projection. From this figure it will appear that the Sitting Bull, belonging to the defendants, covers about thirteen hundred and eighty feet of the outcrop on the northern slope of the hill. Its end lines are parallel, and if this outcrop or vein exposure is the "top," or "apex," of the vein, the location approximates the ideal shown in figure 5.[1]

[1] See, *ante*, § 309.

The plaintiffs owned the Silver Terra, some distance south and up the hill from the Sitting Bull. It does not appear upon what vein the Silver Terra location was based. It was not material for the purposes of the case that it should be shown. Both parties had lode patents for their respective claims. The Sitting Bull had, in following the vein southerly into the hill with its underground works, penetrated underneath the surface of the Silver Terra, whereupon the owners of that claim brought an action in equity to enjoin the owners of the Sitting Bull from trespassing within the boundaries of the Silver Terra.

The Sitting Bull justified its presence underneath the Silver Terra surface by asserting ownership of the apex of the vein, and its right to follow it between its end-line planes, to an indefinite depth.

The principal question involved was—

"*Is the top, or apex, of this vein, or lode, within the lines of "the Sitting Bull location?*"

The court below, in arriving at its conclusions, considered the relative angles of declination in determining which was the top, or apex, of the vein. For the purpose of illustrating this, we present two figures (8 and 9). Figure

FIGURE 8.

8 is a longitudinal section taken through the line A B, shown on the horizontal projection (figure 7), parallel to the line of the outcrop exposed on the western slope of the hill. The angle of declination is found by the court to be, approximately, three degrees, from north to south.

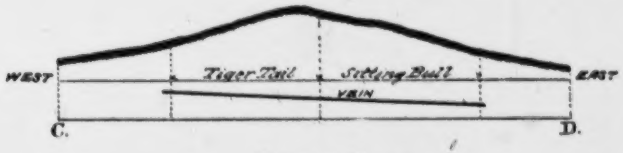



FIGURE 9.

Figure 9 represents a cross section taken through C D (on figure 7), at right angles to A B. The angle of this declination is found by the court to be eight degrees, from west to east, or five degrees greater than that shown in the section A B.

As to what constitutes the "top," or "apex," of a vein, the court expressed its views as follows:—

"The definition of the top, or apex, of a vein usually "given is the end or edge of a vein nearest the surface; "and to this definition the defendants insist we must "adhere with absolute, literal, and exclusive strictness, so "that wherever, under any circumstances, an edge of a vein "can be found at any surface, regardless of all other cir- "cumstances, that is to be considered as the top, or apex, "of the vein. The extent to which this view was carried "by the defendants—and I must confess its logical results "were exhibited by Professor Dickerman, their engineer, "who, replying to an inquiry as to what would be the apex "of a vein cropping out at an angle of one degree from the "vertical, on a perpendicular hillside, and cropping out "also at a right angle with that along the level summit of "the hill, stated that, in his opinion, the whole line of that "outcrop, from the bottom clear over the hill, so far as it "extended, would be the apex of the vein. Some other wit- "nesses had similar opinions. The definition given is no "doubt correct, under most circumstances, but, like many "other definitions, is found to lack fullness and accuracy "in special cases, and I do not think important questions "of law are to be determined by a slavish adherence to this "letter of an arbitrary definition.

"It is indeed difficult to see how any serious question "could have arisen as to the practical meaning of the "terms top, or apex, but it seems, in fact, to have become "somewhat clouded. . . .

"Justice Goodard, a jurist of experience in mining law,

"in his charge to the jury in the case of Iron S. M. Co. *v.* "Louisville, defines 'top,' or 'apex,' as the highest or ter- "minal point of a vein, where it approaches nearest the "surface of the earth, and where it is broken on its edge "so as to appear to be the beginning or end of the vein."

After quoting Judge Beatty's definition given to the public land commission referred to in a preceding section, the court continues:—

"I am aware that in several adjudged cases 'top,' or "'apex,' and 'outcrop' have been treated as synonymous, "but never, so far as I am aware, with reference to a case "presenting the same features as the present. The word "'apex' ordinarily designates a point, and so considered "the apex of a vein is the summit; the highest point in a "vein is the ascent along the line of its dip, or downward "course, and beyond which the vein extends no farther; "so that it is the end, or, reversely, the beginning, of the "vein. The word 'top,' while including 'apex,' may also "include a succession of points—that is, a line,—so that "by the top of a vein would be meant the line connecting "a succession of such highest points or apices, thus form- "ing an edge."

Applying these definitions to the facts of the case under consideration the court below held that the Sitting Bull location did not cover the top, or apex, of the vein. That the outcrop shown on the northern slope of Custer Hill was merely an exposure of the edge of the vein on the line of its dip, just as the exposure of the side edge of the ideal fissure vein represented on Figure 4.[1]

Judgment passed for the plaintiff. The supreme court of Dakota adopting the views of the trial court, affirmed the judgment. It was not in terms decided that the outcrop on the west slope of the hill was the top, or apex, of the vein. It was not necessary to do so in order to defeat the extralateral right claimed by the Sitting Bull. But if the owner of a location covering the outcrop on the western slope should pursue his vein easterly with his underground works so as to intersect the workings of the Sitting Bull, showing identity and continuity, and establish-

[1] See, *ante*, § 309.

ing that the angles of declination disclosed in such workings were the same as in the case proven, the conclusion is irresistible that the western outcrop would be the true apex of the vein, and this is in consonance with the rule applied to veins more or less vertical.

According to the views of Professor Dickerman, both lines of exposure shown on figure 4, would constitute an apex, or top. If such were the case, there would be no longer any difference between "strike" and "dip." The mathematical relationship which must necessarily exist between them would be destroyed, and any vein exposure on the side or bottom edge would be an "apex," and give extralateral rights. In other words, a locator covering the bottom edge of a vein, if it were exposed, could follow his vein on the upward course, and hold it as against a locator of the upper edge, or top. This is not a mere fanciful supposition.

An illustration of this occurred in Idaho in the case of Gilpin *v.* Sierra Nevada Cons. M. Co., decided by the supreme court of that state.[1] It presents a case, so far as the facts were developed at the hearing, of a location on a flat vein similar to that shown in figure 10, where the location

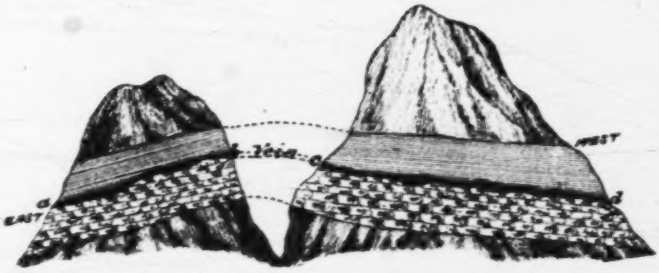



FIGURE 10. FIGURE 11.

was laid along what was claimed as an apex corresponding to the hypothetical exposure on the eastern slope of the hill covering the lower edge of the vein; that is, a location on

[1] 23 Pac. 547, 551.

the assumed line of exposure from *a* (figure 10) southerly along the eastern slope of the hill. The workings of the Sierra Nevada on the vein from this exposure into the hill showed an upward trend to the west in the direction of *b*. This was indicated by a number of physical facts. Among others, the flowage of water out of the mouth of defendant's tunnels, which had their openings on the exposure from *a* southerly, the tunnels having been run on the foot wall or floor of the vein. The defendant's works, following the vein on its upward trend, penetrated underneath the surface of plaintiff's claims. An injunction was sought and denied by the lower court. The supreme court of Idaho reversed the order and directed an injunction principally on the ground that the location of the Sierra Nevada did not cover the apex, and that the showing made did not justify or authorize its presence underneath the plaintiff's surface.[1]

Figures 10 and 11 represent veins having a top, bottom, and side edges exposed. It was formerly one vein, but erosion has made two of it. According to Professor Dickerman's theory, one locating the eastern exposure in figure 10 could follow up the hill along the vein, *a b*, provided, of course, that the western outcrop, *b*, has not been previously covered,—or, he might locate the exposures *a b* and *c d*,—and follow the vein into the mountain, whether its pitch was upward or downward.

Under the rule in the Duggan-Davey case, the exposures *c d* and *a b* might be apices if the vein dipped to the south at a greater angle of declination than shown on the northern face from *b* to *a*, and *c* to *d*. On the other hand, if the course into the hill was upward, the true apices would be found on the southern side. In that case, the exposures, *a b* and *c d*, would be the bottom instead of the top.

Professor Dickerman's theory, if applied, might be a convenient way of settling aggravating and expensive controversies by making the extralateral right depend entirely

[1] For dissenting opinion, see, 23 Pac. 1014.

on priority of appropriation, independent of the fact that the location is on the side edge of the vein, or on the bottom, instead of the top. But congress would have to remodel its laws, or the courts would have to change their construction of them before such a legal result is possible.

Of course, the difficulty comes from applying the terms of a law which was framed to meet ideal conditions — to peculiar occurrences in structural geology, not contemplated when the law was framed.

If a given deposit is of rock in place, it is a lode, or vein. If it is a lode, or vein, it has an apex, or top. While it may be difficult to determine where that top, or apex, is, yet, in the theory of the law it exists, and the lode locator must find it and lay his location along it, or take the chances of developing a valuable mine for some one else to take away from him, after openings have been made in the earth so that the surveyors may determine the relative angles of declination.

§ 311. **The Leadville cases.**—As in almost all other phases of the mining law, the flat deposits of Leadville have produced their full quota of adjudicated law on the subject of "tops" and "apices." As these deposits are legally held to be veins, or lodes, of rock in place, it follows that they must have apices. We have heretofore given an outline of the formation in which these deposits occur, and the manner of their occurrence.[1]

But in connection with the quotation of some of the definitions of the words "top," or "apex," as applied by the Colorado courts, we think it instructive to present in cross-section, illustrations showing the physical conditions surrounding some of the litigated cases, where these definitions have been announced and applied. A much better understanding of the views of the court in a given case is reached by the aid of diagrams.

[1] See, *ante*, § 300.

*Iron Silver Mining Co. v. Cheesman.*[1]—

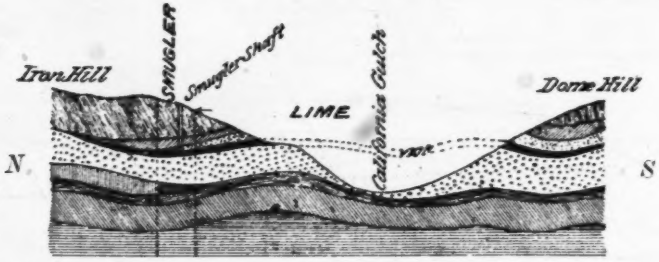



FIGURE 12 A.

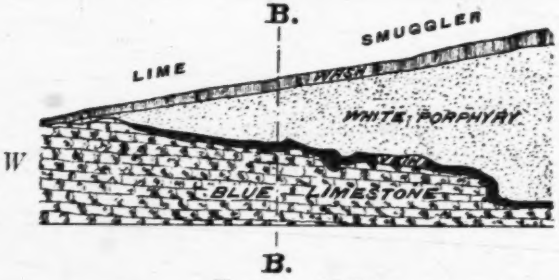



FIGURE 12 B.

Figures 12A and 13B are longitudinal sections on the line of the strike of the vein north and south, the latter section being along the joint Lime-Smuggler side line, along plane B B of figure 12B.

Figures 13A and 12B are cross-sections on the line of the dip, east and west, through the Lime incline, although in figure 12B the incline is not drawn.

Figures 12A and 13A are reduced, with slight modifications, from the atlas sheets of Mr. Emmons accompanying his monograph on "The Geology and Mining Industry of Leadville."[2]

Figures 12B and 13B are practically reproductions of

[1] 8 Fed. 297; 116 U. S. 529.

[2] Monograph XII. of the U. S. Geological Survey.

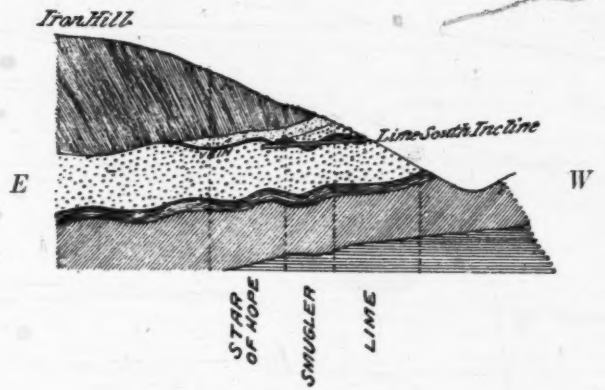



FIGURE 13 A.

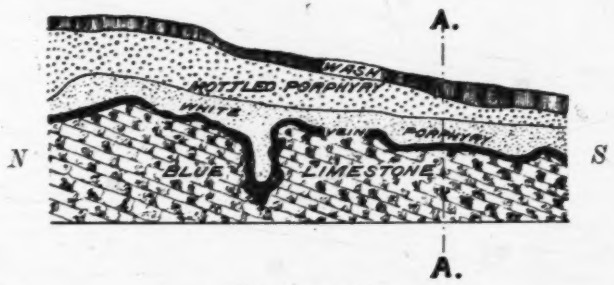



FIGURE 13 B.

the sections prepared by Mr. C. M. Rolker, accompanying his "Notes on Leadville Ore Deposits," read before the American Institute of Mining Engineers.[1]

An inspection of figure 12A indicates that the only vein exposure is on the slope of the hill facing California Gulch. This exposure, and the one appearing on the opposite side in Dome Hill, having resulted from natural erosion. Bearing in mind the description given of the character of the vein and its inclosing rocks, given in a preceding section, the facts involved in the case were substantially as follows:—

[1] Trans. Am. Inst. Min. Eng., vol. xiv., p. 283.

The Iron Silver Mining Company owned by patent the Lime claim. Adjoining it on the east was the Smuggler, owned by the defendants. Prior to location, the defendants sunk a vertical shaft (see figure 12A) to the depth of forty feet, and at the bottom found a large body of mineral. After the discovery of the mineral in the Smuggler claim the owners of the Lime ran inclines (see figure 13A) from the Lime claim into and upon the Smuggler claim, and connected them with the Smuggler workings. Thereupon the Iron S. M. Co. commenced their action against defendants to eject them from the body of mineral they had discovered and developed within the Smuggler location, claiming that it was the lode or vein of mineral which had its apex within the Lime claim. This the Smuggler owners disputed, claiming that there was no vein or lode within the Lime ground; that whatever mineral was there was not in place, but had been removed to that point from some other locality.

The case was tried three times by jury.[1]

We have already noted the charge of Judge Hallett in this case, as to what constitutes a lode, or vein, which was the principal contention between the parties. Upon the subject of "apex," we quote the following from Judge Hallett's charge to the jury:—

"A good deal has been said by the witnesses as to "whether there is a top or apex of the vein. That de- "pends very much as to whether there is any vein, or lode, "there. If you find that there is a vein, or lode, to my "mind the evidence is clear enough that the top of it is in "the Lime location; and if there is none there, of course "that which does not exist, does not exist in any part— "it does not exist by its top nor by its bottom, nor any- "where between the two points."[2]

[1] The first resulted in a verdict for the defendant. Plaintiff demanded a second trial as a matter of right, a practice permissible under the laws of Colorado. The second trial resulted in a disagreement; the third in a verdict and judgment for defendant, which was affirmed by the Supreme Court of the United States (116 U. S. 529).

[2] Iron S. M. Co. v. Cheesman, 8 Fed. 297, 302.

The jury found that there was no vein, or lode, which was the customary finding in all cases where the Iron Silver Mining Company attempted to assert extralateral rights. This was the unwritten law of Leadville. While the deposits were veins, or lodes, within the definitions given by the courts, they were not such, as a matter of fact, when the question was left to a jury of the neighborhood, if their verdict would uphold the right to pass on the dip of the vein through and beyond vertical planes, drawn through the side lines.[1] We cite the charge of Judge Hallett for the purpose of illustrating his views on the subject of "top," or "apex." This charge, as a whole, was approved by the supreme court of the United States.[2]

*Stevens & Leiter v. Williams.*[3]—

This case involved a controversy between the Iron and Grandview claims, situated upon Iron Hill, where the occurrence of the vein and vein exposure were similar to those found in the Lime-Smuggler case. The question of apex in the Iron-Grandview case received full consideration in two trials, at the first of which Judge Hallett presided, and at the second Justice Miller. Although the case was never passed upon by the supreme court of the United States, the charges to the two juries given by the presiding judges are considered to be a full exposition of the law on the subject. We are justified in quoting them fully. Judge Hallett's charge is as follows:—

"We have now to consider the question which was so "much discussed by counsel as to the location with refer- "ence to the top and apex of a vein; and upon that point "it is clear, from an examination of the act, that it was "framed upon the hypothesis that all lodes and veins oc- "cupy a position more or less vertical in the earth — that is, "that they stand upon their edge in the body of the moun- "tain,— and these words 'top' and 'apex' refer to the part "which comes nearest to the surface. The words used are

[1] For an interesting discussion of this, see Dr. Raymond's Law of the Apex.

[2] 116 U. S. 529, 535.

[3] First trial, 1 Morr. Min. Rep. 557; second trial, *Id.* 566.

"'top,' or 'apex,' as if the writer was somewhat doubtful "as to which word would best describe or best convey the "idea which he had in his mind. It was with reference "to that part of the lode which comes nearest to the sur- "face that this description was used; probably the words "were not before known in mining industry; at least, they "are not met with elsewhere, so far as I am informed. Per- "haps, they were not the best that could have been used "to describe the manner in which the lode should be taken "and located. But whether that be true or not, they are "in the act of congress, and there seems to be little doubt "as to their meaning; they are not at all ambiguous. In "some instances, they may perhaps refer to the *floe* of the "lode; that is, a part of the lode which has been detached "from the body of mineral in the crevice and flowed down "on the surface. In others, where there is no such outcrop, "they may mean that part which stands in the solid rock, "although below a considerable body of the superficial "mass, which I have attempted to describe to you. We "are all agreed, however, the courts and counsel, every one, "that that is the meaning of the words; that they are to be "taken in some such sense as that, as being the part of the "lode which comes nearest the surface; and the act requires "that the location shall be along the line of this top, or "apex. Supposing the lode to have a somewhat vertical "position in the earth, with this line of outcrop, or of ap- "pearance on the surface, or nearest to the surface, it shall "be taken up and occupied by the claimant as his location; "and he must find where this top, or apex, is and make "his location with reference to that."[1]

On the second trial, Justice Miller charged the jury, as follows:—

"I think that you will agree with me, as all counsel agree, "and all the witnesses agree substantially, conceding "that there is a vein, that the top, or the apex, of a vein, "within the meaning of the act of congress, is the highest "point of that vein where it approaches nearest to the sur- "face of the earth, and where it is broken on its edge so as "to appear to be the beginning or end of the vein. The "word 'outcrop' has been used in connection with it, and "in the true definition of the word 'outcrop,' as it concerns "a vein, is probably an essential part of the definition of "its apex, or top; but that does not mean the strict use of

[1] Stevens & Leiter v. Williams, 1 Morr. Min. Rep. 557, 561.

"the word 'outcrop.' That would not, perhaps, imply the "presentation of the mineral to the naked eye on the sur- "face of the earth; but it means that it comes so near to "the surface of the earth that it is found easily by digging "for it, or it is the point at which the vein is nearest to the "surface of the earth; it means the nearest point at which "it is found towards the surface of the earth. And where "it ceases to continue in the direction of the surface, is the "top, or apex, of that vein. It is said in this case that the "point claimed to be the top, or apex, is not such, because "at the points where plaintiff shows or attempts to prove "an interruption of that vein in its ascent toward the sur- "face, and what he calls the beginning of it, the defendants "say that it is only a wave or roll in the general shoot of "the metal, and that from that point it turns over and "pursues its course downward as a part of the same vein "in a westerly or southwesterly direction. It is proper, I "should say to you, if the defendant's hypothesis be true, "if at that point which the plaintiff calls the *highest point*, "*the apex*, is merely a swell in the mineral matter, and "that it turns over and goes on down in a declination to "the west, that it is not a true apex within the statute. It "does not mean merely the highest point in a continuous "succession of rolls or waves in the elevation and depres- "sion of the mineral nearly horizontal."[1]

*Iron Silver Mining Company v. Murphy.*[2]—

This involved a controversy between the Iron and Loella claims. Judge Hallett charged the jury as follows:—

"The top, or apex, is the end, or edge, or terminal "point of the lode nearest to the surface of the earth. It "is not required that it shall be on or near or within any "given distance of the surface. If found at any depth, "and the locator can define on the surface the area which "will inclose it, the lode may be held by such location."

§ 312. **Hypothetical illustrations, based upon the mode of occurrence of the Leadville and similar deposits.** —It is not our purpose in this article to deal with the subject of extralateral rights or treat of the apex, as affecting

[1] Stevens & Leiter v. Williams, 1 Morr. Min. Rep. 506, 574.
[2] 1 Morr. Min. Rep. 548.

those rights. We reserve this important element of the mining law for individual treatment in a later portion of this work. We are now interested in determining what is or is not a "top," or "apex." In the course of investigation, however, reference to the extralateral right is incidentally involved, to the end that the conclusions reached may be rationally explained and applied to cases within reasonable probabilities.

We have heretofore considered two classes of deposits: those whose position in the earth approximates the perpendicular, and those approaching the horizontal. The geological conditions at Leadville suggest additional complications, by reason of the fact that the veins do not always occupy the same plane, but are frequently found in alternating anticlinal and synclinal folds, which are best expressed by the use of the term "undulating."

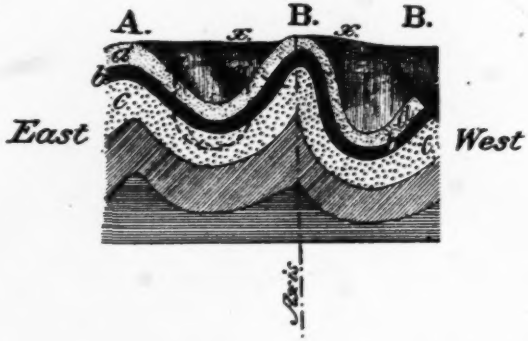



FIGURE 14.

For purposes of illustration, we present in figure 14 a cross-section. In the figure the stratum *d d* represents the overlying white porphyry; *b b*, the vein material; *c c*, the underlying blue limestone. The lines A *x* and B B represent the crests of the ridges formed by the anticlinal folds at right angles to the axes.

If the overlying porphyry were removed, leaving the vein material exposed throughout, it would not be a vein of rock in place, legally speaking, but a mere bed. Neither A *x* nor B B would be apices. They are tops or crests of the folds, but not apices of the deposit. The whole exposed surface would be the top of the deposit, contradistinguished from the bottom lying on the limestone. The same result would follow if the deposit, instead of being exposed at the surface, was covered with detritus or "slide." The deposit, legally speaking, would not be in place in the mass of the mountain. There are no analogies between this instance and that of an outcrop of the upper edge of a vein emerging from the inclosing rocks. Such an uncovered deposit as we have described could only be located under the laws applicable to placer claims. A locator would acquire only so much of the deposit as might be found within vertical planes drawn through his surface boundaries.

With the vein in position, as shown in figure 14, it might be said that its highest part, or the part approaching nearest to the surface (assuming that there was no surface exposure elsewhere), would be along the crest of the fold. But this would not be the top, or apex, of the *vein*. It would be the top, or apex of a fold in the vein. If this line were the apex of the vein, a location with side lines along the crest would give the locator the right to follow the vein in both directions, east and west, "up hill "and down dale," indefinitely, so far as the vein preserved its continuity and identity.

The only exposures of the vein in position as shown in Figure 14 that can possibly answer to the definitions given by the courts are those indicated by the abrupt terminations at the east and west. As to which of these two exposures would be considered the true apex, is a difficult question, and might have to be determined mathematically, by ascertaining which occupied the higher elevation above a given datum plane.

Eliminating from consideration the inquiry as to which of the two exposures is the higher above a given datum plane, a location on the east or west would cover an apex; and if it covers an apex, the right of extralateral pursuit would inure to the locator, to the extent that the identity and continuity of the vein could be established up and down the undulations or folds.

If we can assume that the crest of the anticlinal fold has been eroded, as represented by the dotted line *x x*, we would have then two distinct veins, with their attributes of apices, strike, and dip. But suppose the erosion occurred in the synclinal fold, as illustrated by the dotted line *y y*, leaving two exposures,—would these be apices? They would not be, according to the rule announced in the case of Gilpin *v.* Sierra Nevada Consolidated, heretofore referred to, unless, as suggested by Judge J. H. Beatty in that case, the course upward proved, on subsequent development, to be caused by a mere local fold or dislocation.[1]

It is hardly profitable to pursue this discussion further. Enough has been said to show the absurdity of the law, when applied to geological conditions which were not in contemplation of the law-makers when the laws were enacted. But it is, nevertheless, the law, if these deposits are "veins, or lodes of rock in place," and the courts hold that they are.

Geologists have always insisted that this character of deposits should be separately classified. There is no reason why the law-makers should not so classify them, or else abandon the entire element of lateral pursuit, and limit the locator to vertical planes drawn through surface boundaries. In considering the difficulties surrounding the application of the law to conditions similar to those existing at Leadville, we recall the almost prophetic language of Judge W. H. Beatty, then chief justice of Nevada:—

"We are willing to admit that cases may arise to which "it will be difficult to apply the law; but this only proves

[1] See, *ante*, § 310.

"that such cases escaped the foresight of congress, or that, "although they foresaw the possibility of such cases oc- "curring, they considered that possibility so remote as not "to afford a reason for departing from the simplicity of the "plan they chose to adopt."[1]

**§ 313. The existence and situs of the "top," or "apex," a question of fact.**— When we consider that most, if not all, of the definitions of "top," or "apex," found in this article are contained in charges to juries, it is hardly necessary to cite authorities to show that the existence and *situs* of the "top," or "apex," are questions of fact. What constitutes an apex, is a question of law to be determined by the court; but whether a given portion of a lode, or vein, is its "top," or "apex," and what is its course through the ground of contending parties, is a question for the jury.[2]

This accounts for the presence in the literature of the law of so many able and logical statements as to what constitutes a "top," or "apex," and the absence of recorded cases, establishing the existence of any such tops, or apices, within the Leadville belt. It would seem that among the muniments of a lode locator's title in this section is the unwritten law of the neighborhood, that no extralateral rights should be permitted.

ARTICLE V. "STRIKE," "DIP" OR "DOWNWARD COURSE."

§ 317. Terms "strike" and "dip" not found in the Revised Statutes—Popular use of the terms.

§ 318. "Strike" and "dip" as judicially defined.

**§ 317. Terms "strike" and "dip" not found in the Revised Statutes—Popular use of the terms.**—The act of July 26, 1866, granted the right to follow the located vein, "with its dips, angles, and variations, to any depth."

[1] Gleason *v.* Martin White M. Co., 13 Nev. 442.

[2] Illinois S. M. Co. *v.* Raff (New Mex.), 34 Pac. 544; Blue Bird M. Co. *v.* Largey, 49 Fed. 289. See, also, cases cited in *ante*, § 311.

The Revised Statutes, in defining the extralateral right, use the terms "entire depth," and "course downward," as a substitute for the terms "dips, angles, and variations." The term "dip" is the one in common use. "Dip" and "depth" are of the same origin, and "dip" and "course "downward" are synonymous. "Dip" is the direction or inclination towards the "depth." [1]

"Strike" does not appear in any of the mining laws. It is the popular term for designating the longitudinal course of a vein such as is indicated by following the apex of a lode of the character shown in figure 4,[2] that is the "length along the vein," as these terms are used in section twenty-three hundred and twenty of the Revised Statutes, which is equivalent to the longitudinal course. The terms "dip" and "strike" have such a mathematical relationship to each other that it is almost impossible to define one without including the definition of the other.

**§ 318. "Strike" and "dip" as judicially defined.**— Judge W. H. Beatty, in his testimony before the public land commission, thus defined these terms:—

"The strike, or course, of a vein is determined by a hori-
"zontal line drawn between its extremities at that depth
"at which it attains its greatest longitudinal extent. The
"dip of a vein, its "course downward" (Rev. Stats., § 2322),
"is at right angles to its strike; or, in other words, if a
"vein is cut by a vertical plane at right angles to its course,
"the line of section will be the line of its dip. . . .

"The strike, or course, of a vein can never be exactly
"determined until it has been explored to its greatest
"extent; but a comparatively slight development near the
"surface will generally show its course with sufficient
"accuracy for the purposes of a location. The dip having
"an exact mathematical relation to the course of the vein
"is, of course, undetermined until the strike is determined;
"but, practically, the line of dip is closely approximated
"by taking the steepest the (nearest a vertical) line by which
"a vein can be followed downward." [3]

[1] Duggan *v.* Davey, 4 Dak. 110, 141.
[2] See, *ante*, § 309.
[3] Report of Public Land Commission, p. 399.

The miner in locating his claim, although he is called upon to locate it "along the vein," has but little opportunity to explore the ground and determine prior to location what is its course, or strike. He is compelled to exercise his best judgment from surface indications and such primitive development as the limited time allowed him to perfect his location will permit. A vein does not always outcrop to any considerable distance, so as to present to the miner's observation its longitudinal direction. His location usually precedes any extended exploration, and, in most cases, is made without accurate knowledge of the course or direction of the vein.[1]

Mathematically speaking, the true course of a vein is never demonstrated until after extensive investigation and the expenditure of time and money. In a case decided by Judge Hawley, sitting as circuit judge in the ninth circuit,[2] one of the veins in controversy had been located for forty years, and at different times during that period the mine was in active operation. At the trial, the course of this vein was a disputed and closely contested question, although there were extensive underground workings.

In addition to this, the lower levels of a mine frequently show a different direction from that which guided the miner in making his location, and are at variance with conditions shown in openings nearest to the surface. This was the case in the famous Flagstaff mine in Utah,[3] where the croppings showed that the direction, or course, of the apex of the vein at or near the surface, was nearly east and west. By following a level beneath the surface, the strike of the vein ran in a northwesterly direction, so that if, by a process of abrasion, the mountain were ground down, the strike of the vein would have been northwest instead of west, as the line connecting the surface outcrops tended to show that it was.

[1] Iron S. M. Co. v. Elgin M. Co., 118 U. S. 196, 204.
[2] Cons. Wyoming G. M. C. v. Champion M. Co., 63 Fed. 540, 548.
[3] Flagstaff S. M. Co. v. Tarbet, 98 U. S. 463, 469.

Upon this state of facts, the supreme court of the United States thus expressed its views: —

"We do not mean to say that a vein must necessarily "crop out upon the surface in order that locations may be "properly laid upon it. If it lies entirely beneath the sur- "face, and the course of its apex can be ascertained by "sinking shafts at different points, such shafts may be "adopted as indicating the position of the vein, and loca- "tions may be properly made on the surface above it, so "as to secure a right to the vein beneath. . . . Perhaps "the law is not so perfect in this regard as it might be; "perhaps the true course of a vein should correspond with "its strike, or the line of a level run through it; but this "can rarely be ascertained until considerable work has "been done, and after claims and locations have become "fixed. The most practicable rule is to regard the course "of the vein as that which is indicated by surface outcrop "or surface explorations and workings. It is on this line "that claims will naturally be laid, whatever be the char- "acter of the surface, whether level or inclined."

An interesting and important case involving this question is that of the Carson City Gold and Silver Mining Company *v.* North Star Mining Company, tried before Judge James H. Beatty, United States district judge of Idaho, sitting as circuit judge. Figure 15 represents the properties in controversy and the underground workings of the North Star mine in horizontal projection.

The line C D traversing the center of the North Star surface was the line connecting the collar of the main working shaft, the mouth of the Larimer incline, the East Star shaft, all sunk on the vein, and a shallow vertical shaft at D. The course of the vein to the west was interrupted at the point C by the occurrence of a "crossing," or a zone of fractured country rock, into which the vein, as far as developed, was not shown to have penetrated. The vein was located in 1851, and had been worked by the North Star Company and its predecessors, with casual interruptions, ever since. The plaintiff in the case, owning the Irish-American ground, contended that the true course of the vein was southeasterly from the point C and across the

FIGURE 15.

side line *1 2*, presenting a case, according to its contention, wherein the North Star Company was denied any extra-lateral right. The course of many of the deeper levels appeared to sustain its contention as to the longitudinal direction of the vein. The court, however, declined to accept the underground workings as determining the true course of the apex, announcing its views as follows: —

"The workings of a mine made in mining operations, "and not in support of litigation, are generally important "as evidence of any facts which may be legitimately in- "ferred from them. The three incline working shafts were "started upon this North Star central line, and are all "shown to follow the ledge on their descent. It is reason- "able to presume that they were started upon or near the

"apex of the ledge. . . . As ledges may in their depths "change their course, and as the surface course, or the "course of the apex, is to govern the miner's rights, the "workings nearest the surface are better guides to the course "of the apex than those far below."[1]

The "strike" of the vein, for the purpose of guiding the miners in making their location, is, therefore, not the "technical true strike of the engineer, the line which "would be cut by a horizontal plane. Such a requirement "would be in many cases impracticable."[2]

The true method of determination is found in the rule laid down by the supreme court of the United States in the Flagstaff case, and followed by Judge Beatty in the North Star case, that the workings nearest the surface are better guides to the course of the apex than those far below.

The "strike" once determined, the ascertainment of the direction of the "dip" follows as a mathematical deduction. The true average dip of a vein is always at right angles to the strike.[3]

If the strike is north and south, the dip is either to the east or west. The angle of declination is ascertained by a line drawn in the plane of the vein from the top, or apex, to the lowest workings, at right angles to the strike, and the "dip" may be of any degree between the vertical and horizontal.

Of course, a vein in its course downward does not always maintain a uniform dip,—"faults," "folds," "horses," and local dislocations occur on the "dip," as well as on the "strike," which do not affect the legal identity or continuity of the vein. But these are matters of minor importance, not affecting the rule for determining "strike," or "dip," of the average vein.

In veins that descend into the earth at slight angles of declination, it is of course difficult, if not impossible, at

[1] Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. 597, 601.
[2] Duggan v. Davey, 4 Dak. 110, 143.
[3] Gilpin v. Sierra Nevada Cons. M. Co., 2 Idaho, 662.

times to determine which is "strike" or which is "dip." This is fully shown in the case of Duggan *v.* Davey, commented upon and illustrated in a preceding section,[1] and suggested in discussing the form of the Leadville deposits. Necessarily, each case must depend for solution upon the particular facts surrounding it. For all practical purposes, the definitions given in this article, and the authorities cited, are sufficient.

[1] See, *ante*, § 310.

# CHAPTER II.

## LODE CLAIMS, OR DEPOSITS "IN PLACE."


ARTICLE I. INTRODUCTORY.
II. THE LOCATION AND ITS REQUIREMENTS.
III. THE DISCOVERY.
IV. THE DISCOVERY SHAFT AND ITS EQUIVALENT.
V. THE PRELIMINARY NOTICE AND ITS POSTING.
VI. THE SURFACE COVERED BY THE LOCATION—ITS FORM AND RELATIONSHIP TO THE LOCATED LODE.
VII. THE MARKING OF THE LOCATION ON THE SURFACE.
VIII. THE LOCATION CERTIFICATE AND ITS CONTENTS.
IX. THE RECORD.
X. CHANGE OF BOUNDARIES AND AMENDED LOCATION CERTIFICATES.
XI. RELOCATION OF FORFEITED OR ABANDONED CLAIMS.
XII. LODES WITHIN PLACERS.


### ARTICLE I. INTRODUCTORY.


§ 322. Introductory.
§ 323. The metallic or non-metallic character of deposits occurring in veins as affecting the right of appropriation under the laws applicable to lodes.


**§ 322. Introductory.**—In the preceding chapters of this work, it has been demonstrated that only the public mineral lands of the United States may be appropriated under the mining laws.[1] By "public lands" is meant such as are subject to sale or disposal under general laws. Land to which any claims or rights of others have attached does not fall within the designation of "public land."[2]

[1] See, *ante*, § 112.

[2] Newhall *v.* Sanger, 92 U. S. 761; Bardon *v.* N. P. R. R., 145 U. S. 535; Mann *v.* Tacoma Land Co., 153 U. S. 273; Wilcox *v.* Jackson, 38 U. S. 498; Cameron *v.* United States, 148 U. S. 301; United States *v.* Tygh Valley Land & L. S. Co., 76 Fed. 693.

We have also attempted to illustrate[1] the nature and character of the appropriation under laws (other than those exclusively applicable to the acquisition of mineral lands) which operate as a segregation of a given tract from the body of public land, and inhibit its acquisition, although mineral in character, under the mining laws. What constitutes such an appropriation of mineral lands, under these last-named laws, as will remove them from the category of "public lands," and inhibit their acquisition by other mining claimants, can be determined only after an analysis of the law regulating the acquisition of title to such lands. After we shall have outlined the methods provided by law for such acquisition, we shall endeavor to explain fully the nature and extent of the title so acquired, the tenure by which it is held, the property rights flowing therefrom, and the conditions under which such rights may be lost or extinguished. The general statement may here be properly made, however, that a perfected, valid appropriation of public mineral lands, under the mining laws, operates as a withdrawal of the tract from the body of the public domain, and so long as such appropriation remains valid and subsisting the land covered thereby is deemed private property.[2]

We are now to consider the manner in which public mineral lands containing veins, or lodes, of quartz or other rock in place may be lawfully appropriated.

**§ 323. The metallic or non-metallic character of deposits occurring in veins of rock in place as affecting the right of appropriation under the laws applicable to lodes.**—In defining what constitutes "mineral land" within the meaning of the acts of congress, using that term

[1] See, *ante*, title III., ch. iii., §§ 112-219.

[2] Gwillim v. Donnellan, 115 U. S. 45; Bilk v. Meagher, 104 U. S. 279; S. C., 3 Mont. 65; McFeters v. Pierson, 15 Colo. 201; Iron S. M. Co. v. Campbell, 17 Colo. 267; Seymour v. Fisher, 16 Colo. 188; Garthe v. Hart, 73 Cal. 541; Souter v. Maguire, 78 Cal. 543; Armstrong v. Lower, 6 Colo. 393; Lebanon M. Co. v. Cons. Rep. M. Co., 6 Colo. 371; Faxon v. Barnard, 4 Fed. 702.

as the legal equivalent of the various words and phrases of a kindred nature found in the mining laws,[1] we have heretofore treated the subject regardless of the form in which the deposits occur—*i. e.* whether "of rock in place," as in quartz veins, or not "in place," as in the case of auriferous gravels and other substances encountered in surface beds.[2] The conclusions there reached[3] were intended to apply to all classes of deposits, without any attempt at classification as to form of occurrence. We are now called upon to consider a special class of mineral lands, and to determine to what extent, if any, the metallic or non-metallic character of the deposits found in veins of rock in place controls the manner in which lands containing them may be appropriated.

The act of July 26, 1866, provided for the acquisition of title to veins, or lodes, of quartz or other rock in place bearing gold, silver, cinnabar, or copper. By necessary intendment it excluded all other classes of metallic substances, as well as all which were non-metalliferous. The placer law of July 9, 1870, extended the right of entry and patent "to claims usually called 'placers,' including all forms "of deposit, excepting veins of quartz or other rock in place."

The act of May 10, 1872, provided in terms for the appropriation of lands containing veins, or lodes, of quartz or other rock in place bearing gold, silver, cinnabar, *lead, tin*, copper, or other *valuable deposits*.

This is preserved in the Revised Statutes, which also contain the provisions of the placer law of 1870, heretofore referred to. Therefore, under the existing law we find the classification to be as follows:—

(1) Lands containing veins, or lodes, of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other *valuable deposits*;[4]

(2) Claims, usually called "placers," including all forms of deposit, excepting veins of quartz or other rock in place.[5]

[1] See, *ante*, § 86, p. 93.
[2] See, *ante*, § 95, p. 112.
[3] See, *ante*, § 98.
[4] Rev. Stats. § 2320.
[5] Rev. Stats. § 2329.

And in prescribing the method for obtaining patents, both classes seem to have been grouped under the term "valuable deposits."[1]

It may be said that, ordinarily, nothing but metalliferous ores are encountered in veins of rock in place. There are, however, exceptions to this rule. Coal occurs in veins, and in many instances with as pronounced dip and strike as in the auriferous quartz lodes, But lands containing coal are sold under special laws. Marble, borax, onyx gypsum, tale, graphite, rock phosphates, chalk, marls, oilstones, mica, asbestos, fluorspar, sulphur, and mineral paint are non-metallic substances, and occur in veins of rock in place. All of these have commercial value, and in many instances yield as much profit in proportion to the cost of exploitation and extraction as the metalliferous veins. When any of these substances occur in the form of superficial deposits, lands containing them may be appropriated under the placer laws, as they are not veins of rock in place. But suppose they occupy a pronounced inclined position in the mass of the mountain — how are they to be appropriated? If by the placer laws, and if they are on surveyed lands, they must be taken up in some subdivision of the government surveys, and according to the current of land department authority, there must be a discovery on each twenty acres. If the deposit should exist in the form of an ideal vein, there would be but one exposure upon which a discovery could be based, and nothing overlying the dip beyond the vertical plane drawn through the surface boundary of a twenty-acre tract could be located, because discovery would be impossible except by sinking vertical shafts at great expense, with no protection in the meanwhile, in the possession of the tract. We cannot see, since the act of 1872 was passed increasing the number of terms used in the prior law, what right the land department has to insist that veins, or lodes, must be metalliferous in order to be appropriated under the lode laws. The extralateral right may be of as

[1] Rev. Stats. § 2325.

much value to the proprietor of a mica, rock phosphate, or talc vein, as a gold vein. The act itself, in terms, makes no distinction based upon the chemical composition of the deposit. But it groups the classes according to the *form* in which the valuable deposits occur. In our judgment, the land department is no more authorized to insist that veins, or lodes, of mica or graphite in place should be located as placers, than it has to require cinnabar deposits to be located as lodes, independently of the form of their occurrence.[1]

How shall they be appropriated?

The term "deposits" used in section twenty-three hundred and twenty of the Revised Statutes is just as comprehensive as the same term found in section twenty-three hundred and twenty-nine.

The deliberate addition in the statute of the term "val-"uable deposits" to the enumeration of metallic substances, is of itself evidence of the highest character that the intention of the law-makers was to enlarge the scope of the lode laws, and embrace every character of deposit found in veins of rock in place which fall within the meaning of "mineral" in its broadest sense. If the meaning of the term "valuable deposits" was intended to be restricted to such substances as were metallic in their nature, it is fair to presume that congress would have used the term "valu-"able metallic or metalliferous deposits." Gold occurs in veins of rock in place, and when so found the land containing it must be appropriated under the laws applicable to lodes. It is also found in placers, and when so found the land containing it must be appropriated under the laws applicable to placers. Iron ore is found in veins of rock in place. It also occurs in beds and superficial deposits. Where it is found in veins, lands containing it must be appropriated under the lode laws. Where it is not found in veins of rock in place, the proceedings to obtain government title are the same as those prescribed for placers.[2]

[1] Copp's Min. Dec. 47, 60.

[2] *In re* Stewart, 1 Copp's L. O. 34; Com'rs' Letter, Copp's Min. Dec. 235.

Iron is not named in the act of 1872, nor in the Revised Statutes. Prior to the passage of that act, lands containing it were sold the same as agricultural lands. That act, as interpreted by the land department, was comprehensive enough to include iron ore, and thenceforward lands containing such substances were patented only under the mining laws.[1]

The large number of non-metallic substances mentioned in a previous chapter of this work[2] have been held by the land department to fall within the definition of "mineral" and "deposit," as these terms are used in the mining statutes. True, in the cases wherein this rule was established the substances occurred in the form of superficial deposits. But if it is once determined that they are "mineral" or "valuable deposits," they then become subject to classification for the purpose of appropriation, the same as the metallic substances enumerated in the act.

We are not unmindful of the decision of the supreme court of Washington,[3] wherein that court announced that, in its judgment, a mining claim, whether lode or placer, is not established or entitled to be patented under the mineral laws, unless it contains some of the *metals* for which mining works are prosecuted; nor do we overlook the recent ruling of Secretary Hoke Smith, arising out of the same case, wherein the supreme court of Washington is criticised by the distinguished secretary for invading his jurisdiction; but the conclusions reached by the secretary go further than did the offending state court. The secretary says:

"It appears to me so plain that congress only contem-
"plated lands that were valuable for the *more precious*
"*metals* should be patented as lode claims, that it needs no
"argument to convince one of the proposition."[4]

[1] Com'rs' Letter, Copp's Min. Dec. 214.
[2] See, *ante*, § 97.
[3] Wheeler v. Smith, 5 Wash. 704.
[4] Wheeler v. Smith, 23 L. D. 395, 399.

Commissioner McFarland also made a ruling that veins of clay or non-metalliferous substances were not subject to location as lodes, but might be entered as placers.[1]

It is unnecessary for us to here reiterate the conclusions heretofore reached by us[2] as to what is meant by the terms "mineral land" and "valuable deposits," as these terms are used in the mining laws. We think those conclusions were based upon the weight of authority. If they are correct, it follows, in our judgment, that land containing any substance, metallic or non-metallic, which possesses economic value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts, if such substance exists therein in veins, or lodes, *of rock in place* in sufficient quantities as to render the land more valuable for the purpose of removing and marketing the product than for any other purpose, such land must be appropriated under the laws applicable to lodes.

This may be contrary to the popular notion. But if there is any logic in the law, it seems to us that there is but one conclusion to be deduced, and that is the one we have adopted.

Perhaps instances of non-metallic substances occurring in veins of rock in place are rare, and the solution of the question not of great public importance. But it *is* a matter of public importance that the mining laws should be consistently construed, and that arbitrary interpretation should be avoided.

We are of the opinion that the metallic or non-metallic character of the contents of veins, or lodes, of rock in place is entirely immaterial, if they otherwise fulfill the requirements announced in section ninety-eight of this treatise.

[1] Montague v. Dobbs, 9 Copp's L. O. 165.
[2] See, *ante*, § 98.

## ARTICLE II. THE LOCATION AND ITS REQUIREMENTS.

§ 327. "Location" and "mining claim" defined.
§ 328. Acts necessary to be performed to constitute a valid lode location under the Revised Statutes in the absence of supplemental state legislation and local district rules.
§ 329. The requisites of a valid lode location where supplemental state legislation exists.
§ 330. Order in which acts are performed immaterial.
§ 331. Locations made by agents.

**§ 327. "Location" and "mining claim" defined.**— "Location" and "mining claim" do not always mean the same thing. The supreme court of the United States has said that a mining claim is a parcel of land containing precious metal in its soil or rock.[1] A location is the act of appropriating such parcel according to certain established rules. The "location" in time became among the miners synonymous with the "mining claim" originally appropriated. If the miner has only the ground covered by one location, his "mining claim" and his "location" are identical, and the two designations may be indiscriminately used to denote the same thing. But if by purchase he acquires other adjoining "locations," and adds them to his own, then his "mining claim" covers the ground embraced by all the locations.[2]

Judge Hillyer defined a "mining claim" to be that portion of the public mineral lands which the miner, for mining purposes, takes up and holds in accordance with the mining law.[3] The words "mining claim" have no reference to the different stages in the acquisition of the government title. It includes all mines, whether patented or not patented, if acquired under the mining laws.[4]

"Location" is the inception of the miner's title.

[1] The use of the term "precious metal" in this connection is manifestly of no controlling importance. The Revised Statutes enumerate a number of metals which are in no sense "precious."

[2] St. Louis Smelting Co. *v.* Kemp, 104 U. S. 636; McFeters *v.* Pierson, 15 Colo. 201. See, also, N. P. R. R. Co. *v.* Sanders, 49 Fed. 129, 135; *In re* Mackie, 5 L. D. 199.

[3] Mt. Diablo M. & M. Co. *v.* Callison, 5 Saw. 439.

[4] Bewick *v.* Muir, 83 Cal. 368, 372.

A statute of California provides that "every person who "performs labor upon any 'mining claim' has a lien upon "the same."[1] In construing this law, the supreme court of that state has held that the lien extends to the *whole claim*,[2] but by such a "claim" was meant a portion of the public lands to which the right of enjoyment has been asserted under the mining laws; that a Mexican grant containing eleven hundred and nine acres, and another three hundred and fourteen acres, upon which mining was conducted, the whole being known as the Guadalupe mine, was not a "mining claim," and no lien could be filed thereon.[3] Nor is a tract of one hundred and sixty acres of land, held under agricultural patent, upon which parties were engaged in mining, such a "claim" as is lienable.[4] But a consolidation of numerous *mining locations*, held and operated under one ownership, the aggregation being designated by a general name, such as the "Red Cloud mine," is a "mining claim," and the whole *claim* is lienable.[5]

While the law prescribes a limitation as to the size of a *location*, there is no limitation to the number of *claims* one person may hold by purchase.[6] A single location is a "claim," as that term is used in the Revised Statutes.[7] But, as we have heretofore seen, "claim" may embrace a number of locations.

**§ 328. Acts necessary to be performed to constitute a valid lode location, under the Revised Statutes, in the absence of supplemental state legislation and local district rules.**— It is not necessary that any supplemental state legislation or local district regulations should exist. Where they do not exist, a location may be perfected by

[1] Cal. Code Civ. Proc., § 1183.

[2] Helm *v.* Chapman, 66 Cal. 291.

[3] Williams *v.* Santa Clara Min. Ass'n., 66 Cal. 193; U. S. Min. Dec. 136, 142; Week's Min. Lands, 118.

[4] Morse *v.* De Ardo, 107 Cal. 622.

[5] Tredennick *v.* Red Cloud M. Co., 72 Cal. 78, 84. See, also, Malone *v.* Big Flat G. M. Co., 76 Cal. 583.

[6] St. Louis Smelting Co. *v.* Kemp, 104 U. S. 636, 648; Malone *v.* Big Flat G. M. Co., 76 Cal. 578, 583.

following the requirements of the federal law. The acts to be performed in the absence of state or district regulations are few and simple. The requisites of such location are:—

(1) The discovery;

(2) The marking of the location on the ground so that its boundaries can be readily traced.

No notice need be posted[1] nor recorded;[2] no particular kind of marking is required so long as the "boundaries "may be readily traced." The taking and holding of actual possession is wholly unnecessary, and this applies to all classes of locations, wherever made, and whether state legislation, or local rules, exist or not. Actual possession is no more necessary for the protection of title acquired by a valid mining location than it is for any other grant from the United States.[3] Such a discovery having been made as will satisfy the law,[4] the marking of the location on the ground including the place of his discovery completes the location and clothes the locator with the complete possessory title. No development or discovery work is required. In fact, no labor need be performed nor improvements made until within the year commencing on the first day of January succeeding the date of the location.[5]

**§ 329. The requisites of a valid lode location under the Revised Statutes where supplemental state legislation exists.**—Most of the precious-metal-bearing states have availed themselves of the privilege of supplementing federal legislation, and have adopted systems more or less comprehensive. We have heretofore given an outline of the general scope and character of this legislation,[6] from which it will be readily observed that in some of the states certain requirements exist which are not found in others. A location made with all the formalities required by the

[1] See, *post*, art. v.
[2] See, *post*, art. ix.
[3] Belk v. Meagher, 104 U. S. 279, 283.
[4] See, *post*, § 336.
[5] Amend. to § 2324 Rev. Stats. Jan. 22, 1880, 21 Stats. at Large, 61.
[6] See, *ante*, §§ 248-252.

federal statute only, might be valid in California, but would not be in Colorado. As state laws form an important element of the federal system in their respective jurisdictions, it is necessary to a satisfactory presentation of the subject under consideration to give them their proper place, distributed under the several appropriate heads. We think the object may be intelligently accomplished by selecting as a type of such state legislation the local code which is the most comprehensive, and note the differences between that code and the existing laws of other states and territories. In this way we shall be enabled to present, under appropriate subdivisions approaching methodical arrangement, the rule in each state or territory touching the subject immediately under consideration, in connection with the treatment of the requirements of the congressional laws. For this purpose we select the state of Colorado, and will divide our subject, for purpose of treatment, on the basis of the Colorado mining laws, noting wherein the requirements of other states are similar, or are different.

Under the laws of Colorado the following acts are required to complete a valid lode location:—

(1) The discovery;

(2) The sinking of a discovery shaft of certain prescribed dimensions, or its equivalent;

(3) The posting of a notice;

(4) The marking of surface boundaries in a certain specified manner;

(5) The making of a location certificate;

(6) The recording of such certificate.[1]

A substantial compliance with the requirements of the laws, federal and state, as well as local rules, where they exist and are not repugnant to state or federal legislation, is a condition precedent to the completion of a valid location.[2]

[1] Strepey v. Stark, 7 Colo. 614.

[2] Upton v. Larkin, 5 Mont. 600; Garfield M. & M. Co. v. Hammer, 6 Mont. 53; Strepey v. Stark, 7 Colo. 614; McKinstry v. Clark, 4 Mont. 370, 395; Noyes v. Black, 4 Mont. 527; Gleeson v. Martin White M. Co., 13 Nev. 443; Sweet v. Webber, 7 Colo. 443; Lalande v. McDonald, 2 Idaho, 283.

Mere possession without complying with the law confers no rights.[1]

In the nature of things, we cannot deal with local district regulations in detail. We have heretofore outlined our views as to their legitimate scope and the extent to which they may be operative.[2] Where they exist and are in harmony with state and federal legislation they are to be considered and construed in the light of the general principles, which will be enunciated in reference to state legislation in the succeeding articles.

**§ 330. Order in which acts are performed immaterial—Time when non-essential.**—The order in which the several acts required by law are to be performed is non-essential, in the absence of intervening rights.[3]

The failure to perform any of the given acts within the time limited by the laws or local rules may subject the ground to relocation; but if the requirements are complied with prior to the acquisition of any intervening rights, no one has a right to complain. Of course, the locator delays at his peril; but if the appropriation becomes complete before any one else initiates a right, the antecedent delay is condoned, and the right becomes perfected.[4] But unless completed the attempted location is of no avail as against intervening rights,[5] assuming, of course, that the subsequent entry for the purpose of location is peaceable and in good faith.[6]

[1] See, *ante*, §§ 216-219; Horswell v. Ruiz, 67 Cal. 111; Morenhaut v. Wilson, 52 Cal. 263; Chapman v. Toy Long, 4 Saw. 28; Belk v. Meagher, 104 U. S. 279, 284; Jordan v. Duke, 36 Pac. 896.

[2] See, *ante*, §§ 208-275.

[3] Golden Terra v. Mahler, 4 Morr. Min. Rep. 390; Thompson v. Spray, 72 Cal. 528; Gregory v. Pershbaker, 73 Cal. 109.

[4] McGinnis v. Egbert, 8 Colo. 41; North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 314; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 115; Omar v. Soper, 11 Colo. 380; McEvoy v. Hyman, 25 Fed. 596; Preston v. Hunter, 67 Fed. 998, 999; Faxon v. Barnard, 4 Fed. 702; Strepey v. Stark, 7 Colo. 614; Craig v. Thompson, 10 Colo. 517.

[5] Pelican & Dives v. Snodgrass, 9 Colo. 339; Hauswirth v. Butcher, 4 Mont. 299; Upton v. Larkin, 5 Mont. 600.

[6] See, *ante*, § 219.

**§ 331. Locations made by agents.** — There is nothing in the Revised Statutes that prohibits one from initiating a location of a mining claim by an agent.[1] As the title comes from appropriation made in accordance with the law, and as it is not necessary that a party should personally act in taking up a claim, or in doing the acts required to give evidence of the appropriation, or to perfect the appropriation, it would seem, at least in the absence of a local rule or state statute to the contrary, that such acts are valid if done by one for another, or with his assent.[2] A location may be made without the knowledge of the principal, if there is a local rule authorizing it; otherwise, there may be antecedent authority or subsequent ratification.[3]

A party in whose name a mining claim is located is presumed to have assented to the location,[4] upon the principle that a party is presumed to assent to a deed or other act manifestly for his benefit.[5]

One of several co-locators of a mining claim may cause a notice of a mining claim to be recorded in the name of himself and others not present, and the location will be valid.[6]

When a location is made by one in the name of others, the persons in whose names it is made become vested with the legal title to the claim.[7] The estate so acquired cannot be divested by making a second location leaving out the names of the original locators, so long as the first location remains valid and subsisting.[8] If, however, they have

[1] Schultz v. Keeler, 2 Idaho, 305.

[2] Gore v. McBrayer, 18 Cal. 582, 587.

[3] Thompson v. Spray, 72 Cal. 528; Murley v. Ennis, 2 Colo. 300; Morton v. Solambo C. M. Co., 26 Cal. 527, 534; Hirbour v. Roeding, 3 Mont. 13; Welland v. Huber, 8 Nev. 203; Moritz v. Lavelle, 77 Cal. 10; Book v. Justice M. Co., 58 Fed. 106.

[4] Kramer v. Settle, 1 Idaho, 485; Van Valkenburg v. Huff, 1 Nev. 142, 149; Rush v. French (Ariz.), 25 Pac. 816.

[5] Gore v. McBrayer, 18 Cal. 582, 588.

[6] Kramer v. Settle, 1 Idaho, 485; Dunlap v. Pattison (Idaho), 42 Pac. 504.

[7] Van Valkenburgh v. Huff, 1 Nev. 142, 149; Moore v. Hamerstag, 109 Cal. 122.

[8] Van Valkenburgh v. Huff, 1 Nev. 115, 149; Thompson v. Spray, 72 Cal. 528; Gore v. McBrayer, 18 Cal. 582; Morton v. Solambo C. M. Co., 26 Cal. 533.

abandoned or forfeited their rights by failure to perform the annual labor required by law,[1] or by failure to comply with the conditions of the agreement under which the location was originally made,[2] a relocation may be made by the original co-locator or agent in his own name.

## Article III. The Discovery.

§ 335. Discovery the source of the miner's title.
§ 336. What constitutes a valid discovery.
§ 337. Where such discovery must be made.
§ 338. The effect of the loss of discovery upon the remainder of the location.
§ 339. Extent of locator's rights after discovery and prior to completion of location.

**§ 335. Discovery the source of the miner's title.**—Discovery in all ages and all countries has been regarded as conferring rights or claims to reward. Gamboa, who represented the general thought of his age on this subject, was of the opinion that the discoverer of mines was even more worthy of reward than the inventor of a useful art. Hence, in the mining laws of all civilized countries the great consideration for granting mines to individuals is *discovery*. "Rewards so bestowed," says Gamboa, "besides "being a proper return for the labor and anxiety of the "discoverers, have the further effect of stimulating others "to search for veins and mines, on which the general pros- "perity of the state depends."[3]

While in some of the older countries of Europe, as in France and Belgium, the nature of the reward to the discoverer was something less than an absolute preference in the right of enjoyment, yet in Spain and Spanish-America there was guaranteed to him "an absolute right of property "in the mine which he discovers if he will take the proper "measures to denounce it and have it duly registered. No "one can have any preference over him, and he loses the

[1] Saunders v. Mackey, 5 Mont. 523; Stang v. Ryan, 46 Cal. 33.
[2] Murley v. Ennis, 2 Colo. 300.
[3] Halleck's De Fooz on the Law of Mines, p. xxvi.

"rights which result from his discovery only through his "own neglect to make it publicly known in the manner in "which the law directs."[1]

This wise and liberal policy which pervaded the Mexican system at the time of the conquest and the acquisition of California by the United States became the recognized basis of mining rights and privileges as they were held and enjoyed under the local rules and regulations established by the miners occupying the public mineral lands within the newly acquired territory, and in all subsequent legislation, whether congressional, state, or territorial, discovery is recognized as the primary source of title to mining claims.[2]

As was said by Halleck in his introduction to De Fooz on the "Law of Mines,"[3] "*Discovery* is made the source of "title, and *development*, or working, the condition of the "continuance of that act."

Whatever may be the rule governing the acquisition of title to "claims usually called placers, including all forms "of deposit, excepting veins of quartz or other rock in "place," of which we treat in a subsequent chapter, there can be no valid appropriation of a lode claim unless there has been an antecedent discovery. "No location of a min-"ing claim shall be made until the discovery of the vein "or lode within the limits of the claim located."[4]

A location can rest only upon an actual discovery of the vein or lode.[5] Such discovery must precede the location,[6] or be in advance of intervening rights.[7]

[1] Halleck's De Fooz on the Law of Mines, p. xxvii.

[2] Erhardt v. Boaro, 113 U. S. 527.

[3] San Francisco, 1860. [4] Rev. Stats. § 2320.

[5] King v. Amy & Silversmith M. Co., 152 U. S. 222.

[6] Hauswirth v. Butcher, 4 Mont. 299; Upton v. Larkin, 7 Mont. 449; North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 309; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 109; Burke v. McDonald, 2 Idaho, 646; Stinchfield v. Gillis, 96 Cal. 33; McLaughlin v. Thompson, 2 Colo. App. 135; Waterloo M. Co. v. Doe, 56 Fed. 685; Etling v. Potter, 17 L. D. 424; N. P. R. R. Co. v. Marshall, 17 L. D. 545.

[7] Patchen v. Keeley, 19 Nev. 404; North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 309; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 109; Golden Terra v. Mahler, 4 Morr. Min. Rep. 390; Wright v. Taber, 2 L. D. 738, 743; *In re* Mitchell, 2 L. D. 752.

Priority of discovery gives priority of right against naked location and possession, without discovery.[1]

It has been said that this requirement as to antecedent discovery is made for the benefit of the United States, so that land cannot be acquired under this law until its character is first ascertained to be mineral.[2]

When it is considered that lands of this character are only sold in limited quantities, and for a price in excess of that exacted for those agricultural in character, the statement seems illogical. It would seem that the object of the law is manifestly to encourage the exploration of the public domain and stimulate the development of its mineral resources, reserving the reward of enjoyment to him who first makes a *bona fide* discovery. That the statute should be construed in this light seems apparent, when we consider the general policy of the government with reference to its mineral lands.

It will be necessary for us to determine:—

(1) What constitutes a valid discovery;

(2) Where such discovery must be made;

(3) The effect of the loss of discovery upon the remainder of the location.

(4) The extent of a locator's rights after discovery and prior to completion of location.

§ 336. **What constitutes a valid discovery.**—In determining what constitutes such a discovery as will satisfy the law and form the basis of a valid mining location, we find, as in the case of the definition of the terms "lode" or "vein," that the tendency of the courts is toward marked liberality of construction where a question arises between two miners who have located claims upon the same lode, or within the same surface boundaries, and toward strict rules of interpretation when the miner asserts rights in property which either *prima facie* belongs

[1] Crossman v. Pendery, 8 Fed. 693.
[2] Upton v. Larkin, 7 Mont. 449.

to some one else, or is claimed under laws other than those providing for the disposition of mineral lands, in which latter case the *relative* value of the tract is a matter directly in issue. The reason for this is obvious. In the case where two miners assert rights based upon separate alleged discoveries on the same vein, neither is hampered with presumptions arising from a prior grant of the tract, to overcome which strict proof is required. In applying a liberal rule to one class of cases and a rigid rule to another, the courts justify their action upon the theory, that the object of each section of the Revised Statutes, and the whole policy of the entire law, should not be overlooked.

The particular character of each case must be kept continually in view. "The fact is," said the circuit court of appeals, eighth circuit, in a recent case, "that there is a "substantial difference in the object and policy of the law "between the cases where the determination of the ques- "tion as to what constitutes the discovery of a vein, or "lode, between different claimants of the same lode under "section twenty-three hundred and twenty of the Revised "Statutes on the one hand, and a 'lode known to exist' "within the limits of a placer claim at the time the appli- "cation is made for a patent therefor under section twenty- "three hundred and thirty-three, in the other."[1]

In the first class of cases, it was never intended to "weigh scales" to determine the value of the mineral found. In the latter class, the rule is different. Slight evidence of the existence of a lode might satisfy the demands of the law upon the question of discovery as the basis of location, when clear and convincing proof would be required to establish the existence of a "known vein" within a prior townsite or placer patent.

The supreme court of the United States clearly recognizes the distinction between the two classes of cases, by intimating that the land officers might, on a *prima facie* case, decide the right of an applicant to a vein or lode, and

[1] Migeon v. Mont. Cent. Ry., 77 Fed. 249, 255.

issue a patent therefor, upon a much less degree of proof than would be required where a conflict arises between a prior placer and subsequent lode patent.[1]

Even in the same line of cases, that court has at one time approved a liberal definition of a lode "known to "exist" within a placer;[2] and at another, insisted upon adhering to strict rules of construction,[3] and ultimately announcing its conclusion, that after all it is a question for the jury; that it cannot be said as a matter of law, in advance, how much gold or silver must be found in a vein before it will justify exploitation and properly be called a "known vein."[4]

Judge De Witt, of the supreme court of Montana, in a dissenting opinion filed in the case of Shreve *v.* Copper Bell M. Co.,[5] and speaking for the court in the later case of Brownfield *v.* Bier,[6] reviewed all the adjudicated law upon the subject of what constitutes a "lode," as well as a "discovery," and clearly showed the reasons for the distinctions drawn between the two classes of cases.

To hold that, in order to constitute a discovery as the basis of the location, it must be demonstrated that the discovered deposit will, when worked, yield a profit, or that the lands containing it are, in the condition in which they are discovered, more valuable for mining than for any other purpose, would be to defeat the object and policy of the law.

Most, if not all, of the decisions arising out of controversies between lode claimants on the one hand and the owners of prior patented placers on the other, or between the holder of title under patented townsites and parties asserting rights under the mining laws, insist that, to fulfill the designation of known lodes, or veins, which are reserved out of that class of patents, such lodes, or veins,

[1] Iron S. M. Co. *v.* Campbell, 135 U. S. 286.
[2] Iron S. M. Co. *v.* Cheesman, 116 U. S. 529.
[3] United States *v.* Iron S. M. Co., 128 U. S. 673.
[4] Iron S. M. Co. *v.* Mike & Starr Co., 143 U. S. 394, 405.
[5] 11 Mont. 309. [6] 15 Mont. 403.

must be clearly ascertained and be of such extent as to render the land more valuable on that account and *justify* their exploitation.[1]

No court has ever held, that in order to entitle one to locate a mining claim, ore of commercial value, in either quantity or quality, must first be discovered. Such a theory would make most mining locations impossible. "Logically carried out," says Judge Hawley,[2] "it would "prohibit a miner from making any valid location until "he had fully demonstrated that the vein, or lode, of quartz "or other rock in place bearing gold or silver which he "had discovered, would pay all the expenses of removing, "extracting, crushing, and reducing the ore, and leave a "profit to the owner. If this view should be sustained, "it would lead to absurd, injurious, and unjust results."

It has been frequently said, that a valid location may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following it, in expectation of finding ore, and such a location may be made of a ledge deep in the ground and appearing at the surface, not in the shape of ore, but in vein matter only.[3] But an *expectation* is something more than a *hope*. A location made in the "hope of finding some ore in it at some time" is worthless,[4] unless the hope should be realized before some one else makes a discovery. While the courts permit a liberal construction, the liberality must be exercised within reasonable and common sense limits. Locations are not permitted upon a conjectural or imaginary existence of a vein.[5]

There must be something beyond a mere guess on the part of the miner to authorize him to make a location

[1] United States *v.* Iron S. M. Co., 128 U. S. 673; Deffeback *v.* Hawke, 115 U. S. 392; Davis *v.* Weibbold, 139 U. S. 507; Dower *v.* Richards, 151 U. S. 658. See, *ante*, § 176.

[2] Book *v.* Justice M. Co., 58 Fed. 106, 124.

[3] Burke *v.* McDonald, 2 Idaho, 1022; Harrington *v.* Chambers, 3 Utah, 94; Mont. Cent. Ry. *v.* Migeon, 68 Fed. 811.

[4] Waterloo M. Co. *v.* Doe, 56 Fed. 685.

[5] King *v.* Amy & Silversmith M. Co., 152 U. S. 222, 227.

which will exclude others from the ground, such as the discovery of the presence of the precious metals in it, or in such proximity to it as to justify a reasonable belief in their existence.[1]

Every crevice or seam in the rock, even if filled with vein matter, does not necessarily constitute a vein.[2] But something must be found to distinguish it from the surrounding mass. "While the contents of ore-bearing veins "widely differ," said the supreme court of Idaho, "there "is that indescribable peculiarity in the ledge matter, the "matrix of all ledges, by which the experienced miner "easily recognizes his vein when discovered."[3]

Judge Hallett was of the opinion that the discovery must be of vein matter *in place* in the form of a vein, or lode.[4]

Discovery of detached pieces of quartz, mere bunches, or "float," is not sufficient.[5]

Neither the size nor richness of the vein is material.[6] Any *genuine* discovery is sufficient.[7]

While the courts may be unable to define with sufficient accuracy for all purposes what is necessary to constitute a discovery, they may have no difficulty in discriminating between the genuine and the counterfeit, the real and the sham.

The land department, whose function it is to determine in all applications for patent what constitutes a discovery, has uniformily adopted a liberal rule of construction. In the judgment of that tribunal, a mineral discovery sufficient to warrant the location of a mining claim may be regarded as proven when mineral is found and the evidence shows that a person of ordinary prudence would be justified

[1] Erhardt v. Boaro, 113 U. S. 527, 536.

[2] Burke v. McDonald, 2 Idaho, 646; Mont. Cent. Ry. v. Migeon, 68 Fed. 811.

[3] Burke v. McDonald, 2 Idaho, 646.

[4] Van Zandt v. Argentine M. Co., 8 Fed. 725, 727.

[5] Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 107; Book v. Justice M. Co., 58 Fed. 106.

[6] See, *ante*, § 294, p. 376.

[7] O'Donnell v. Glenn, 8 Mont. 248, 252.

in a further expenditure of his labor and means with a reasonable prospect of success.[1]

The value of a mineral deposit is a matter into which the government does not inquire as between two mineral claimants. Inquiries of this character are confined to controversies between mineral and agricultural claimants.[2]

There is a material difference between a discoverer being *willing* to spend his time and money in exploiting the ground and being *justified* in doing so. The former is a question to be answered by the miner himself; the latter would present a question for expert testimony, and determination by a jury.[3]

But it would seem that the question should not be left to the arbitrary will of the locator. Willingness, unless evidenced by actual exploitation, would be a mere mental state which could not be satisfactorily proved. The facts which are within the observation of the discoverer, and which induce him to locate, should be such as would *justify* a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property.[4]

Judge Hawley's definition seems to answer all practical purposes:—

"When the locator finds rock in place containing min-
" eral, he has made a discovery within the meaning of the
" statute, whether the earth or rock is rich or poor, whether
" it assays high or low. It is the finding of the mineral in
" the rock in place, as distinguished from float rock, that
" constitutes the discovery and warrants the prospector in
" making a location of a mining claim."[5]

[1] Castle v. Womble, 19 L. D. 455.

[2] Tam v. Story, 21 L. D. 440.

[3] Clarke v. McDonald, 2 Idaho, 1022.

[4] McShane v. Kenkle (Mont.), 44 Pac. 979.

[5] Book v. Justice M. Co., 58 Fed. 106, 120.

The question of "discovery" will be found discussed to a limited extent in the following cases, not heretofore cited: Southern Cross M. Co. v. Europa M. Co., 15 Nev. 383, 385; Territory v. McKay, 8 Mont. 168; Davidson v. Bordeaux, 15 Mont. 245; Golden Terra M. Co. v. Mahler, 4 Morr. Min. Rep. 390; United States v. King, 9 Mont. 75.

**§ 337. Where such discovery must be made.**—It is almost unnecessary to repeat what we have heretofore said, that title to a mining claim can only be initiated by discovery upon the unappropriated lands of the government. No rights are acquired by an entry within the surface lines of patented lands,[1] or other lands which are withdrawn from the body of the public domain.[2]

The discovery must be made within the limits of the location as it is ultimately marked upon the ground.[3]

A location based upon a discovery made within the limits of another existing and valid location is void.[4]

That a vein discovered in another location *may* penetrate the ground sought to be located, where there is no outcrop in the latter, and no physical evidence of the existence of the vein, is not proof of discovery within the limits.[5]

Any portion of the apex on the course, or strike, of the vein found within the limits of a claim is sufficient discovery to entitle the locator to obtain title.[6]

But a discovery of mineral must be treated as an entirety and as the proper basis of but one location. Therefore, it is not susceptible of subdivision for the purpose of two locations having a common end line that bisects the discovery shaft.[7]

[1] Moyle *v.* Bullene, 7 Colo. App. 308; Golden Terra M. Co. *v.* Mahler, 4 Morr. Min. Rep. 390.

[2] Michael *v.* Mills, 22 Colo. 439; Armstrong *v.* Lower, 6 Colo. 393. See, *ante*, § 322; Branagan *v.* Dulaney, 2 L. D. 744; Winter Lode, 22 L. D. 362.

[3] Gwillim *v.* Donnellan, 115 U. S. 45, 50; Larkin *v.* Upton, 144 U. S. 19, 23; Upton *v.* Larkin, 7 Mont. 449; *Id.* 5 Mont. 600; Cheesman *v.* Shreeve, 40 Fed. 787; Michael *v.* Mills, 22 Colo. 439; Girard *v.* Carson, 22 Colo. 345.

[4] Branagan *v.* Dulaney, 2 L. D. 744; Little Pittsburg Cons. Co. *v.* Amie M. Co., 17 Fed. 57; *In re* Williams, 20 L. D. 458.

[5] Michael *v.* Mills, 22 Colo. 439; Silver Jennie Lode, 7 L. D. 6.

[6] Larkin *v.* Upton, 144 U. S. 19, 23; Upton *v.* Larkin, 5 Mont. 600; *Id.* 7 Mont. 449; Golden Terra M. Co. *v.* Mahler, 4 Morr. Min. Rep. 390.

[7] Poplar Creek Cons. Quartz Mine, 16 L. D. 1, 2; see, also, McKinstry *v.* Clark, 4 Mont. 370; Morr. Mining Rights, 8th ed. 35.

In a case arising under the laws of New Mexico as they existed in 1871, a locator divided his claim into three parts, and conveyed two of them to other parties. There was but one discovery shaft. The supreme court held, that the severance of title as to the two parts conveyed

Yet, where a discovery shaft sunk by a junior locator bisects a common boundary between him and a prior appropriator, and a portion of apex is found disclosed within the limits of the junior location, such a discovery is sufficient upon which to base the subsequent location.[1]

**§ 338. The effect of the loss of discovery upon the remainder of the location.**— As the discovered lode must lie within the limits of the location which is made by reason of it, if the title to the discovery fails, so must the location which rests upon it.

If there is but one point of discovery, and all workings are done at that point, a patent issued to another claimant, covering the place of working, restores the remainder of the ground to the public domain.[2]

In conformity with this rule, the land department refuses to issue a patent upon an application wherein the land upon which are situated the discovery shaft and improvements is expressly excepted therefrom, and the proof fails to show the discovery or existence of the mineral on the claim as applied for.[3]

A lode claim that is intersected by a prior location[4] or a patented millsite[5] must be confined to that part which contains a discovery shaft and improvements. It cannot be allowed to include ground not contiguous to that containing the discovery.

The exclusion of that portion of the claim which contains the discovery renders it incumbent upon the applicant

rendered a separate shaft on each part necessary. The case as reported does not state whether, or not, the discovery shaft had been sunk prior to the conveyance. Zeckendorf v. Hutchison, 1 New Mex. 476; 9 Morr. Min. Rep. 483.

[1] Larkin v. Upton, 144 U. S. 19, 23.

[2] Gwillim v. Donnellan, 115 U. S. 45, 50; Miller v. Girard, 3 Colo. Ct. App. 278; Girard v. Carson, 22 Colo. 345.

[3] *In re* J. G. Kennedy, 10 Copp's L. O. 150; Antediluvian Lode, 8 L. D. 602; Independence Lode, 9 L. D. 571; Lone Dane Lode, 10 L. D. 53; *In re* Thomas J. Laney, 9 L. D. 93.

[4] Silver Queen Lode, 16 L. D. 186.

[5] Andromeda Lode, 13 L. D. 146.

to show the existence of mineral within the remainder of the claim prior to the allowance of entry therefor.[1]

Such showing will authorize the entry of such remainder, as in such case it is not restored to the public domain.[2]

And the applicant may be permitted, after entry at the local land office and prior to patent, to establish these facts by supplemental proof.[3]

Judge Hallett has ruled, that a locator may sell or otherwise dispose of that portion of his location which covers his discovery and workings without affecting his right to the remainder.[4]

In the case in which this rule was announced, the sale was evidently brought about by the pendency of adverse proceedings. The decision was made before that of the supreme court of the United States in Gwillim *v.* Donnellan, heretofore cited.

The supreme court of California has attempted to qualify the rule announced by the supreme court of the United States in Gwillim *v.* Donnellan, and which has been followed uniformly by the land department, in a case where the discovery and workings were embraced within an agricultural patent, the mining locator subsequently acquiring the agricultural title.[5]

The court evidently strained the law to avoid sanctioning what it deemed an injustice. Work done on the patented agricultural land, if it had a manifest tendency to develop that part of the location excluded from the agricultural entry, would be considered in law as the equivalent of work done within the limits of the claim. But a discovery, without which no location possesses any potential force, and the only thing which gives it vitality, once passing by patent to another, can no more be used as the basis of acquiring title to unpatented lands, although

[1] Cayuga Lode, 5 L. D. 703.
[2] *In re* Hagland on review, 1 L. D. 593.
[3] Spur Lode, 4 L. D. 160.
[4] Little Pittsburg Cons. M. Co. *v.* Amie M. Co., 17 Fed. 57.
[5] Richard *v.* Wolfling, 98 Cal. 195.

held by the same owner, than can a discovery in one mining claim be used as the basis of locating another. Certainly, no patent could ever be obtained to the remainder of the mining claim upon the facts shown in the California case, unless other discoveries were made within such remainder. It is manifest, that the ruling of Judge Hallett and the decision of the supreme court of California are opposed to the weight of authority. Loss of discovery results in loss of location, unless a new discovery is made within the excluded ground prior to the inception of intervening rights. Such new discovery will save the remainder from reverting to the body of the public domain.

§ 339. **Extent of a locator's rights after discovery and prior to completion of location.**—When a prospector has made such a discovery as will satisfy the law and form the basis of the location, he is allowed, in most of the states and territories, a specified time in which to perform the remaining acts which are requisite to perfect the location. As to whether, in the absence of such legislation and district rules, the discoverer has any appreciable time within which to mark his boundaries and complete his location, is a subject upon which the courts differ. The supreme court of California holds, that while if the locator be on the ground actually engaged in making the location, another could not locate over him, yet in the absence of local rules authorizing it, no time is allowed to perfect the location; that until it is actually marked on the ground, the claim is not appropriated so as to prevent its acquisition by a subsequent locator.[1]

The circuit court of appeals for the eighth circuit was called upon to determine the question upon the same evidence and the same state of facts arising in one of the California cases,[2] and that tribunal declined to accept the rule announced by the California courts. The court of

[1] Newbill v. Thurston, 65 Cal. 419; Pharis v. Muldoon, 75 Cal. 284.
[2] Newbill v. Thurston, 65 Cal. 419.

appeals held, that after a discovery and posting a notice thereof, the locator had a reasonable time in which to complete the location; that what was a reasonable time would depend upon the facts of each particular case; that evidence of customs prevalent in other localities on this subject might be received for the purpose of aiding the court in its determination, and that, under the circumstances of that case, twenty days was a reasonable time.[1]

The doctrine announced by the circuit court of appeals is in consonance with the views expressed by the supreme courts of Nevada[2] and Idaho,[3] and accords with the spirit of the law as interpreted by the supreme court of Colorado,[4] and the supreme court of the United States.[5]

To hold that the miner, as soon as he discovers a lode, must immediately stake the territory which he is entitled to claim, in order to protect it from invasion and claims of other persons, would be an unreasonable, if not impossible, requirement.[6]

As to what is a reasonable time for the completion of the location, depends upon the nature of the ground to be located, the means of properly marking, and the ability to properly ascertain the dimensions and course, or strike, of the vein.[7]

As so much depends upon the locator determining the position of his vein in the earth and the course of its apex, and the consequences of a failure to make his location and establish his end lines, as the law contemplates, being accompanied with such serious results, it would seem that congress never intended to compel the discoverer to

[1] Doe *v.* Waterloo M. Co., 70 Fed. 455; affirming decision of Judge Ross, Doe *v.* Waterloo, 55 Fed. 11.

[2] Golden Fleece M. Co. *v.* Cable Cons. M. Co., 12 Nev. 312, 329; Gleeson *v.* Martin White M. Co., 13 Nev. 442; testimony of Chief Justice Beatty, Rep. Pub. Land Com. 399.

[3] Burke *v.* McDonald, 2 Idaho, 646.

[4] Murley *v.* Ennis, 2 Colo. 300; Patterson *v.* Hitchcock, 3 Colo. 533; Marshall *v.* Harney Peak Tin M. Co., 1 S. Dak. 350.

[5] Erhardt *v.* Boaro, 113 U. S. 527.

[6] Omar *v.* Soper, 11 Colo. 380.

[7] Doe *v.* Waterloo M. Co., 70 Fed. 455, 460.

immediately proceed at his peril with the marking of his boundaries. The posting of a preliminary notice, though not specially authorized by statute, should be sufficient to protect the discoverer for a reasonable time, at least, within which he might determine approximately the all-important facts upon which the value of his property to a great degree depends.

As to what is a reasonable time, is a question of law.[1]

In states or localities where the laws or district regulations fix a given time within which certain acts subsequent to the discovery are required to be performed, the posting of a preliminary notice specifying the name of the lode, date of discovery, and the intention to locate the claim is equivalent to actual possession.[2]

Whenever preliminary work is required to define and describe the claim located, the first discoverer must be protected in the possession of the claim until sufficient excavations and development can be made so as to disclose whether a vein or deposit of such richness exists as to justify the work to extract the metal. Otherwise, the whole purpose of allowing the free exploration of the public lands for the precious metals would in such cases be defeated, and force and violence in the struggle for possession, instead of previous discovery, would determine the rights of the claimants.[3]

The effect of this rule is practically to reserve, after the discovery and during the statutory period allowed for perfecting the claim, a surface area circular in form, the radius of which may be the length claimed on the discovered lode, within which area the location may be ultimately made. Such is the manifest intent of the rule. This was the custom under the act of 1866. The miner posted his notice, claiming so many linear feet on the vein; and under the law as then interpreted, prior to fixing the *situs* of his lode,

[1] Patterson v. Hitchcock, 3 Colo. 533, 540.

[2] Erhardt v. Boaro, 8 Fed. 692.

[3] Erhardt v. Boaro, 113 U. S. 527, 535; Marshall v. Harney Peak Tin M. Co., 1 S. Dak. 350; Omar v. Soper, 11 Colo. 380.

by filing a diagram for patent purposes, he might follow the vein wheresoever it ran to the length claimed.[1]

When he filed his diagram and inclosed his lode within surface boundaries, his right to pursue the vein on its course ceased when it passed out of his surface lines.[2]

Under the existing state of the law, the location must be marked within a certain period of time, whereupon the locator's rights become definitely fixed and confined, except as to the extralateral right, to his marked boundaries. Until this is done, however, and within the prescribed periods, his right to be protected to the extent heretofore stated is well settled.

If he fails to comply with the law within the statutory period, his rights would thereafter be no greater than the rights of one in possession without discovery. He might protect his *pedis possessio* against forcible intrusion and hold it as against one having no higher right;[3] but he would be a mere occupant without color of title, and his possession must yield to any one possessing the necessary qualifications, who enters peaceably and in good faith for the purpose of perfecting a valid location.[4]

## Article IV. The Discovery Shaft and Its Equivalent.

§ 343. State legislation requiring development work as prerequisite to completion of location.
§ 344. Object of requirement as to development work.
§ 345. Relationship of the discovery to the discovery shaft.
§ 346. Extent of development work.

**§ 343. State legislation requiring development work as prerequisite to completion of location.**—Of the precious-metal-bearing states, neither California, Oregon, Utah, Nevada, nor Washington have thus far enacted any laws requiring work of any character to be performed as a

[1] Johnson v. Parks, 10 Cal. 447. See, *ante*, § 58.
[2] See, *ante*, § 60.
[3] Crossman v. Pendery, 8 Fed. 693; Field v. Grey (Ariz.), 25 Pac. 793.
[4] See, *ante*, "Occupancy without color of title," §§ 216–219.

prerequisite to the completion of a location;[1] therefore, as to such states this article is inapplicable.

The states and territories hereinafter enumerated, however, have supplemented federal legislation by requiring that certain preliminary development work in the nature of a discovery shaft, or its equivalent, shall be performed as a condition precedent to the completion of a lode location. As these state statutes are frequently important factors necessary to be considered in construing and applying decisions of the state courts, we will present an outline of the provisions found in the several states and territories upon this subject, taking the state of Colorado as a basis of comparison.

*Colorado.*—The laws of Colorado require the filing for record of a location certificate within three months from the date of discovery.[2] Prior to the expiration of this time, and within sixty days from the time of uncovering or disclosing the lode,[3] the discoverer must sink a discovery shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of the shaft at the surface, or deeper, if necessary, to show a well-defined crevice.[4] Any open cut, crosscut, or tunnel which shall cut a lode at the depth of ten feet below the surface, or an adit of at least ten feet in, along the lode from the point where the lode may be in any manner discovered, is equivalent to the discovery shaft.[5]

*Arizona.*—Within ninety days from the date of discovering the lode and posting notice thereon,[6] a discovery shaft must be sunk within the premises claimed to a depth of at least ten feet from the lowest rim of such shaft at the surface, and deeper, if necessary, until there is shown by such

[1] The legislatures of most of the mining states are in session as this treatise goes to the press. Any modification in the existing state laws which may take effect before the completion of the work, will be found in its appropriate place in the appendix.

[2] Mills' Annot. Stats., § 3150.

[3] *Id.*, § 3155.

[4] *Id.*, § 3152.

[5] Mills' Annot. Stats., § 3154.

[6] Laws of 1895, p. 54, § 6.

work a lode deposit or mineral in place.[1] Any open cut, crosscut, adit, or tunnel which shall be made as above provided for, as a part of the location, and which shall be equal in amount of work to a shaft ten feet deep, and four feet wide by six feet long, and which shall cut a lode or mineral in place at the depth of ten feet from the surface, is equivalent as discovery work to a shaft sunk from the surface.[2]

*Idaho.*—The locator must complete his location by marking his boundaries within three days from the date of discovery.[3] Within sixty days from the date of location, the locator must sink a shaft upon the lode to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, and of not less than sixteen square feet in area. Any excavation which shall cut such vein ten feet from the lowest part of the rim of such shaft, and which shall measure one hundred and sixty cubic feet in extent, shall be considered a compliance with this provision.[4]

*Montana.*—After discovery, the initial step in the series of acts culminating in a completed location is the posting of a notice.[5] Before the expiration of ninety days from the date of such posting, the locator must sink a discovery shaft to the same depth as required by the laws of Colorado, except that to the words "well-defined crevice" is added "or valuable deposit." The equivalent of such shaft is the same as in Colorado.[6]

*New Mexico.*—Within ninety days from the time of taking possession,[7] and prior to recording the notice of location

[1] Laws of 1895, p. 53, § 3.
[2] *Id.*, p. 53, § 5.
[3] Rev. Stats., § 3101 as amended; Laws of 1895, p. 26.
[4] Stats. 1895, p. 27, § 3.
[5] Pol. Code, § 3610.
[6] *Id.*, § 3611.
[7] There is nothing in the statutes of New Mexico fixing the time within which *possession* is to be taken, or defining what constitutes such possession. A notice is required to be posted, and within three months to be recorded. The posting of this notice is probably "taking possession."

(three months after posting), the locator must sink a discovery shaft upon the claim to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or must drive a tunnel, opencut, or adit upon such claim, exposing mineral in place at least ten feet below the surface.[1]

*North Dakota.*—The locator must record a location certificate within sixty days from the date of discovery,[2] and before filing such certificate for record, must sink a discovery shaft on the claim sufficient to show a well-defined mineral vein or lode.[3] There is also a provision granting the locator sixty days from the time of uncovering or disclosing the lode in which to sink such shaft.[4] The statute is evidently drawn on the lines of the Colorado law, with this marked distinction: In Colorado, the shaft must be sunk within *three months* from the date of the discovery, and within sixty days from uncovering or disclosing the lode, suggesting that the locator might have thirty days after discovery to uncover or disclose his lode. In North Dakota, the time is fixed at sixty days from date of discovery (*i. e.* before recording the notice), and sixty days from uncovering or disclosing the lode. To give the statute effect in all its parts, the uncovering or disclosing the lode must be construed as meaning the *discovery*. If this be not true, then the locator might have an indefinite time in which to uncover and disclose his lode.

If a discovery should be made on January 1st, the certificate must be recorded on or before March 2d. If the lode is not uncovered or disclosed until the 5th of January, unless the construction we place upon the law is correct, the locator would have until March 8th to sink his shaft, rendering the requirement that he should perform this development work before the certificate is recorded nugatory. It would therefore seem that the provision allowing sixty days from the uncovering of the lode in which to sink

[1] Laws of 1889, p. 42.
[2] Rev. Pol. Code 1895, § 1428.
[3] Rev. Pol. Code 1895, § 1430.
[4] *Id.*, § 1433.

the shaft is inoperative unless that act is understood to mean the *discovery*.

Any open cut, crosscut, or tunnel, at a depth sufficient to disclose the mineral vein, or lode, or an adit of at least ten feet along the lode from the point where the lode may be in any manner discovered, is equivalent in North Dakota to a discovery shaft.[1]

*South Dakota*.—The laws upon this subject in South Dakota are the same as in North Dakota.[2]

*Wyoming*.—The locator is required to sink a shaft upon the discovered lode or fissure to the depth of ten feet from the lowest rim of the shaft at the surface within one hundred and twenty days from the date of discovery.[3]

Any open cut which shall cut the vein ten feet in length, and with face ten feet in height, or any crosscut tunnel, or tunnel on the vein, ten feet in length which shall cut the vein ten feet below the surface, measured from the bottom of such tunnel, is considered the equivalent of a discovery shaft.[4]

**§ 344. Object of requirement as to development work.**—The object of this class of legislation is two fold:—

(1) To demonstrate to a reasonable degree of certainty that the deposit sought to be located as a lode is in fact a vein of quartz or other rock in place;

(2) To compel the discoverer to manifest his intention to claim the ground in good faith under the mining laws.

The Colorado act, which is the parent of all the others, was passed in 1874, about the time of the discovery of the blanket carbonate deposits in the Leadville regions. In these localities, the vein exposures, such as answered the popular definition of outcrop, were few, along the sides of eroded gulches, and the underlying beds were in the main

[1] Rev. Pol. Code 1895, § 1432.

[2] Comp. Laws of Dak. 1887, §§ 1999, 2001, 2003, 2004. Adopted by South Dakota—Laws of 1890, ch. 105, § 1.

[3] Laws of 1890-91, pp. 179, 180.

[4] Laws of 1888, p. 88, § 18.

reached by vertical shafts sunk from the surface through the overlying "slide" and white porphyry to the contact with the blue limestone, where the ore bodies, in certain geological horizons, were usually encountered. In many of these cases, there was no real discovery from the surface. The miner's "indications" consisted of the development of work of his neighbors and the generally accepted geological theories.

The vertical depth from the surface to the deposits varied in localities, so the law required the shaft to be sunk to a sufficient depth to show a well-defined crevice. These local conditions, if they were not the moving cause of the enactment, certainly proved its wisdom.

On the other hand, in the absence of this class of state legislation, alleged discoveries may be made, and after marking boundaries, the locator is allowed a year from the first day of January next succeeding the date of his location within which to do one hundred dollars' worth of work. Until that time elapses, he is not called upon to do anything. In many instances, he does no work until compelled to, and about the time the period elapses, he "resumes" work which he never commenced, and each succeeding first day of January finds him again in a state of "resumption." During this period, in a large number of cases which have come under our personal observation, the location is a threat, preventing others who might be willing to develop the ground from acquiring rights. The requirement that some genuine development work should be done as a condition precedent to the perfection of a lode location, is wise and beneficial, and the courts uniformly enforce the law—not with rigid strictness, but with fairness and liberality. In our judgment, this class of state legislation was contemplated by congress when it enacted the mining laws.

§ 345. **Relationship of the discovery to the discovery shaft.**—As Mr. Morrison in his "Mining Rights" tersely states,[1] "the fact of discovery is a fact of itself, to be totally

[1] 8th ed., p. 27.

"disconnected from the idea of discovery shaft. The dis-
"covery shaft is a part of the process of location subse-
"quent to discovery."

When we speak of the discovery shaft, we mean to include in that term the various equivalents provided for by the several state enactments, as hereinbefore outlined.

As heretofore demonstrated, the discovery must be within the limits of the location as ultimately defined, and upon land that is free and open to exploration. The same rule applies to the discovery shaft.[1] But it is not required that the development work shall be performed at the point where the first discovery is made. The locator may make any shaft he may sink his discovery shaft,[2] provided always, that he discloses within it his well-defined crevice or mineral "in place." The first discovery may not always indicate to the miner the appropriate place where economic considerations require his development work to be done.[3] For the purpose of enabling him to determine these facts and select his place, the state laws grant him fixed periods within which to make his selection and complete his location, with the necessary condition attached, that if he fails to disclose his vein at or below the depth required by the local laws, and within the specified period, his ground will become subject to relocation by the next comer.

His original discovery will protect him in his possession during the statutory period,[4] but if he permits that period to lapse, and fails to perform his development work and accomplish the results contemplated by law, his possession must yield to the next comer who succeeds by peaceable methods in initiating a right. As is said by

[1] Armstrong v. Lower, 6 Colo. 393; Upton v. Larkin, 5 Mont. 600; Morr. Min. Rights, 8th ed. p. 31.

[2] Charge of Judge Hallett in Van Zandt v. Argentine M. Co., as outlined in Argentine M. Co. v. Terrible M. Co., 122 U. S. 478, 481. This charge as reported in 8 Fed. 725; 4 Morr. Min. Rep. 441, does not contain this element.

[3] Harrington v. Chambers, 3 Utah, 94.

[4] Erhardt v. Boaro, 113 U. S. 527; Marshall v. Harney Peak Tin Co., 1 S. Dak. 350; Omar v. Soper, 11 Colo. 380.

Mr. Morrison, the neglect of the locator to comply with this requirement is equivalent to an abandonment of the inchoate right given by discovery.[1] The discovery has performed its office. The perfected location rests ultimately on the completed development work. This we understand to be the rule announced by Judge Hallett in the Adelaide-Camp Bird case,[2] and we are not aware of any adjudicated case to the contrary. It is true, that the supreme court of Utah[3] and the United States circuit court, ninth circuit, district of California,[4] have announced that it is not necessary that the locator should show the existence of a vein in any particular place, provided it is shown to exist in some portion of the claim; but it must be borne in mind, that neither the laws of Utah nor California require the performance of development work as a prerequisite to a perfected location,[5] and in the absence of such local legislation it is not required.

An original discovery may be made in the discovery shaft, even after a location has been perfected, and this will be sufficient in the absence of intervening rights.[6]

**§ 346. Extent of development work.**—While in some of the states under consideration[7] the requirements of the law are satisfied when the discovery shaft or opening shows a well-defined mineral vein, or lode, regardless of the vertical distance from the surface at which it is disclosed, the others[8] require a certain depth in case of the shaft, and length in case of other openings, and this requirement must be fulfilled, although the vein is disclosed before reaching the required distance,[9] thus giving sanction to

[1] Morr. Min. Rights, 8th ed., p. 27.
[2] Van Zandt v. Argentine M. Co., 8 Fed. 725.
[3] Harrington v. Chambers, 3 Utah, 94.
[4] North Noonday M. Co. v. Orient M. Co., 6 Saw. 299.
[5] See, *ante*, § 343.
[6] Strepy v. Stark, 7 Colo. 619; Zollars & H. C. C. M. Co. v. Evans, 2 McCrary, 39. See, *ante*, § 330.
[7] North and South Dakota.
[8] Colorado, Arizona, Idaho, Montana, New Mexico, and Wyoming.
[9] Morr. Min. Rights, 8th ed., p. 33.

the view hereinbefore expressed, that the object of requiring development work was two fold.[1]

For example, the discovery shaft must be at least ten feet deep. It must be deeper if, at the required vertical distance from the lowest rim, the vein or crevice be not disclosed. It is hardly profitable to discuss the consequences flowing from a failure to strictly comply with the requirements as to depth, if the proper vein exposure is found within the required distance. Prudent miners will not jeopardize valuable rights by failing to comply fully with the law, and courts will readily detect a manifest attempt at evasion.

The requirement as to disclosing the vein, crevice, or deposit in place, which terms are legal equivalents, is unquestionably mandatory. As to what constitutes such a vein, is to be determined by the rules announced by the courts in the adjudicated cases, which have been fully presented in preceding articles,[2] and need not here be repeated.

A former statute of Montana required the discovery shaft to disclose at least one wall of the vein,[3] but this has since been repealed.

In construing the provisions of the Colorado statute providing for development by adit, which in mining parlance is an opening on and along the vein used for drainage, the supreme court of Colorado has held, that it was the legislative intention to substitute horizontal development in and along the lode for ten feet, in lieu of a discovery shaft of that depth, and that the distance below the surface at which the vein appeared in place as the result of this class of development was immaterial.[4]

The same court also determined that an "adit" need not be altogether under cover.[5]

[1] See, *ante*, § 344.

[2] See, *ante*, §§ 286–301.

[3] Foote v. National M. Co., 2 Mont. 402; O'Donnell v. Glenn, 8 Mont. 248.

[4] Gray v. Truby, 6 Colo. 278; Craig v. Thompson, 10 Colo. 517, 526.

[5] Electro-Magnetic M. & D. Co. v. Van Auken, 9 Colo. 204; Craig v. Thompson, 10 Colo. 517, 526.

## ARTICLE V. THE PRELIMINARY NOTICE AND ITS POSTING.

§ 350. Local customs as to preliminary notice, and its posting prior to enactment of federal laws—Not required by congressional law.
§ 351. State legislation requiring the posting of notices.—States grouped.
§ 352. First group.
§ 353. Second group.
§ 354. Third group.
§ 355. Liberal rules of construction applied to notices.
§ 356. Place and manner of posting.

**§ 350. Local customs as to preliminary notice, and its posting prior to enactment of federal laws—Not required by congressional law.**—During the period when mining privileges upon the public domain were governed exclusively by the local regulations and customs of miners, the first step in the inception of the miner's right, after the discovery, was the posting of a notice at some point on, or in reasonable proximity to, the discovered lode, usually upon a tree, stake, or mound of rocks.[1] The posting of this notice served to manifest the intention of the discoverer to claim the vein to the extent described, and to warn all others seeking new discoveries that there was a prior appropriation of the lode to which the posted notice applied.

These notices were of the simplest character, were required to be in no particular form, and were generally prepared by unlettered men. They served the purpose, however, and enabled any one seeking in good faith to locate claims, to ascertain the extent and nature of the right asserted on the particular lode by the prior discoverer.

During this period, it will be remembered, as well as during the period immediately preceding the passage of the act of May 10, 1872, the lode was the principal thing sought, and the surface was a mere incident.[2]

[1] Yale on Mining Claims and Water Rights, p. 78; J. Ross Browne's Mineral Resources, 1867, pp. 236-242; Gleeson v. Martin White M. Co., 13 Nev. 450.

[2] Johnson v. Parks, 10 Cal. 447; Patterson v. Hitchcock, 3 Colo. 533, 544; Wolfley v. Lebanon M. Co., 4 Colo. 112; Walrath v. Champion M. Co., 63 Fed. 552.

The locator could hold but one vein,[1] and while surface boundaries were eventually in some way defined, neither the form nor extent of such surface, prior to filing the diagram for patent, controlled the rights on the located lode.[2]

While the act of 1872 changed all this,[3] and required the marking of surface limits inclosing the located lode, it did not dispense with the necessity of posting the preliminary notice, when such was required by state or district rules, nor destroy its usefulness in the absence of any such regulations. While, in the absence of state legislation or district regulations, the posting of a notice on the claim is not required at any stage of the proceedings culminating in the completion of the location,[4] the prospector's first impulse upon discovering a lode is to post his notice. While his failure to so do, where the state law or local custom do not require it, is accompanied with no deprivation of right, yet it may be safely said, that the practice of posting a notice of this character is almost universal.

§ 351. **State legislation requiring the posting of notices — States grouped.**—There are no state statutes requiring the posting of any notice whatever in either California, Utah, Washington, or Nevada. In these states the subject is left entirely to district regulation, in the absence of which no posting is required, although, as heretofore indicated, it is the universal custom to initiate the right by placing on the ground a preliminary or discovery notice.

For the purpose of disclosing the nature of the legislation on this subject in the other precious-metal-bearing

[1] Eureka Case, 4 Saw. 302, 323; Eclipse G. & S. M. Co. v. Spring, 59 Cal. 304.

[2] See, *ante*, § 58.

[3] See, *ante*, §§ 70, 71.

[4] Haws v. Victoria C. M. Co., 160 U. S. 303; Gird v. California Oil Co., 60 Fed. 531, 536; Book v. Justice M. Co., 58 Fed. 106, 115; Allen v. Dunlap, 24 Ore. 229; Carter v. Bacigalupi, 83 Cal. 187, 192.

states and territories, we may group them into three classes:—

(1) Those requiring a preliminary notice which has no reference to the recorded certificate of location;

(2) Those wherein the posted notice bears a direct relation to the recorded certificate;

(3) Those requiring two different notices to be posted—one a preliminary, or discovery notice, the other conforming to the certificate which must ultimately be recorded.

**§ 352. First group:—**

*Colorado* requires to be posted at the point of discovery on the surface a plain sign, or notice, containing: (1) the name of the lode; (2) the name of the locator; (3) the date of discovery. This posting must precede the recording of the certificate of location, but otherwise the posted notice is wholly disconnected from the recorded instrument.[1]

*Montana.*—The Montana law adds to the requirements of the Colorado law: (4) the number of linear feet each way from the point of discovery; (4*a*) the width on each side of the center of the vein; (4*b*) the general course of the vein. Nothing is said as to when the notice shall be posted, but the inference is, that it should be done at the time of the discovery.[2]

*North Dakota*[3] and *South Dakota*[4] add to the Colorado requirements: (4) the number of feet claimed in length on either side of the discovery; (5) number of feet in width on either side of the lode.

*Oregon* requires a notice to be posted on the lead or vein, "with names attached." Nothing is specified as to the contents of the notice.[5]

[1] Mills' Annot. Stats., § 3152.
[2] Rev. Code, 1895, § 3610.
[3] *Id.*, § 1430, sub. 2.
[4] Comp. Laws of Dakota, 1887, § 2001. Adopted by South Dakota—Laws of 1890-91, ch. cv., § 1.
[5] Hill's Annot. Laws, 1887, § 3828.

*Wyoming.*—The requirements in this state are the same as in Colorado, except that the name of the discoverer must also appear, suggesting that the locator and discoverer may be different persons.[1]

**§ 353. Second group:—**

*New Mexico* provides for the posting, in some conspicuous place on the location, of a notice in writing, stating: (1) the names of the locators; (2) the intent to locate the claim; (3) a description by reference to some natural object or permanent monument. A copy of this notice as posted must be recorded.[2]

*Arizona* requires the posting, at the point of discovery on the surface, of a plain sign or notice, substantially conforming to the certificate to be recorded, which must contain: (1) name of claim; (2) name of locator; (3) date of location; (4) number of feet in length and width on each side of the center of the shaft; (5) the general course of lode or premises; (6) locality of the claim with reference to natural monuments.[3]

**§ 354. Third group:—**

*Idaho* is the only state in this group. Its laws provide for the posting of two notices:—

(1) At the time of the discovery, when a monument must be erected at the place of discovery, upon which the locator must place his name, the date of discovery, and the distance claimed along the vein each way from such monument;

(2) At the time of marking his boundaries he must post another notice, the requirements of which are much more elaborate, and a substantial copy of which must be recorded.[4]

[1] Laws of 1888, p. 88, § 17.
[2] Comp. Laws 1884, p. 754, § 1566.
[3] Laws of 1895, p. 53, § 1.
[4] *Id.*, p. 25, § 1.

**§ 355. Liberal rules of construction applied to notices.**—The statutory requirements found in the first group of states, and the first requirement in the third group, are nothing more than the perpetuation of the system in vogue during the early history of the mining industry of the west. They preserve the simplicity of the primitive system and recognize the fact that miners are unacquainted with legal forms, and usually are out of reach of legal assistance.[1] A sample of these preliminary notices may be found in the reports of any of the mining states. A case involving the following notice, arising under the statute of Colorado, heretofore referred to, reached the supreme court of the United States: "Hawk "Lode.—We, the undersigned, claim fifteen hundred feet "on this mineral-bearing lode, vein, or deposit,"—dated and signed by the locators. It was contended, and the court below held, that the notice was insufficient because it failed to designate the number of feet on each side of the discovery point. The supreme court of the United States ruled, however, that as the law did not require the linear distances from the discovery monument to be stated, the notice and its posting was a valid appropriation of the lode to the extent of seven hundred and fifty feet on each side of the posted notice.[2] In construing these notices, both the courts and land department have been uniformly liberal. As they are generally made by unlettered men, it would be productive of a great hardship if prospectors should be held to technical accuracy in their preparation. If they are sufficiently certain to put an honest inquirer in the way of ascertaining where the lode is, that is sufficient.[3]

When we deal with cases, however, arising under laws similar to those found in Arizona and New Mexico, and provisions like those of Idaho, in reference to the second

[1] Carter v. Bacigalupi, 83 Cal. 187, 193.

[2] Erhardt v. Boaro, 113 U. S. 527.

[3] Prince of Wales Lode, 2 Copp's L. O. 2; Carter v. Bacigalupi, 83 Cal. 187, 193; Gird v. California Oil Co., 60 Fed. 531, 544; Book v. Justice M. Co., 58 Fed. 106; Doe v. Waterloo M. Co., 70 Fed. 455.

notice required by that state to be posted, we encounter a different element. Where the posted notice is the basis of the one to be ultimately recorded, the provisions of the federal law are operative, and the posted notice must contain the requirements of that law as to the contents of the record.

A notice might serve the purpose of a notice of discovery manifesting an intention to locate, and be wholly insufficient as a notice of perfected location which is to be recorded.[1]

In the absence of a state statute or local rule requiring it, the posted notice need not contain any reference to natural objects or permanent monuments, but the recorded notice must contain such description.[2]

If a statute or local rule prescribes the form of a notice to be posted, and provides that a copy of such notice shall be recorded, if such notice does not contain the requirement of the federal statute it is an insufficient record. The supreme court of California has said, that where district rules provide for the recording of a copy of a posted notice, such record is sufficient;[3] but this must not be understood as sanctioning a rule, that if a posted notice does not contain the facts required by section twenty-three hundred and twenty-four of the Revised Statutes, providing for the contents of the record, that the record of such posted notice is sufficient. Neither a local rule nor a state statute can dispense with the plain requirements of the federal law.[4]

§ 356. **Place and manner of posting.**—Most of the state laws requiring notices to be posted fix the point of discovery as the place of posting. Naturally, this will be on the lode, or in such reasonable proximity as will identify it.

[1] Doe v. Waterloo M. Co., 70 Fed. 455, 458; Gleeson v. Martin White M. Co., 13 Nev. 465; Gird v. California Oil Co., 60 Fed. 531, 536.

[2] Brady v. Husby, 21 Nev. 453; Poujade v. Ryan, 21 Nev. 449; Southern Cross M. Co. v. Europa M. Co., 15 Nev. 383.

[3] Carter v. Bacigalupi, 83 Cal. 187.

[4] See, *post*, art. ix.

In California, a local district custom required that a notice of location of a quartz claim should be in writing, "and "posted conspicuously in a conspicuous place upon the "claim located, at or near the lode line of said claim."

The supreme court of that state held, that such a notice, written on one side of a sheet of paper which was folded with the writing inside and placed upon a mound of rocks three feet high, underneath two flat rocks, with a margin of the paper exposed to view, the rest being obscured by the two stones which covered it, was a conspicuous posting in a conspicuous place, and satisfied the rule.[1]

An artificial mound of rocks on the line of a lode is a conspicuous object which would naturally attract the attention of one seeking information as to a former location of a lode, and the slightest examination of the mound would result in the discovery of a written notice.

In another case in the same state, it was held, that a written notice placed in a tin can, and the can placed in a mound of rocks, was sufficient posting.[2]

It is manifest, that some precaution should be taken to protect the notice from destruction by exposure to wind and weather.

In the absence of any specific direction in the state statute or district regulation prescribing the manner of posting, any device adopted, which would enable one seeking information in good faith, to discover the existence of the notice, should be sufficient.[3] The posting of such a notice after a *bona fide* discovery is an appropriation of the territory specified for the period allowed by local rules or state legislation for the performance of the remaining acts required to complete the location, and the appropriator is entitled during that period to be protected in his possession against all comers.[4]

[1] Donahue v. Miester, 88 Cal. 121.

[2] Gird v. California Oil Co., 60 Fed. 531, 544.

[3] *Id.*

[4] Erhardt v. Boaro, 113 U. S. 527, 537; Marshall v. Harney Peak Tin M. & M. Co., 1 S. Dak. 350; Omar v. Soper, 11 Colo. 380, 387.

## Article VI. The Surface Covered by the Location—Its Form and Relationship to the Located Lode.

§ 360. The ideal location.
§ 361. Surface area, length, and width of lode claims.
§ 362. Location covering excessive area.
§ 363. Surface conflicts with prior locations.
§ 364. Surface must include apex. —Location on the dip.
§ 365. The end lines.
§ 366. The side lines.
§ 367. Side-end lines.

**§ 360. The ideal location.**—When we speak of an ideal location, we mean one which not only responds to all the requirements of the law, but one which confers upon its possessor the greatest possible property right, and conforms to the judicial theories of what constitutes the highest type of a perfected location. The ideal is rarely encountered in the practical mining world, but it furnishes a convenient standard with which the every-day location may be compared, enabling us to show to what extent a departure from the ideal diminishes the property rights which are susceptible of acquisition under a location of the highest possible type.

The ideal location must have for its basis an ideal lode, such a one as we have described and illustrated in a preceding section.[1] With this assumed, we should describe the highest type of a location as a rectangular parallelogram, the lines crossing the apex of the lode at right angles to the general course of the vein, termed in law the end lines, the extremities of which are equi-distant from the center of the vein, the side lines parallel to the course of the vein, that is, equi-distant throughout from a line drawn through the center of the apex on its longitudinal course; such a location as is represented in figure 5.[2] Without intending to enter into a discussion at this time of the extralateral right, we may say that this form of location confers upon the possessor the greatest

[1] See, *ante*, § 309. [2] See, *ante*, § 309.

property rights susceptible of being conveyed under the mining laws applicable to lode claims. It is to this standard that the various forms of locations on the surface which may come under discussion in the future will be compared.

**§ 361. Surface area, length, and width of lode claims.**—Prior to the passage of the act of July 26, 1866, the number and length of claims on a discovered lode, and the extent of surface ground which might be occupied and enjoyed therewith, was, like everything else connected with mining upon the public domain during that period, regulated by district rules or local customs. The act of 1866 fixed the limit of a single claim at two hundred feet in length along the vein, for each locator, except the discoverer, who was entitled to two claims. No person could make more than one location on the same lode, and not more than three thousand feet could be taken by any association of persons.[1]

As to width, this was left entirely to local regulations. When the claimant filed the diagram of his lode on application for patent, he was called upon to extend his claim laterally, so as to conform to the local laws, customs, and rules of miners.[2] In some districts, the width was specified with reference to either the center of the vein or its inclosing walls. In others, the locator was allowed a reasonable quantity of surface. As the lode was the principal thing, and the surface a mere incident, neither the form nor extent of the surface area controlled the rights on the located lode.[3]

The act of May 10, 1872, which is incorporated into the Revised Statutes, changed this rule, giving to the surface boundaries a controlling importance.[4] It fixed the maximum length on the vein at fifteen hundred feet, and a maximum surface width of six hundred feet, three

[1] 14 Stats. at Large, p. 252, § 4.
[2] *Id.*, § 2.
[3] See, *ante*, § 58.
[4] See, *ante*, § 71.

hundred feet on each side of the middle of the vein, at the surface.[1]

State or district regulation may limit this width to a minimum of twenty-five feet on each side of the middle of the vein,[2] and we cannot see why the length of a claim may not likewise be limited by state or local rules within the maximum.[3]

Be that as it may, where state statutes deal with the subject at all they follow the lines of the federal law,[4] and no such limitation has ever been attempted by district regulations within our knowledge.

As to width, the maximum allowed by the federal law is the rule, except in a few localities. In Gilpin, Clear Creek, Boulder, and Summit counties, in the state of Colorado, the width is fixed by statute at seventy-five feet on each side of the center of the vein. In all other counties of that state, it is one hundred and fifty feet on each side of the center of the vein,[5] which rule obtains in North Dakota[6] and South Dakota.[7]

These three states also provide, that any county at any general election may determine upon a greater width within the limitations of the federal laws, but Mr. Morrison informs us,[8] that this privilege has never been exercised.[9]

With the exceptions above noted, the customary surface area is, therefore, fifteen hundred by six hundred feet,

[1] 17 Stats. at Large, p. 91, § 2.

[2] Rev. Stats, § 2320; North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 305; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 104; Copp's Min. Dec. 201; *In re* Taylor, 9 Copp's L. O. 52, 92.

[3] Mr. Morrison, in his Mining Rights, 8th ed., p. 17, doubts the power of the state to so limit the length, but gives no reason for his conclusion other than the fact that no attempt in that direction has ever been made.

[4] See, *ante*, § 250 (1).

[5] Mills' Annot. Stats. § 3149; Morr. Min. Rights, 8th ed., p. 19.

[6] Rev. Code 1895, § 1427.

[7] Comp. Laws of Dak. 1887, § 1998. Adopted by South Dakota — Laws of 1890, ch. ev.

[8] Morr. Min. Rights, 8th ed., p. 20.

[9] See, *ante*, § 250 (2).

embracing twenty and two-thirds acres. This may be called the unit of lode locations.

It is entirely immaterial how many or how few locators participate in this class of locations. The size of the "claim," or, more properly, the location, is not governed by the number of persons participating in its appropriation. There is nothing in the law which prevents any one locator or any set of locators from appropriating as many locations on the same lode as they may be able to find independent discoveries upon which to base them,[1] but no *location* may exceed the statutory limit as to length and width.

**§ 362. Location covering excessive area.**— It frequently happens, that the locator marking his surface without the aid of chain or compass includes within his boundaries an area in excess of the statutory limit.

The courts uniformly hold, that such a location, where it injures no one at the time it is made, and it has been made in good faith, is voidable only to the extent of the excess.[2]

Upon application for patent, the monuments may be moved and the lines drawn in to cast off the excess.[3]

An excessive location cannot be said to be a fraud upon others. It cannot take away rights already acquired by prior appropriation. A location within the statutory limit cannot accomplish this. As to subsequent locators, they can measure the ground from the preliminary discovery

[1] Copp's Min. Dec. 207.

[2] Rose v. Richmond M. Co., 17 Nev. 25; Richmond M. Co. v. Rose, 114 U. S. 576, 580; Glacier Mt. S. M. Co. v. Willis, 127 U. S. 471, 481; Hauswirth v. Butcher, 4 Mont. 299; Leggatt v. Stewart, 5 Mont. 107, 109; Lakin v. Dolly, 53 Fed. 333; S. C. on appeal, 54 Fed. 461; Thompson v. Spray, 72 Cal. 528; North Noonday M. Co. v. Orient M. Co., 6 Saw. 299; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 107; Atkins v. Hendree, 1 Idaho, 95; Burke v. McDonald, 2 Idaho, 646; Stem Winder M. Co. v. Emma & L. C. M. Co., 2 Idaho, 421. Affirmed on appeal to U. S. Sup. Ct. (not officially reported), Law. Co-op. ed., book 37, p. 941. Hanson v. Fletcher, 10 Utah, 266; Howeth v. Sullenger, 113 Cal. 541.

[3] *In re* Empey, 10 Copp's L. O. 102; Howeth v. Sullenger, 113 Cal. 547.

notice, which is universally posted at, or in reasonable proximity to, the point of discovery.[1] This notice itself, as a rule, specifies the linear distance claimed from the discovery point, and where it does not, the locator can only claim seven hundred and fifty feet along the vein on each side of his discovery notice.[2]

If the prior locator has too much ground, it is easy to discover it; and all the benefit that a subsequent locator can claim is, that he shall be entitled to maintain his right to the excess.[3]

In a locality where neither state law nor district rule require the posting of a preliminary notice at the discovery point,[4] a case might arise where a location, as marked, includes so large an area as to give rise to the suspicion of bad faith. In such a case, where such preliminary notice is wanting, there would be nothing to guide the subsequent locator, and the excessive location should be held worthless for any purpose. A fifteen-hundred-foot claim cannot be shifted from one end to the other of a two-thousand-foot claim, as circumstances might require, to cover the discovery of a third person within the two-thousand-foot location.[5]

As we have heretofore stated, however, the general, if not universal, rule is, to hold this class of locations void only as to the excess.

**§ 363. Surface conflicts with prior locations.**—As a mining location can only be carved out of the unappropriated public domain, it necessarily follows that a subsequent locator may not invade the surface territory of his neighbors and include within his boundaries any part of a prior valid and subsisting location. But conflicts of surface area are more than frequent. Many of them arise

[1] See, *ante*, § 350.

[2] Erhardt v. Boaro, 113 U. S. 527.

[3] Atkins v. Hendree, 1 Idaho, 95, 100.

[4] See, *ante*, § 350.

[5] Hauswirth v. Butcher, 4 Mont. 299; Leggatt v. Stewart, 5 Mont. 107, 109.

from honest mistake, others from premeditated design. In both instances the question of priority of appropriation is the controlling element which determines the rights of the parties. Two locations cannot legally occupy the same space at the same time. These conflicts sometimes involve a segment of the same vein, on its strike; at others, they involve the dip bounding planes underneath the surface. More frequently, however, they pertain to mere overlapping surfaces. The same principles of law apply with equal force to all classes of cases. Such property rights as are conferred by a valid prior location, so long as such location remains valid and subsisting, are preserved from invasion, and cannot be infringed or impaired by subsequent locators. To the extent, therefore, that a subsequent location includes any portion of the surface lawfully appropriated and held by another, to that extent such location is void.

However regular in form, it is of no effect while there is a valid prior location subsisting.[1]

A location to be effectual must be good at the time it is made. The subsequent abandonment or forfeiture of the conflict area by the senior appropriator would not inure to the benefit of the subsequent locator.[2]

The junior locator might, subsequent to the abandonment or forfeiture of the conflict area by the senior, amend his location and include the overlapping surface;[3] but without some act on his part manifesting an intention to make a new appropriation or acquire a new right after the abandonment or forfeiture became effectual, this area would not by mere gravity become a part of the junior location.[4]

**§ 364. Surface must include apex — Location on the dip.**— There can be no question but that the act of July

[1] Belk *v.* Meagher, 3 Mont. 65; S. C. on appeal, 104 U. S. 279; Garthe *v.* Hart, 73 Cal. 541; Souter *v.* Maguire, 78 Cal. 543; Armstrong *v.* Lower, 6 Colo. 393; Aurora Hill Cons. *v.* S. M. Co., 12 Saw. 355.

[2] Belk *v.* Meagher, 104 U. S. 279, 285; Oscamp *v.* Crystal River M. Co., 58 Fed. 293, 295.

[3] Johnson *v.* Young, 18 Colo. 625.

[4] Pralus *v.* Pacific G. & S. M. Co., 35 Cal. 30, 36.

26, 1866,[1] as well as all subsequent legislation of congress, contemplates that the location shall be made along the course or strike of the lode.[2]

A location cannot be made on the middle part of a vein, or otherwise than on the top, or apex.[3]

Any portion of the apex on the course, or strike, of the vein will be sufficient to support the location,[4] but upon the extent and course of this apex within the location depends the extent of rights acquired.

In the case of Van Zandt *v.* Argentine M. Co.,[5] Judge Hallett charged the jury, that a junior location along the line of the top, or apex, could not prevail against a senior location on the dip of the lode.

In some of his prior rulings, the judge used language which, considered in the abstract, is not altogether consistent with this charge. For example, he has held, that "it "is a part of the statute law of the United States that loca- "tions shall be upon the top and apex of the vein; ". . . that being done gives the miner the whole vein";[6] and that the locator "must find where this top and apex "is, and make his location with reference to that."[7]

As we understand the views of Judge Hallett, considering all his decisions, he maintains the opinion, that to invoke the right of lateral pursuit, the locator must cover the apex in such a way as will permit him to follow his vein underneath the claim of a *junior* locator; that a senior

[1] Eureka Case, 4 Saw. 302; McCormick *v.* Varnes, 2 Utah, 355; Wolfley *v.* Lebanon, 4 Colo. 112.

[2] Flagstaff M. Co. *v.* Tarbet, 98 U. S., 463, 467; Argentine M. Co. *v.* Terrible M. Co., 122 U. S., 478, 485; Iron S. M. Co. *v.* Elgin, 118 U. S. 196; Doe *v.* Sanger, 83 Cal., 203; Watervale *v.* Leach (Ariz.), 33 Pac. 418; King *v.* Amy & Silversmith M. Co., 9 Mont. 543.

[3] Iron S. M. Co. *v.* Murphy, 2 McCrary, 121; *Id.*, 1 Morr. Min. Rep. 548; Stevens *v.* Williams, 1 Morr. Min. Rep. 557; Leadville M. Co. *v.* Fitzgerald, 4 Morr. Min. Rep., 380; Larkin *v.* Upton, 144. U. S., 19; Colorado Central C. M. Co. *v.* Turck, 50 Fed. 888; S. C. on rehearing, 54 Fed. 267.

[4] Larkin *v.* Upton, 144 U. S. 19.

[5] 8 Fed. 725, 728.

[6] Iron S. M. Co. *v.* Murphy, 1 Morr. Min. Rep. 548, 550, 551.

[7] Stevens *v.* Williams, 1 Morr. Min. Rep., 557, 562.

locator on the dip will hold everything within vertical planes drawn through the surface boundaries, and exclude the junior apex locator, but will himself obtain no extralateral right.

A full discussion of this question necessarily involves the subject of extralateral rights, which it is our intention to treat separately in a subsequent chapter. In advance of this, however, we do not hesitate, with all due deference to the views of the distinguished jurist, to say that, as we read the decisions of the supreme court of the United States,[1] and those of the circuit court of appeals in the eighth circuit,[2] the Eureka cases, as well as other cases to be commented on when we reach the subject of dip rights, the doctrine announced by him in the Van Zandt-Argentine case is not the true doctrine.

The question of priority is only an important and material inquiry, either when there are overlapping surfaces, or where both contending parties have some portion of the apex of the same vein, and a conflict arises between them involving dip planes underneath the surface, such as are found in the Tyler-Last Chance litigation.[3]

A patent once issued, the existence of an apex will be presumed;[4] but, prior to patent, the holder of a location, if his right is challenged, must show to some extent, at least, the apex of a discovered vein within the limits of the claim.

Mr. Morrison adopts the views of Judge Hallett, and cites *discoveries* by tunnel, which are uniformly upheld as supporting the validity of a location on the dip.[5]

[1] Flagstaff M. Co. *v.* Tarbet, 98 U. S. 463; Argentine M. Co. *v.* Terrible M. Co., 122 U. S. 478, 485; Iron S. M. Co. *v.* Elgin M. Co., 118 U. S. 196; Larkin *v.* Upton, 144 U. S. 19; Gwillim *v.* Donnellan, 115 U. S. 45, 47.

[2] Colorado Cent. Cons. M. Co. *v.* Turck, 50 Fed. 888, although in the opinion on rehearing (54 Fed. 263), the court reserved the question; Colorado Cent. Cons M. Co. *v.* Turck, 70 Fed. 294, 295, wherein the question seems to be decided practically on the lines of the case reported in 50 Fed. 888.

[3] 54 Fed. 284; 71 *Id.* 848; 61 *Id.* 557; 157 U. S. 683.

[4] Iron S. M. Co. *v.* Campbell, 17 Colo. 267.

[5] Morr. Min. Rights, 8th ed., p. 127.

A discovery may be made anywhere within the limits of a claim as ultimately located, but Judge Hallett himself ruled, that after a discovery in a tunnel, it is just as necessary to mark the boundaries on the surface and file a certificate for record as in any other case.[1]

Mr. Morrison also accepts this view,[2] which is undoubtedly the correct one, and suggests, that in fixing the surface lines in cases of discovery by tunnel, approximate calculations should be made for the dip, with a view, of course, to cover the apex.

We think it well established, that ledges which have their apices outside the boundaries of a location do not as a matter of law belong to the locator. As a matter of presumption, a patentee of a location on the dip may be held to own everything between vertical planes drawn through his surface boundaries; but we expect to be able to fully demonstrate, when we deal with the subject of extra-lateral rights, that this presumption must yield in the presence of the junior locator of the apex if his surface lines are properly constructed with reference to such apex.

We are free to admit, that Judge Hallett's views, as expressed in the Van Zandt case, owing to the peculiar geological conditions existing in some sections of Colorado, afford, from an economic standpoint, a satisfactory method of solving some of the difficulties with which that distinguished jurist has been confronted in his judicial experience; but we do not think, with all due deference to his opinions, that the equilibrium of the entire law should be disturbed by novel conditions existing in isolated localities in the mining regions. If the law is odious, its rigid enforcement will secure its repeal or amendment.

§ 365. **The end lines.**—The function of end lines may be said to be twofold:—

(1) They stop the pursuit of the vein on its strike;

[1] Rico Aspen Cons. M. Co. *v.* Enterprise M. Co., 53 Fed. 321.
[2] Morr. Min. Rights, 8th ed., p. 182.

(2) When properly constructed with reference to the located lode, permitting the exercise of the extralateral right, they may be produced indefinitely in their own direction, so that vertical planes drawn downward through them, as so produced, carve out a segment of the vein throughout its entire depth, the ownership of which becomes vested in the locator.

The location of a mining claim, as made and defined, must control not only the rights of the claimant to the vein, or lode, within its surface, but also any lateral rights. The locator must stand upon his own location, and can take only what it will give him under the law. The courts cannot relocate his claim and make new side or end lines.[1]

As heretofore observed,[2] the act of 1866 did not in terms mention end lines, although in the sense that they were necessary to determine the right to pursue the vein on the strike, they were implied.[3] They were not required to be parallel;[4] therefore, the failure to make them so was accompanied with no penalty.

Under the act of May 10, 1872, however, their substantial parallelism, or at least their non-divergence in the direction of the dip, is an absolute essential to the right of extralateral pursuit. It has been said that the provisions of this act as to parallelism are merely directory, and that no consequence is attached to a deviation from its direction.[5] By this it may be understood that a location with non-parallel end lines is a valid location, and if other conditions are complied with, it will, subject to the dip rights of others who have properly located on the apex, hold everything within vertical planes drawn through the surface boundaries. The rights conferred, however, by such a location are not as great as in case of one having the end

[1] King *v.* Amy & Silversmith M. Co., 152 U. S. 222.
[2] See, *ante*, § 58.
[3] Eureka Case, 4 Saw. 302.
[4] Iron S. M. Co. *v.* Elgin M. Co., 118 U. S. 196.
[5] Eureka Case, 4 Saw. 302, 319; Horswell *v.* Ruiz, 67 Cal. 111.

lines parallel. The consequences of non-parallelism of end lines will be fully presented in a subsequent chapter when dealing with the subject of extralateral rights.

While it may be true, that the highest type of the theoretical location may imply that the end lines of a location should be at right angles to the general course of the vein, there is nothing in the law which requires it, either expressly or by implication. While the ideal location is in the form shown in figure 16, where the end lines

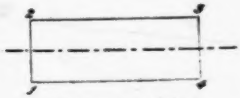


FIGURE 16.

cross the lode at right angles to its general course, a location marked on the ground with end lines crossing the lode at acute or obtuse angles, as indicated in figures 17 and 18, is just as valid and complete, and the extent of

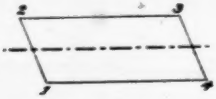


FIGURE 17.

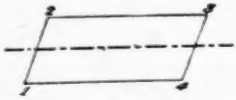


FIGURE 18.

property rights conferred thereby just as great, as in the ideal location, as the end lines cross the lode, and the side lines are parallel with and along its general course. The land officers have no right to require that an end line shall make a right angle, or any other particular angle, with the general direction of the vein. It is the locator's privilege to give such direction to his end lines as he pleases, so long as they are across the vein, are parallel to each other, and the length of the lode measured between them does not exceed the statutory limit of fifteen hundred feet.[1]

[1] Monarch of the North Mining Claim, 8 Copp's L. O. 104.

It is a matter of common knowledge, that veins are not of uniform value throughout, but that frequently the "pay ore" occurs in "shoots," at intervals in the course of the vein, and that these "shoots" have frequently, in the language of the miner, a right or left-hand "pitch." There is no reason why the locator should not be permitted to mark his end lines, observing the statutory requirement as to parallelism, with regard to the pitch of the ore bodies within the vein, if he is fortunate enough to detect their existence and direction during his work of preliminary exploration.

If it be true, and the courts so assert, that the theory of the law requiring this parallelism is, that the miner may only have as much of the lode underneath as he has apex within his surface, then the object is accomplished by making a location in the form suggested by figures 17 and 18, as well as by that suggested by figure 16. The subsequent locator is in no sense injured, and will be compelled to either make his location conform to the lines of the first discoverer, or take the chance of losing a segment of the vein by underground conflict with the prior appropriator.[1]

It must be borne in mind, however, that the failure to construct the end lines so that they are parallel to each other does not render the location absolutely void, so long as it is within the statutory limit. A location in the form of a horseshoe[2] or an isosceles triangle[3] will, subject to the extralateral right of others who have properly located the apex, hold whatever may be found within vertical planes drawn through the surface boundaries; provided, of course, that such irregularly-shaped figures include some portion of the apex of a discovered vein.

The requirement as to parallelism of end lines, as a condition precedent to the exercise of the extralateral right, means that they should be parallel throughout, or at least should not diverge in the direction of the dip. This

[1] Flagstaff M. Co. *v.* Tarbet, 98 U. S. 463; Eureka Case, 4 Saw. 302.
[2] Iron S. M. Co. *v.* Elgin M. Co., 118 U. S. 196.
[3] Montana Co. Limited *v.* Clark, 42 Fed. 626.

requirement of the law is not satisfied by constructing broken end lines, as shown in figure 19, and a survey for patent made in such form would be rejected.[1] Where the

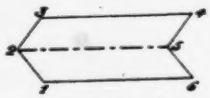


FIGURE 19.

location as originally marked upon the ground has non-parallel end lines, it may be rectified at any time, if such rectification does not interfere with intervening rights.[2]

A locator of a mining claim may abandon a portion of his original location without forfeiting any rights he may have to the remainder of the claim.[3]

There is no necessity for the two end lines being of the same length. If they both cross the lode and one parallels the other, the fact that one may be six hundred feet long and the other shorter is entirely immaterial. The end lines as finally established should be *throughout their length* upon the public domain. We do not admit that a junior locator has any right to invade the surface of a senior proprietor for any purpose. If the lode of the junior locator on its course reaches or crosses the properly established surface boundaries of a prior location, the right to pursue the vein beyond that point cannot be asserted. The end line of the junior must either conform to the crossed boundary of the senior, or he must, at the expense of abandoning a portion of the lode, so construct his end lines that no part of them shall be on territory previously appropriated.

We are aware, that in the manual of instructions issued by the land department on October 25, 1895, the commissioner of the general land office, construing prior issued circulars, sanctions the right of the junior to extend one

[1] Instructions to Surveyor Gen'l, 10 Copp's L. O. 86.

[2] Doe *v.* Sanger, 83 Cal. 203; Doe *v.* Waterloo M. Co., 54 Fed. 935.

[3] Tyler M. Co. *v.* Sweeney, 54 Fed. 284; Last Chance M. Co. *v.* Tyler M. Co., 61 Fed. 557; Tyler M. Co. *v.* Last Chance M. Co., 71 Fed. 848.

half of his end line within the surface lines of a prior location, as shown by the line *a b* in figure 20, the location B representing the prior location; but we are of the opinion, that this is based upon an erroneous construction of the law. If the triangle *x y b* is a part of a prior valid appropriation, A. has no right to appropriate it. At best, the line *x b* could be nothing more than an imaginary one, and mining rights upon the public domain cannot be based upon imaginary lines. As heretofore indicated, in our judgment, A. must adopt either the lines *y c* and *d e*, or *y z* and *d f*.

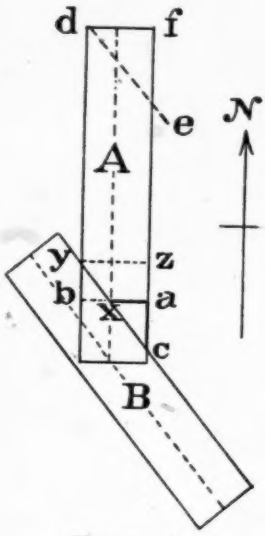



FIGURE 20.

It is not to be understood, that the mere marking of the location in the first instance, by placing monuments within the limits of a prior location, will render the subsequent location void. This frequently occurs, and the junior location is held to be valid to the extent that it covers vacant and unappropriated ground if the monuments are within the statutory limit.[1] Many irregularly shaped locations, such as the triangle in Montana Limited *v.* Clark,[2] are the results of this doctrine.

Our contention is, that the junior locator's rights will be determined, in case of his neglect to rectify his lines, by reference to the intersected boundaries of the senior locator, regardless of where the junior's monuments are placed, or the course of the lines connecting them.

This discussion suggests the question of "cross lodes"—a subject to be fully considered in a subsequent chapter.[3]

[1] Doe *v.* Tyler M. Co., 73 Cal. 21; West Granite M. & M. Co. *v.* Granite M. & M. Co., 7 Mont. 356. See, *post*, art. vii. of this chapter.

[2] 42 Fed. 626.

[3] See, *post*, tit. vi., ch. ii.

**§ 366. The side lines.**—The primary function of the side lines is, to connect the opposite extremities of the end lines, and to complete the enclosure of a surface within which is found the apex of the discovered lode. As the width of a location is fixed with reference to the middle of the vein, the law contemplates that this must be ascertained by actual exploration and development, and cannot be assumed to be in an unexplored position.[1]

Where the vein outcrops at the surface, there can be no question as to the point from which the lateral measurement must begin. When the discovery shaft develops the vein at some distance below the surface, and the locator does not determine by any further development that the nearest actual surface point is elsewhere, and the fact does not otherwise appear, the land department has ruled, that for executive purposes, the middle of the vein as disclosed in the shaft will be assumed to be the point from which lateral measurements are to be calculated.[2]

According to the regulations of the department, lateral measurements cannot extend more than three hundred feet on either side. Four hundred feet cannot be taken on one side and two hundred on the other; but if, by reason of prior claims, the full width allowed cannot be taken on one side, the locator will not be restricted to less than three hundred feet on the other.[3]

Side lines, properly drawn, run on each side of the course of the vein, distant not more than three hundred feet from the middle of such vein;[4] but there is no requirement that they should be parallel.[5] So long as they keep within the statutory width they may have angles and elbows, as in figure 21, or converge toward each other, as in figure 22, without jeopardizing any rights so far as the located lode is concerned, if the end lines are properly constructed with

[1] *In re* Albert Johnson, 7 Copp's L. O. 35.

[2] *In re* Hope Mining Co., 5 Copp's L. O. 116; par. 10, Circ. Instructions, Dec. 10, 1891 (see appendix).

[3] Par. 10, Circ. Instructions, Dec. 10, 1891 (see appendix).

[4] King v. Amy & Silversmith M. Co., 152 U. S. 222.

[5] Stevens v. Williams, 1 Morr. Min. Rep. 566.

reference to such lode. A locator, whose surface lines are constructed as in figure 22, of course obtains less area than is embraced in the ideal location, but otherwise he suffers

FIGURE 21.

FIGURE 22.

no dimunition of rights from those acquired by the ideal. The parallelism or non-parallelism of the side lines may, however, become an important factor if the locator makes a mistake, as he frequently does, as to the course of his vein, and locates crosswise instead of along the vein.

Where a location is of excessive width, the excess should be cast off, so that the middle of the vein shall be in the center of the location.[1]

§ 367. **Side-end lines.**—End lines are not always those which are designated as such by the locator. If the vein does not cross the line called by him an end line, it is not in law an end line. In such case it performs the mere function of a side line. In all cases where a vein crosses a side line, the side line performs the function of an end line to the extent, at least, that it stops the pursuit of the vein on its strike. It is therefore called in law an end line.[2] We call it a side-end line for descriptive purposes. Whether the side-end line performs the function of an end line for the purpose of determining the extralateral right, will depend upon circumstances. If the vein crosses two side lines, substantially as in the Flagstaff-Tarbet[3] and

[1] Lakin *v.* Dolly, 53 Fed. 333.

[2] Flagstaff M. Co. *v.* Tarbet, 98 U. S. 463; Argentine M. Co. *v.* Terrible M. Co., 122 U. S. 478; King *v.* Amy & Silversmith M. Co., 152 U. S. 222; Ellers *v.* Boatman, 3 Utah, 159; Stevens *v.* Williams, 1 Morr. Min. Rep. 557; Tombstone M. & M. Co. *v.* Wayup M. Co. (Ariz.), 25 Pac. 794; Watervale M. Co. *v.* Leach (Ariz.), 33 Pac. 418; Colorado Cent. R. R. *v.* Turck, 50 Fed. 888; *Id.* on rehearing, 54 Fed. 262; Tyler M. Co. *v.* Sweeney, 54 Fed. 284.

[3] 98 U. S. 463.

Argentine-Terrible[1] cases, where the crossed side lines were parallel, we do not see why the vein could not be followed on its downward course throughout its entire depth, between vertical planes drawn downward through the side-end lines, produced indefinitely in their own direction. If the side-end lines are not parallel, as indicated in figure 22, and the dip of the vein is towards their convergence, these lines may be extended in their own direction until they meet, and the locator may pursue the vein in depth to the vertical line of junction between the two planes. If the dip is in the direction of the divergence, there would certainly be no extralateral right. The consideration, however, of this character of cases, together with those where a vein crosses one end and one side line, will be deferred until we reach the subject of extralateral rights.

## ARTICLE VII. THE MARKING OF THE LOCATION ON THE SURFACE.

§ 371. Necessity for, and object of, marking.
§ 372. Time allowed for marking.
§ 373. What is sufficient marking under the federal law.
§ 374. State statutes defining the character of marking.
§ 375. Perpetuation of monuments.

**§ 371. Necessity for, and object of, marking.**—The Revised Statutes of the United States[2] contain the mandatory provision, that the "location must be distinctly marked "upon the ground so that its boundaries may be readily "traced." There is no escape from this requirement. While it is possible that state statutes or local district regulations may particularize as to the character of the marking, they cannot dispense with the necessity for compliance with the law of congress. While, as we shall hereafter point out, time is allowed within which to establish the

[1] 122 U. S. 478.

[2] § 2324.

boundaries, until this is done the location is not complete.[1] The requirement is an imperative and indispensable condition precedent of a valid location, and is not to be "frittered away by construction."[2] After the discovery, it is the main act of original location.[3] This was the rule under the Spanish and Mexican law.[4] The object of the law in requiring the location to be marked on the ground is, to fix the claim, to prevent floating or swinging, so that those who, in good faith, are looking for unoccupied ground in the vicinity of previous locations may be enabled to ascertain exactly what has been appropriated, in order to make their locations upon the residue.[5] It also operates to determine the right of the claimant as between himself and the general government.[6]

§ 372. **Time allowed for marking.**—In the absence of state legislation or district regulation, it has been held, in California, that while a party in actual possession, proceeding with diligence to mark his boundaries, would be protected as against a stranger attempting to relocate, yet, strictly speaking, no time is allowed to the locator to complete his location by marking it on the surface.[7] This view is also adopted by the supreme court of Oregon.[8]

But, as heretofore indicated,[9] the circuit court of appeals for the ninth circuit, upon the same state of facts presented in one of the California cases,[10] declines to accept the

[1] Belk v. Meagher, 104 U. S. 279; Strepey v. Stark, 7 Colo. 614; Garfield M. & M. Co. v. Hammer, 6 Mont. 53; Gilpin County M. Co. v. Drake, 8 Colo. 586, 589; Sweet v. Webber, 7 Colo. 443.

[2] Gleeson v. Martin White M. Co., 13 Nev. 442, 456.

[3] Donahue v. Meister, 88 Cal. 121, 131.

[4] United States v. Castillero, 2 Black, 17; Gonu v. Russell, 3 Mont. 358.

[5] Gleeson v. Martin White M. Co., 13 Nev. 442, 462; Patterson v. Tarbell (Ore.), 37 Pac. 76, 78; Gird v. California Oil Co., 60 Fed. 531, 536.

[6] Pollard v. Shively, 5 Colo. 309, 317. See, also, Drumond v. Long, 9 Colo. 538.

[7] Newbill v. Thurston, 65 Cal. 419; Gregory v. Pershbaker, 73 Cal. 109; Pharis v. Muldoon, 75 Cal. 284. By act passed in this state in 1897, sixty days from date of discovery are allowed for this purpose.

[8] Patterson v. Tarbell (Ore.), 37 Pac. 76.

[9] See, *ante*, § 339.

[10] Newbill v. Thurston, 65 Cal. 419.

doctrine of the California courts,[1] but follows the rule announced by the supreme courts of Nevada[2] and Idaho,[3] and the manifest intent of the law as suggested by the supreme court of the United States[4] and by the courts of last resort in Colorado[5] and South Dakota.[6] It is unnecessary to here repeat what we have said on this subject in a preceding section.[7] For the reasons therein suggested, we are of the opinion that the rule announced in California is opposed to both the spirit of the law and the weight of authority.

**§ 373. What is sufficient marking under the federal law.**— As noted in the succeeding section, some of the states have enacted laws defining the character of monuments, or marks, to be placed on the ground. In the absence of such state legislation, or local regulation, what constitutes a sufficient marking is a question to be determined by the jury, according to the circumstances in each particular case.[8] It naturally depends upon the conformation of the ground. What might be sufficient in the case of a comparatively level or bare surface might not answer the requirements of the law in a mountainous region where the hills are precipitous or the surface covered with timber or undergrowth.[9]

In this view of the law, adjudicated cases are not often of controlling weight. They depend for their value as precedents upon the reasoning of the courts and the similarity as to facts existing in the case to which they are sought to be applied.

While the commissioner of the general land office has

[1] Doe *v.* Waterloo M. Co., 70 Fed. 455, affirming 55 Fed. 11.

[2] Golden Fleece M. Co. *v.* Cable Cons. M. Co., 12 Nev. 312, 329; Gleeson *v.* Martin White M. Co., 13 Nev. 442.

[3] Burke *v.* McDonald, 2 Idaho, 646

[4] Erhardt *v.* Boaro, 113 U. S. 527.

[5] Murley *v.* Ennis, 2 Colo. 300; Patterson *v.* Hitchcock, 3 Colo. 533.

[6] Marshall *v.* Harney Peak Tin M. Co., 1 S. Dak. 350.

[7] See, *ante*, § 339.

[8] Taylor *v.* Middleton, 67 Cal. 656; Russell *v.* Chumasero, 4 Mont. 309; Anderson *v.* Black, 70 Cal. 226; Du Prat *v.* James, 65 Cal. 555.

[9] Book *v.* Justice M. Co., 58 Fed. 106, 113.

advised the erection of posts at the corners, and the erection of a signboard at the location point, the law may be satisfied by something less.[1]

We have collated the following examples, wherein the marking in the manner designated was held to satisfy the law:—

In a district where the extent of a claim on each side of the center line is established by local rule, it has been said, that the object of the law is attained by marking this center line; that a man of common intelligence acquainted with the customs of the country, seeing the discovery monument, the preliminary posted notice, and the stakes marking this center line, would be informed by the rules of the district and the laws of the land that the boundaries of the claim were formed by lines parallel to the center line, at the distance prescribed by local rules, and by end lines at right angles thereto. With this knowledge, he could easily trace the boundaries and ascertain exactly where he could locate with safety.[2]

Judge Sawyer held, that the sinking of a discovery shaft, posting a notice thereon, and placing a monument and post at *one* extremity of the linear measurement, was a compliance with the law.[3]

We think these cases stretch the law to the utmost limit of liberality. It is almost a return to the primitive rules, prevalent when the lode was the principal thing located and the surface a mere incident, when the locator could hold but one vein, and his rights as to that vein were not defined by surface boundaries.[4]

Under the existing law, a grant of the surface is sought, and the rights on the discovered lode, as well as all others whose apices may be found therein, are defined exclusively by the form of the location and the direction of the boundary

[1] Gleeson *v.* Martin White M. Co., 13 Nev. 442, 462.
[2] *Id.* 442, 463. See, also, Mt. Diablo M. & M. Co. *v.* Callison, 5 Saw. 439, 449.
[3] North Noonday M. Co. *v.* Orient M. Co., 6 Saw. 299, 311.
[4] See, *ante*, § 58.

lines. Such being the case, it would seem that the posted notice, serving a temporary purpose,[1] constitutes no part of the *marking*, which succeeds its posting. What the existing law evidently contemplates is, physical evidence on the ground of *marks* which will enable one to trace the lines on the surface—not a notice indicating where the locator *may* place them.

Posted notices may be an aid in determining the *situs* of monuments, but they cannot be substituted for the markings.

In many cases, stakes driven into the ground are the most certain means of identification.[2]

Fencing is not necessary;[3] in fact, where in California the early occupants inclosed their ground with substantial inclosures, it was an open invitation for prospectors to enter, as it indicated a holding for agricultural purposes.

Stakes firmly planted in the ground, marked as corner stakes, with stone mounds placed around them, which stakes and mounds were found by the court to be "prominent and permanent monuments," were held to justify the legal conclusion, that the location was distinctly marked on the ground so that the boundaries could be readily traced.[4]

Stakes and stone monuments at each corner of the claim, and at the center of each of the end lines, is, according to the supreme court of Nevada, as much as has ever been required under the most stringent construction of the law;[5] and yet there are states which require eight posts and monuments, the additional two being placed at the center of the side lines.

A location marked by a discovery monument, on which

[1] See, *ante*, § 350. See, *post*, § 379.

[2] Hammer v. Garfield M. & M. Co., 130 U. S. 291, 299.

[3] Rogers v. Cooney, 7 Nev. 215, 219.

[4] Du Prat v. James, 65 Cal. 555; Gird v. California Oil Co., 60 Fed. 531, 537; Book v. Justice M. Co., 58 Fed. 106.

[5] Southern Cross G. & S. M. Co. v. Europa M. Co., 15 Nev. 383. See, also, Souter v. Maguire, 78 Cal. 543; Book v. Justice M. Co., 58 Fed. 106; Howeth v. Sullenger, 113 Cal. 547.

was placed the notice of location, and by a stake at each of three of the corners of the claim, and a monument at the center of each end line, leaving one corner unmarked, was held to be sufficient to comply with the law.[1]

The omission to mark one end of a claim where the ground was so inaccessible that the surveyor when surveying for patent was compelled to determine the position of the end line by triangulation, the remainder of the claim being marked by stakes and mounds at the accessible corners, the center of one end line, a discovery monument and blazed trees on the center line, was held not to be an evasion of the law. Under the circumstances, the marking was sufficient.[2] Posting notices on trees, one at each end of the claim,[3] or posting a notice in the center of the claim without any attempt at marking,[4] is, of course, wholly insufficient. These notices would serve the purpose for which they were originally intended, as notices of intention to locate, but would only preserve the right for a reasonable time to enable the locator to mark his boundaries.

As intimated in a previous section, the marks, stakes, or monuments should be within the statutory limit as to area;[5] yet this rule is to be understood in the light of the doctrine, that excessive locations are not wholly void, but are invalid only as to the excess.[6] They should also be placed upon the public domain, and not upon the property of others; but if within the statutory limit, the placing of such marks on ground previously appropriated will not absolutely vitiate the marking.

In so far as the ground taken is vacant, each location, if properly made in other respects, will be valid.[7]

[1] Warnock *v.* De Witt, 11 Utah, 324.

[2] Eilers *v.* Boatman, 3 Utah, 159; affirmed, 111 U. S. 356.

[3] Holland *v.* Mt. Auburn G. Q. M. Co., 53 Cal. 149, 151.

[4] Gelcich *v.* Moriarity, 53 Cal. 217; Morenhaut *v.* Wilson, 52 Cal. 263, 269; Doe *v.* Waterloo M. Co., 70 Fed. 455.

[5] Leggatt *v.* Stewart, 5 Mont. 107, 109; Hauswirth *v.* Butcher, 4 Mont. 299.

[6] See, *ante*, § 362.

[7] Doe *v.* Tyler, 73 Cal. 21; West Granite Mt. M. Co. *v.* Granite Mt. M. Co., 7 Mont. 356.

The boundary lines of the senior locator, or prior appropriator, will, however, control the rights of the junior, who will ultimately be compelled to rectify his markings so as to respect such boundaries.[1] A failure to comply with the law as to the marking within a reasonable time after discovery, where there is no local rule or state statute fixing the time, or within the time fixed by statute or local rule, renders the ground subject to relocation;[2] or, in case of a relocation, the right of the relocator is lost if he fails to mark his boundaries prior to the resumption of work by the former owner,[3] always assuming that the failure to perfect the location is not caused by the fraud or tortious acts of the relocator.[4] Failure to mark the boundaries within the time allowed by law, or prescribed by state or local regulation, cannot be taken advantage of by a subsequent locator, if the prior locator perfects his location in advance of any intervening rights.[5] A location when perfected relates back to the discovery.[6] Boundaries once established cannot be changed to the detriment of intervening locators.[7]

**§ 374. State statutes defining character of marking.** —There is no legislation upon the subject of marking the location in either Nevada, Oregon, Washington, or Utah. The following statutory requirements are found in the remaining precious-metal-bearing states and territories:—

*Colorado.*— Before filing the certificate of location for record (within three months after discovery),[8] the surface boundaries must be marked by six posts, hewed or marked on the side, or sides, in toward the claim, and sunk into the

[1] See, *ante*, § 365, p. 476.

[2] White *v.* Lee, 78 Cal. 593; Funk *v.* Sterrett, 59 Cal. 613.

[3] Gonu *v.* Russell, 3 Mont. 358, 363; Pharis *v.* Muldoon, 75 Cal. 284; Holland *v.* Mt. Auburn G. Q. M. Co., 53 Cal. 149. But see, *post*, § 408.

[4] Erhardt *v.* Boaro, 113 U. S. 527; Miller *v.* Taylor, 6 Colo. 41.

[5] North Noonday M. Co. *v.* Orient M. Co., 6 Saw. 299, 314; Jupiter M. Co. *v.* Bodie Cons. M. Co., 7 Saw. 95, 115. See, *ante*, § 330.

[6] Doe *v.* Waterloo M. Co., 70 Fed. 455; Gregory *v.* Pershbaker, 73 Cal. 109.

[7] O'Reilly *v.* Campbell, 116 U. S. 418; Golden Fleece M. Co. *v.* Cable Cons. M. Co., 12 Nev. 312; Crœsus M. & S. Co. *v.* Colorado L. & M. Co., 19 Fed. 78.

[8] Mills' Annot. Stats., § 3150.

ground, one at each corner and one at the center of each side line. If bedrock prevents the sinking of posts, the boundary may be marked by a pile of stones. Where it is impracticable (because of danger in placing or other reason) to place the post at the proper place, it may be placed at the nearest practicable point, suitably marked to designate the proper place.[1]

*California.*—Sixty days after date of discovery is allowed for the purpose of marking, but no method of marking, other than that required by the federal law, is prescribed.[2]

*Idaho.*—Within three days from the date of discovery, the discoverer must mark his boundaries by establishing at each corner thereof, and at any angle in the side lines, a monument of any material or form which will readily give notice, which shall be marked with the name of the claim and the corner, or angle, it represents. If the monument cannot be safely planted at the true angle, or corner, it may be placed as near thereto as practicable, and so marked as to indicate the place of such corner, or angle. If of posts or trees, the monuments must be hewn, and marked upon the side facing discovery, and must be four inches square, or in diameter. All monuments must be four feet high.[3]

*Arizona.*—Before filing location certificate (sixty days after location),[4] the surface boundaries must be marked by eight substantial posts, projecting at least three feet above the surface of the ground, or by substantial stone monuments, at least three feet high, to wit: One at each corner of said claim, and one at the center of each end and side line thereof.[5]

*Montana.*—No time is specified in the Montana laws within which the marking of the location is to be effected. Ninety days are allowed to sink discovery shaft and record the declaratory statement. The inference is plausible, that the locator should be allowed to complete his development

[1] Mills' Annot. Stats., § 3153.
[2] Act of March, 1897.
[3] Rev. Stats., § 3101, as amended. Laws 1895, p. 27, § 2.
[4] Rev. Stats. 1887, § 2349. [5] Laws 1895, p. 53, §§ 3, 4.

work before marking his boundaries.[1] In any event, he is allowed a reasonable time. The character of the marking is as follows: By marking a tree or rock in place, or by setting a post or stone, at each corner, or angle, of the claim. If a post is used, it must be at least four inches square by four feet six inches in length, set one foot in the ground, with a monument of earth or stone four feet in diameter by two feet in height around the post. If a stone is used, not a rock in place, it must be at least six inches square and eighteen inches in length, set two thirds of its length in the ground, which trees, stakes, or monuments must be so marked as to designate the corners.[2]

*New Mexico.*— No time is provided within which marking is to be effected. In this respect the laws of New Mexico are the same as Montana. Surface boundaries are to be marked by four substantial posts, or four substantial monuments of stone, set at each corner of the claim. Such posts, or monuments, shall each be plainly marked, so as to indicate the direction of the claim from each monument.[3]

*North Dakota.*— Before filing the certificate of location for record (sixty days from date of discovery), the boundaries shall be marked by eight substantial posts, hewed, or blazed, on the side facing the claim, and marked with the name of the lode and the corner, end, or side of the claim that they respectively represent, and sunk into the ground as follows: One at the corner, and one at the center of each side line, and one at each end of the lode; but when it is impracticable, on account of rock or precipitous ground, to sink such posts, they may be placed in a monument of stone.[4]

*South Dakota.*— Same as North Dakota.[5]

*Wyoming.*— Substantially the same as Colorado.[6]

[1] See, *ante*, § 372.
[2] Rev. Code 1895, § 3611.
[3] Laws 1889, p. 42, § 2.
[4] Rev. Code 1895, §§ 1428, 1430, 1431.
[5] Comp. Laws of Dak. 1887, § 2002. Adopted by South Dakota — Laws of 1890, ch. cv.
[6] Laws 1888, p. 88, § 17.

While the requirements of these several laws should be fulfilled to a reasonable degree, a substantial compliance, where the good faith of the locator is manifest, would undoubtedly be held sufficient. Such statutes are, as a rule, liberally construed. Slight variations should not be permitted to invalidate a location otherwise valid.

**§ 375. Perpetuation of monuments.**— Under the rules and customs governing the rights of tin bounders in Cornwall, bounds were required to be renewed annually, in default of which the estate was subject to re-entry by others.[1]

These bounds, however, were marked, and possession delivered after proceedings had in the stannary courts, the writ of possession being executed by the court bailiff.

The "gales" of the free miner, in the coal and iron mines of the Forest of Dean, were set out and marked by the gaveler of the forest;[2] and among the lead miners of Derbyshire, the "meers" were measured by the barmaster, an agent of the crown, in conjunction with two of the grand jury.[3]

In Mexico, the boundaries were marked, after measurement, by an agent of the mining deputation, who was usually a skilled engineer, and the miner was called upon to enter into an obligation to "keep and observe them "forever."[4]

These methods of establishing boundaries, succeeding, as they did, a formal adjudication as to the right to possession, suggest the propriety of permanency. In the United States, however, we are required to mark our boundaries first, and determine our right to possession afterwards. Even when a survey for patent is made, the deputy mineral surveyor is an agent of the claimant, and his acts in no sense bind the government, and, as we shall observe when dealing with patent proceedings, surveys are made,

[1] See, *ante*, § 5.
[2] See, *ante*, § 7.
[3] See, *ante*, § 8.
[4] See, *ante*, § 13, p. 21.

in the first instance, of the ground *claimed*, regardless of overlapping surfaces or interference with prior surveys or locations. Relative rights arising out of these conflicts are frequently not determined until after long litigation. Therefore, there would be but little use in compelling the erection of indestructible monuments for the purpose of marking the extent of the ground *claimed*. Ordinary prudence will suggest to the locator the advisability of preserving his marks. But the law does not require it. Therefore, it has been held, that where a mining claim is once sufficiently marked on the ground, and all other necessary acts of location are performed, a right vests in the locator, which cannot be divested by the subsequent obliteration of the marks or removal of the stakes without the fault of the locator.[1]

The supreme court of Colorado suggests a sensible exception to this rule: Where there is a variation between the calls of the recorded location certificate and the monuments established on the ground, the locator, in order to avail himself of the rule of law which gives controlling effect to the monuments as they were placed on the ground, must keep up his markings. The reason given in support of this is, that as the erroneous record fails to give constructive notice, if the monuments are swept away, no search, no exercise of prudence, diligence, or intelligence, would advise the subsequent locator of the extent and limits of the prior appropriation,[2] and this is one of the principal objects of marking.

[1] Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 110; Book v. Justice M. Co., 58 Fed. 106, 114; McEvoy v. Hyman, 25 Fed. 596, 598.

[2] Pollard v. Shively, 5 Colo. 309, 318.

## Article VIII. The Location Certificate and Its Contents.

§ 379. The location certificate—Its purpose.
§ 380. State legislation as to contents of location certificate.
§ 381. Rules of construction applied.
§ 382. Variation between descriptive calls in certificate and monuments on the ground.
§ 383. "Natural objects" and "permanent monuments."
§ 384. Effect of failure to comply with the law as to contents of certificate.
§ 385. Verification of certificates.

**§ 379. The location certificate—Its purpose.**—In speaking of the "location certificate," we have no reference to the preliminary posted notice of discovery and intention to locate, discussed in a preceding article,[1] except in so far as such posted notice forms the basis of the recorded notice, as it does in the territories of Arizona and New Mexico.[2] In this latter class of cases, the posted notice performs the function of a certificate of location, as it is termed in most states. This certificate is also equivalent in its legal effect to the "declaratory statement" provided for by the laws of Montana.[3]

By the term "certificate of location," we mean the instrument prepared by the locator after the completion of the development work and the marking of his location, which certificate is required by the state laws or local rules to be recorded. This instrument when recorded is a statutory writing affecting realty, being, in the states or localities where it is required, the basis of the miner's "right of exclusive possession" of his mining location granted by the laws of congress.[4] It is the first muniment of his paper title, upon the record of which proceedings for patent are based, and as recorded is intended to impart constructive notice to all subsequent locators of the existence of the claim, its precise locality and extent, as the marking of the location on the ground is intended to

[1] See, *ante*, §§ 350-356.
[2] See, *ante*, § 353.
[3] See, *post*, § 380.
[4] Pollard *v.* Shively, 5 Colo. 309, 312.

impart actual notice of these facts. The preliminary posted notice performs a temporary function; the recorded certificate a more permanent one. This recorded certificate, notice, or declaratory statement, by whatever name it may be called, is the genesis of the locator's paper title.

The congressional laws do not in terms require any such certificate, but they provide, that where a record of the location is made, such record "shall contain the name "or names of the locators, the date of the location, and such "a description of the claim or claims located, by reference "to some natural object or permanent monument, as will "identify the claim."[1] In the absence of a state law or local rule requiring a record to be made, congress has not undertaken to prescribe the nature of the notices which a miner may be compelled by such laws or rules to *post*, or which he may see fit to post on his own motion. It is only when such notice, or its equivalent, is required to be recorded that the provisions of the federal law become mandatory.[2]

Where state laws or local rules require a record to be made, the recorded instrument must contain at least the elements provided for by the Revised Statutes.[3]

A few of the states provide for a record, but do not prescribe the contents of the notice or certificate to be recorded. In such cases, compliance with the federal law is all that is necessary. Most of the states and territories, however, within the purview of this treatise, have provided by law for the contents of such instruments. Before

[1] Rev. Stats., § 2324.

[2] Gleeson *v.* Martin White M. Co., 13 Nev. 443, 464; Golden Fleece M. Co. *v.* Cable Cons. M. Co., 12 Nev. 312; Jupiter M. Co. *v.* Bodie Cons. M. Co., 7 Saw. 96, 112; Poujade *v.* Ryan, 21 Nev. 449; Doe *v.* Waterloo C. M. Co., 55 Fed. 11; Erhardt *v.* Boaro, 113 U. S. 527.

[3] Brown *v.* Levan (Idaho), 46 Pac. 661; Drummond *v.* Long, 9 Colo. 538; Faxon *v.* Barnard, 4 Fed. 702; Gilpin County M. Co. *v.* Drake, 8 Colo. 586; Darger *v.* Le Sieur, 8 Utah, 160; S. C. on rehearing, 9 Utah, 192; Dillon *v.* Bayliss, 11 Mont. 171; Russell *v.* Chumasero, 4 Mont. 309; Garfield M. & M. Co. *v.* Hammer, 6 Mont. 53; Hammer *v.* Garfield M. & M. Co., 130 U. S. 291; Poujade *v.* Ryan, 21 Nev. 449; Gleeson *v.* Martin White M. Co., 13 Nev. 443.

proceeding with a discussion of the nature of these certificates, it is advisable to present an outline of the state legislation upon the subject.

**§ 380. State legislation as to contents of location certificate: —**

*Colorado.*—The location certificate must contain: (1) name of the lode; (2) name of locator; (3) date of location; (4) number of feet in length claimed on each side of the center of discovery shaft; (5) the general course of the lode;[1] (6) a description of the claim sufficient to identify it.[2]

*California.*— By an act passed March 1897, a preliminary notice is required to be posted and recorded within twenty days from the date of discovery, and within sixty days from such discovery a final certificate of location must be recorded in the county recorder's office. Such certificate shall state: (1) the name of the lode or claim; (2) the name of the locator, or locators; (3) the date of discovery and posting of the preliminary notice, which is deemed the date of location; (4) a description of the claim, defining the exterior boundaries as they are marked upon the ground, and such additional description by reference to some natural objects or permanent monument as will identify the claim; (5) a statement that it is the final or completed notice of location, and that the development work required by the act has been done. The certificate must be dated, signed, and verified by oath of the locator, or some one in his behalf.[3]

*Idaho.*—The laws of Idaho provide for two notices: one preliminary, to be posted only; the other a final one, to be both posted and recorded.[4] The final notice must contain: (1) name of lode; (2) name of locator; (3) date of discovery; (4) direction and distance claimed along the ledge from the discovery; (5) distance claimed on each side of the middle of the ledge; (6) distance and direction from

[1] Mills' Annot. Stats., § 3150.
[2] *Id.*, § 3151.
[3] For full text of the act, see appendix.
[4] See, *ante*, § 354.

discovery monument to some natural object by which the claim may be identified; (7) name of mining district, county, and state.[1]

*Arizona.*—The notice or certificate of location must contain: (1) name of the claim; (2) name of locator; (3) date of location; (4) number of feet in length, and number of feet claimed on each side of discovery shaft lengthwise of the claim; (5) general course of the lode; (6) the locality of the claim with reference to some natural object or permanent monument as will identify the claim.[2]

*Montana.*—The instrument which is to be recorded is called the "declaratory statement." It must contain: (1) name of lode or claim; (2) name of locator; (3) date of location, and such a description with reference to natural objects or permanent monuments as will readily identify the claim; (4) the number of linear feet claimed along the course of the vein each way from point of discovery, with the width on each side of the center of the vein, and the general course of the vein as near as may be; (5) dimensions and location of discovery shaft, or its equivalent, sunk upon the lode; (6) location and description of each corner, with the markings thereon. The declaratory statement must be verified by the oath of a locator, or one of the locators, and, in case of a corporation, by a duly authorized officer.[3]

*Nevada.*—There is no legislation on the subject in Nevada.

*New Mexico.*—A copy of the posted notice is required to be recorded. This must contain: (1) the names of the locators; (2) the intent to locate the claim; (3) a description by reference to some natural object or permanent monument.[4]

[1] Laws 1895, p. 25, §§ 2, 4.
[2] Laws 1895, p. 53, § 1.
[3] Rev. Code 1895, § 3612.
[4] Comp. Laws 1884, § 1566. See, *ante*, § 353.

*North Dakota.*—The location certificate must contain: (1) name of lode; (2) name of locator; (3) date of location; (4) number of feet in length claimed on each side of the discovery shaft; (5) number of feet in width claimed on each side of lode; (6) general course of lode as near as may be;[1] (7) such a description as shall identify the claim with reasonable certainty.[2]

*Oregon.*—No provision is made as to the contents of a notice, other than that it shall contain a description of the claim "as near as may be." Continuous working dispenses with the necessity of a record.[3]

*South Dakota.*—The requirements as to certificate of location are the same as in North Dakota.[4]

*Washington.*—While a record is contemplated,[5] no formal certificate is required.

*Wyoming.*—The certificate must contain: (1) name of the lode; (2) name of the locator or locators; (3) date of location; (4) length of claim along the vein, measured from center of discovery shaft, and general course of the vein as far as known; (5) amount of surface ground claimed on either side of the center of the discovery shaft or workings; (6) a description of the claim by such designation of natural or fixed objects as shall identify the claim beyond question.[6]

**§ 381. Rules of construction applied.**— In the initiation of rights upon public mineral lands, as well as in the various steps taken by the miner to perfect his location, his proceedings are to be regarded with indulgence, and the notices required invariably receive at the hands of the courts a liberal construction.[7]

[1] Rev. Code 1895, § 1428.
[2] Rev. Code 1893, § 1429.
[3] Hill's Annot. Stats., § 3828.
[4] Comp. Laws 1887, §§ 1999, 2000. Adopted by South Dakota—Laws 1890, ch. cv., § 1.
[5] Hill's Annot. Stats., § 2214.
[6] Session Laws 1890-91, ch. xlvi., pp. 179-180.
[7] Carter v. Bacigalupi, 83 Cal. 187; Prince of Wales Lode, 2 Copp's L.O. 2, 3.

To hold him to absolute technical strictness in all the minor details, would be practically to defeat the manifest end and object of the law. The pioneer prospector, as a rule, is neither a lawyer nor a surveyor. Neither mathematical precision as to measurement, nor technical accuracy of expression in the preparation of notices, is either contemplated or required.[1] The law, being designed for the encouragement and benefit of the miners, should be liberally interpreted, "looking to substance, rather than shadow, "and should be administered on the lines of obvious com- "mon sense."[2] Mere imperfections in the certificate will not render it void.[3] In matters of description, calls that are erroneous will not destroy the validity of the notice or certificate, if by excluding them a sufficient description remain to enable its application to be ascertained.[4]

Thus, where a certificate of a location specified its *situs* as being in the wrong county, it being otherwise valid, and having been recorded in the right county, the erroneous statement was mere surplusage, and as such was rejected.[5]

In the absence of a local requirement to that effect, the certificate need not state either the district, county, or state in which the location is situated.[6]

A mistake in the certificate as to the direction and course, such as "northerly" instead of "northeasterly," the description being aided by monuments on the ground, is of no moment.[7]

The certificate is not required to show the precise boundaries of the claim as marked on the ground, but it is sufficient if it contains directions, which, taken in connection with such boundaries, will enable a person of reasonable intelligence to find the claim and trace the lines.[8]

[1] Book v. Justice M. Co., 58 Fed. 106, 115.
[2] Cheesman v. Hart, 42 Fed. 98, 99.
[3] Bennett v. Harkrader, 158 U. S. 441, 443.
[4] Duryea v. Boucher, 67 Cal. 141.
[5] Metcalf v. Prescott, 10 Mont. 283.
[6] Carter v. Bacigalupi, 83 Cal. 187.
[7] Book v. Justice M. Co., 58 Fed. 106, 115.
[8] Gamer v. Glenn, 8 Mont. 371; Upton v. Larkin, 7 Mont. 449; Flavin v. Mattingly, 8 Mont. 242; Brady v. Husby, 21 Nev. 453.

§ 382. **Variation between calls in certificate and monuments on the ground.**— When it is once conceded that a recorded certificate of location is a statutory instrument affecting real property,[1] it follows, that general rules regarding descriptive calls in this class of instruments apply with equal force to the construction of such certificates.

Mr. Washburn states the general rule to be, that courses and distances are generally regarded as more or less uncertain, and always give place, in questions of doubt or discrepancy, to monuments and boundaries that are referred to as indicating and identifying the land.[2]

This doctrine has been uniformly applied by the courts to certificates of location of mining claims.[3]

The general rule applicable to patents, deeds, and other instruments of conveyance, that where a monument is referred to in a descriptive call, and it has been obliterated or destroyed, parol evidence may be introduced to show where it was actually located in the field, does not, it seems, apply to certificates of location. As heretofore indicated, in order to invoke the rule, that courses and distance yield to monuments, these monuments must be actually existing, and parol evidence is inadmissible to point out where they were originally placed.[4] The reason for this rule has been fully explained in a preceding section.[5]

§ 383. **"Natural objects" and "permanent monuments."**—The words "natural objects" and "permanent monuments" are general terms, susceptible of different shades of meaning, depending largely upon their application. What might be regarded as a permanent monument for one purpose, might not be so considered with reference

[1] See, *ante*, § 379.

[2] 3 Washburn on Real Property, 3d ed., p. 348; 2 Devlin on Deeds, § 1029.

[3] Pollard v. Shively, 5 Colo. 309, 313; Book v. Justice M. Co., 58 Fed. 106, 115; Hoffman v. Beecher, 12 Mont. 489; Cullacott v. Cash G. S. M. Co., 8 Colo. 179; McEvoy v. Hyman, 25 Fed. 596, 599.

[4] Pollard v. Shively, 5 Colo. 309, 318. [5] See, *ante*, § 375, p. 489.

to a different purpose. The same rule applies to natural objects.[1] There is no particular necessity for drawing a distinction between "natural objects," such as streams, rivers, ponds, highways, trees, and other things, *ejusdem generis*, and "permanent monuments," which may imply an element of artificial construction, it being the manifest intent of the law that any object of a fairly permanent character, whether natural or artificial, may, if sufficiently prominent, serve for the purpose of reference and identification.

As to whether a given notice or certificate of location contains such a description of the claim as located by reference to some natural object or permanent monument as will identify it, is a question of fact to be determined by the jury,[2] and parol evidence is admissible for the purpose of proving that the thing named in the certificate is, in fact, a natural object or permanent monument.[3] In the absence of evidence for, or against, the sufficiency of the reference in the notice, it will be presumed to be sufficient to identify the claim.[4]

The following cases indicate the views of the courts as to what are natural objects or permanent monuments:—

Prominent posts, or stakes, firmly planted in the ground;[5] stones, if of proper size and properly marked;[6] monuments,[7] prospect holes,[8] and shafts,[9] may be sufficient

[1] Quinby v. Boyd, 8 Colo. 194.

[2] Eilers v. Boatman, 111 U. S. 356; Gamer v. Glenn, 8 Mont. 371; Brady v. Husby, 21 Nev. 453; Flavin v. Mattingly, 8 Mont. 242; Metcalf v. Prescott, 10 Mont. 283; Russell v. Chumasero, 4 Mont. 309.

[3] Carter v. Bacigalupi, 83 Cal. 187; O'Donnell v. Glenn, 8 Mont. 248; Flavin v. Mattingly, 8 Mont. 242; Metcalf v. Prescott, 10 Mont. 283; Dillon v. Bayliss, 11 Mont. 171; Kelly v. Taylor, 23 Cal. 14; Prince of Wales Lode, 2 Copp's L. O. 2, 3.

[4] Brady v. Husby, 21 Nev. 453; Gleeson v. Martin White M. Co., 13 Nev. 442; Hammer v. Garfield M. & M. Co., 130 U. S. 291, 299.

[5] Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 112; Russell v. Chumasero, 4 Mont. 309; O'Donnell v. Glenn, 8 Mont. 248; Hanson v. Fletcher (Utah), 37 Pac. 480.

[6] Russell v. Chumasero, 4 Mont. 309; Gamer v. Glenn, 8 Mont. 371.

[7] Hanson v. Fletcher (Utah), 37 Pac. 480.

[8] *Id.*

[9] Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 111; North Noonday M. Co. v. Orient M. Co., 6 Saw. 299, 312.

as permanent monuments within the meaning of the law. The boundary lines of adjoining claims have uniformly been held to be such.[1] A tree is a fixed natural object, and when marked artificially or naturally, there is less room to question its sufficiency than in the case of a shaft.[2] A cañon, or any other prominent feature of the landscape, is a natural object.[3]

**§ 384. Effect of failure to comply with the law as to contents of certificate.**—It follows from what we have heretofore said, that any notice or certificate of location which is used as the basis of the record, which fails to reasonably comply with the requirements of the federal law as to the contents of such record, is ineffectual and void. As to the omission of any of the other elements required by state legislation, in some of the states the law itself prescribes the penalty by providing that the failure to insert any of the requirements renders the location void. This is the rule in California, Colorado, Arizona, North and South Dakota. The laws of the other states and territories are silent upon the subject.

If the rules applicable to local regulations and customs[4] may be properly invoked in the case of statutory enactments —that is, that a forfeiture is not worked unless the custom or local rule in terms so declares—the provisions of the statutes in the last class of states, exacting requirements in excess of those made essential by the federal law, are merely directory, and their omission is accompanied with no serious consequences. We do not see why such rule should not be applicable alike to local and statutory regulations. As to the other states, where legislation of the

[1] Upton *v.* Larkin, 7 Mont. 449; Russell *v.* Chumasero, 4 Mont. 309; Hammer *v.* Garfield M. & M. Co., 130 U. S. 291; Metcalf *v.* Prescott, 10 Mont. 283; Book *v.* Justice M. Co., 58 Fed. 106; Southern Cross M. Co. *v.* Europa M. Co., 15 Nev. 383; Gamer *v.* Glenn, 20 Pac. 658; Live Yankee Co. *v.* Oregon Co., 7 Cal. 41. *Contra:* Baxter Mt. G. M. Co. *v.* Patterson, 3 New M. x. 179.

[2] Quinby *v.* Boyd, 6 Pac. 462.

[3] Flavin *v.* Mattingly, 8 Mont. 242.

[4] See, *ante*, § 274.

character noted is found, it may be said, that forfeitures are not favored by the courts, and where a location is made in good faith, and all the essential requirements are complied with, instances are not frequent where the miner is deprived of substantial rights for failure to strictly comply with the letter of the law.

§ 385. **Verification of certificates.**—Three of the states, California,[1] Idaho, and Montana, require the certificate of location, or declaratory statement, to be verified by the oath of a locator. In a preceding section[2] we have suggested that these provisions may be repugnant to the federal law, as imposing unnecessary and onerous burdens upon locators. We have there shown, that the supreme court of Montana, after doubting the validity of the provision, has upheld its validity. We are not aware of any ruling on the subject in Idaho. Where the law makes notices of this character *prima facie* evidence of the facts therein recited, it would seem that the formality of an oath is not an unreasonable requirement. In many states, instruments affecting title to real property are required to be verified before they are entitled to record, and all states require some form of acknowledgment to such class of documents. We do not see upon principle, why the law, as found in California, Montana, and Idaho, should not be upheld.

## Article IX. The Record.

§ 389. Time and place of record.
§ 390. Effect of failure to record within the time limited.
§ 391. Proof of record.
§ 392. The record as evidence.

§ 389. **Time and place of record.**—As heretofore frequently indicated,[3] in the absence of a state law or local rule requiring it, there is no necessity for recording any notice or certificate in connection with the acquisition of title to public mineral lands by location.

[1] Act of March, 1897.

[2] See, *ante*, §§ 273, 328.

[3] See, *ante*, § 251.

But as observed in a preceding section,[1] the popular notion is, that notices of location should be recorded somewhere, and although in the absence of a law or rule so declaring, a failure to record is not accompanied with any loss of right, yet the universal rule is, to file the notice of location with the county officer charged by the state or territorial laws with the duty of registering instruments affecting title to real estate.

Where the law or regulation requires a record to be made, but does not specify the time within which it is to be effected, we think a reasonable time should be allowed, following the rule heretofore announced as to the time of performance of other acts of location.[2] What constitutes a reasonable time depends upon the circumstances surrounding each particular case, such as the distance from the discovered mine to the place of record, and the means of communication between the two points. For the most part, the states and territories wherein laws exist requiring a record to be made, provide for the time within which the notice or certificate is to be lodged with the recording officer. Colorado,[3] allows ninety days; California,[4] North Dakota,[5] and South Dakota,[6] sixty days, computed from date of discovery; Idaho,[7] ninety, and Arizona, sixty days from date of *location*;[8] Montana[9] and New Mexico,[10] ninety, and Oregon,[11] thirty days from posting the preliminary notice referred to in a preceding article.[12] In Wyoming, if the discovered claim is within an organized district, two

[1] See, *ante*, § 273.
[2] See, *ante*, § 339.
[3] Mills' Annot. Stats., § 3150.
[4] Act of March, 1897.
[5] Rev. Code 1895, § 1428.
[6] Comp. Laws Dak. 1887, §§ 1999, 2000. Adopted by South Dak.— Laws 1890, § 1.
[7] Laws 1895, p. 25, § 4.
[8] Rev. Stats. 1887, § 2349. Laws 1895, p. 53, § 2.
[9] Rev. Code 1895, § 3612.
[10] Comp. Laws 1884, § 1596.
[11] Hill's Annot. Stats. 1892, §§ 3828, 3831.
[12] See, *ante*, §§ 350-353.

records are required—one with the district recorder, within ninety, the other with the county clerk, within one hundred and twenty days from the date of discovery.

Washington authorizes the election of recorders by mining districts, but its laws are silent, both as to contents of the notice and the time within which it is to be recorded.

Nevada provides for the recording of the original with the district recorder, and a duplicate with the county recorder.[1]

Until the passage of a recent act by the legislature of California, it was customary in that state to record in the county recorder's office, as well as with the district recorder, if there were one. In the absence of a written district rule, a custom as to place of record might be shown. But such custom, to be binding, ought to be so well known, understood, and recognized in the district, that locators should have no reasonable ground for doubt as to what was required as to place of record.[2] But the subject of recording is now regulated by statute. Recording in districts is now prohibited.[3]

**§ 390. Effect of failure to record within the time limited.**—The mere failure to record a notice, certificate, or declaratory statement, within the statutory time does not render the location of the claim invalid, where there are no intervening rights before the record is properly made, if there has been full compliance with the law in all other respects.[4]

This is but the reiteration of a principle announced in a previous section,[5] that the failure to comply with any of the requirements of the law within the time limited *may* subject the ground to relocation; that the locator delays the performance of these acts at his peril; but if he complies

[1] Stats. 1885, p. 27, § 1.

[2] See, *ante*, § 273.

[3] Act of March, 1897.

[4] Preston *v.* Hunter, 67 Fed. 996, 999; Faxon *v.* Barnard, 4 Fed. 702, 703; Strepey *v.* Stark, 7 Colo. 614; Craig *v.* Thompson, 10 Colo. 517.

[5] See, *ante*, § 330.

with the law prior to the acquisition of any right by a subsequent locator, no one has a right to complain. The acts when completed will relate back to the inception of the right. Where, however, the requirement as to recording is fixed by local rule, the failure to record will not work forfeiture unless the rule itself so provides.[1]

§ 391. **Proof of record.**— Where a state law or local rule requires the certificate to be recorded with a county officer whose duties are defined by statute, such as recorder, clerk, or register of deeds, the record will prove itself, and as a rule, certified copies thereof are admissible in evidence with like effect as the original. But in case of records in the mining districts, the rule is different. Such records do not prove themselves. They must be produced by the proper officer, whose official character must be shown, and the authenticity of such records must be established.[2] Certified copies of such records cannot be admitted in evidence, unless it be first shown that their custodian was empowered under the local rules to give and authenticate such copies.[3]

§ 392. **The record as evidence.**— Constructive notice by recording is wholly a creature of the statute. A record not provided for by statute or recognized by law gives no notice. Therefore, before a record of a mining location can be introduced in evidence for any purpose, it must appear that it is authorized by law; otherwise, it is irrelevant and inadmissible.[4]

Where such record is authorized, it is *prima facie* evidence only of such facts as are required by law to be stated therein,[5] provided they are sufficiently stated.[6] A record

[1] See, *ante*, § 274.

[2] Roberts v. Wilson, 1 Utah, 292.

[3] Harvey v. Ryan, 42 Cal. 626; Roberts v. Wilson, 1 Utah, 292. See, *ante*, § 272. See, also, Atwood v. Fricot, 17 Cal. 37.

[4] Moxon v. Wilkinson, 2 Mont. 421; Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312; Chamberlain v. Bell, 7 Cal. 292; Mesick v. Sunderland, 6 Cal. 298, 315; 1 Wharton on Evidence, 3d ed., § 643.

[5] 2 Jones on Evidence, § 521.

[6] Strepey v. Stark, 7 Colo. 614; Jantzen v. Arizona C. Co. (Ariz.), 20 Pac. 93.

of a certificate of a location which recites the citizenship of locators, the fact of discovery, and the fact that the location had been marked upon the ground so that the boundaries could be readily traced, is not evidence of any of these facts[1] in any of the states or territories, for the simple reason, that no such facts are required to be stated in any of the statutory notices.

Where the right of possession is founded upon an alleged compliance with the law relating to a valid location, all the necessary steps, aside from the making and recording of the location certificate, must, when contested, be established by proof outside of such certificate. The record of the certificate is proof itself of its own performance as one of such steps, and in regular order, generally speaking, the last step in perfecting the location.[2]

While many of the states require the date of the discovery to be stated in the recorded certificate, we do not think that this would be evidence of the *fact* of discovery. A discovery once proven, such a record would, *prima facie*, fix the date. The question of discovery is the most important of all the acts required in the proceedings culminating in a perfected location. It is the foundation of the right without which all other acts are idle and superfluous. With the exception of three states (California, Idaho, and Montana), the certificate is executed with no solemnity. It is not either acknowledged or sworn to. It is a mere *ex parte* declaration in his own behalf of the party most interested.[3] The same may be said of marking the boundaries.

It is quite true, that when a certificate contains a

[1] Flick v. Gold Hill & L. M. Co., 8 Mont. 298.

[2] Strepey v. Stark, 7 Colo. 614, 619.

[3] Judge Phillips, in his charge to the jury in Cheesman v. Shreeve, 40 Fed. 787, said, that certificates of location are presumptive evidence of discovery. But in this case, many years elapsed between the original location and the litigation, and the fact of discovery was supported by the testimony of the parties. Under these circumstances the judge held, that every reasonable presumption should be indulged in favor of the integrity of the location. The reasoning, while persuasive so far as this case is concerned, does not militate against the views announced in the text.

description of the claim with reference to a natural object or permanent monument, the recorded notice to this extent may be *prima facie* evidence of its own sufficiency, for the reason, that the statute requires such description to be inserted in the certificate.

The real purpose of the record is to operate as constructive notice of the fact of an asserted *claim* and its extent. When the locator's right is challenged, he should be compelled to establish by proof outside of the certificate all the essential facts, without the existence of which the certificate possesses no potential validity. These facts once proven, the recorded certificate may be considered as *prima facie* evidence of such other facts as are required to be stated therein.

## Article X. Change of Boundaries and Amended Location Certificates.

§ 396. Circumstances justifying change of boundaries.
§ 397. Privilege of changing boundaries exists in the absence of intervening rights, independent of state legislation.
§ 398. Objects and functions of amended certificates.

**§ 396. Circumstances justifying change of boundaries.**—The difficulties surrounding the locator in determining the precise position of his discovered vein in the earth, the probable course of its apex, and in many instances its width, frequently render it impossible for him to so mark his boundaries within the time allowed by law for that purpose, as to entitle him to the full measure of property rights which the law permits him to acquire as the reward for his discovery. It frequently happens, that the limited extent of surface exploration possible within the periods allowed him does not develop the true conditions. His markings, therefore, are frequently based on erroneous suppositions and wrong theories. While the government is not concerned with the particular individual who is the

recipient of its bounty, and it makes but little difference to it who discovers and develops its mineral resources, its policy is to encourage the search for, and the opening of, mines, and this policy is best subserved by permitting the discoverer to rectify and readjust his lines whenever he may do so without impairing the intervening rights of others.

While the locator marks his boundaries in every instance at his peril, there is no reason why he should be compelled to abide by first impressions, if no one is injured by a subsequent rectification of his boundaries.

It also frequently happens, that at the time a discovery is made, the existence of contiguous prior locations prevents him from giving to his surface that symmetrical form which the law contemplates; or if he makes it in the ideal form, a surface conflict arises, rendering the extent of his rights vague and uncertain. These prior locations are frequently abandoned, and the ground embraced therein becomes subject to reappropriation. As heretofore suggested, when such abandonment or forfeiture becomes effectual, the conflict area does not inure to the advantage of the junior locator.[1] But the courts uphold the right of the junior under such circumstances to re-form his lines and amend his location so as to include the overlapping surface.[2] Where an application for patent is made, and a survey for that purpose is ordered, the deputy mineral surveyor is controlled by the record of the certificate of location, where one is required,[3] and the markings on the ground, the latter controlling where there is a variation between the descriptive calls of the record and the monuments.[4] While, for the purpose of obtaining parallelism,[5] the lines may be drawn in, so that, as finally surveyed, the

[1] See, *ante*, § 363.

[2] See, *ante*, § 363.

[3] Lincoln Placer, 7 L. D. 81; Rose Lode Claims, 22 L. D. 83; Com'rs' Letter—1 Copp's L. O. 12.

[4] See, *ante*, § 382.

[5] Doe *v.* Sanger, 83 Cal. 203, 214; Doe *v.* Waterloo M. Co., 54 Fed. 935, 940; Tyler *v.* Sweeney, *Id.* 284; Last Chance M. Co. *v.* Tyler, 61 Fed. 557; Philadelphia M. Claim *v.* Pride of the West, 3 Copp's L. O. 82.

boundaries are approximately within the limits of the surface area as originally claimed, yet no authority is given to extend the surveyed boundaries so as to include area which at the time of the survey is not within the ground actually claimed, or found to be, at least, approximately within the lines connecting the monuments as marked, prior to the order for survey.

It is therefore frequently found necessary to change boundaries before applying for an order for survey; and when so changed, an amended location is made, and an amended certificate is prepared and recorded, which, if free from conflicts with prior locators, or those whose rights have supervened since the perfection of the original location, is just as valid as if made in the original instance.

Those locating subsequently to the perfection of the amended location are not injured, and have no right to complain.[1]

**§ 397. Privilege of changing boundaries exists, in the absence of intervening rights, independent of state legislation.**—In some of the states and territories, amended locations and certificates are the subject of statutory regulation. This is the case in Colorado,[2] Idaho,[3] Arizona,[4] New Mexico,[5] North Dakota,[6] South Dakota,[7] and Wyoming.[8]

The provisions in all these states are on parallel lines with those of Colorado, which are as follows:—

"If, at any time, the locator of any mining claim here-
"tofore or hereafter located, or his assigns, shall apprehend
"that his original certificate was erroneous, defective, or that
"the requirements of the law had not been complied with
"before filing, or shall be desirous of changing his surface

[1] Gleeson *v.* Martin White M. Co., 13 Nev. 442.
[2] Mills' Annot. Stats., § 3160.
[3] Laws 1895, p. 27, § 5.
[4] *Id.*, p. 54, § 7.
[5] Laws 1889, p. 42, § 4.
[6] Rev. Code 1895, § 1437.
[7] Comp. Laws Dak. 1887, § 2008. Adopted by South Dak.—Laws 1890, ch. cv.
[8] Laws 1888, p. 85, § 17.

"boundaries, or taking in any part of an overlapping claim "which has been abandoned, or in case the original certifi- "cate was made prior to the passage of this law, and he "shall be desirious of securing the benefits of this act, such "locator, or his assigns, may file an additional certificate, "subject to the provisions of this act; *provided*, that such "relocation does not interfere with existing rights of others "at the time of such relocation, and no such relocation, or "other record thereof, shall preclude the claimant, or claim- "ants, from proving any such title, or titles, as he, or they, "may have held under previous location."

But in the nature of things, this right exists throughout the mining regions, independent of statutory regulations. The supreme court of California, a state which has no legislation on the subject, has held, that if locators have any apprehension as to the sufficiency of their original location, there is no reason why they should not be permitted to modify or amend it.[1]

Of course, the alteration of boundaries, by taking in new territory and filing amended certificates where the antecedent one is absolutely void, cannot be permitted to the prejudice of intervening rights.[2] But with this qualification, the right to change boundaries and rectify lines exists throughout the mining regions.

In dealing with this subject in the future, we shall assume the correctness of this theory, and, therefore, that the decisions of the courts in states where laws of this character exist, so far as underlying principles are discussed therein, may be resorted to as precedents in states where legislation on the subject is wanting. We think the circumstances set forth in the preceding section justify this assumption.

**§ 398. Objects and functions of amended certificates.** — Where a change of boundaries is sought, the acts necessary to accomplish the desired result are specified by statute

[1] Thompson *v.* Spray, 72 Cal. 528, 529.

[2] Seymour *v.* Fisher, 16 Colo. 188; Omar *v.* Soper, 11 Colo. 380; Hall *v.* Arnott, 80 Cal. 348; Tombstone Townsite Cases, 15 Pac. 26; Wight *v.* Tabor, 2 L. D. 738.

in the states enumerated in the preceding section. Where there is no statute, in re-marking of the boundaries and preparing and recording the certificate the same formalities should be observed as in the case of an original location.

In speaking of the objects and functions of additional or amended certificates of location, the supreme court of Colorado thus states its views:—

"The evident intent of the statute is, that the additional "certificate shall operate to cure defects in the original, and "thereby to put the locator, where no other rights have "intervened, in the same position that he would have "occupied if no such defect had occurred. Such intent is "in accord with the principle of all curative provisions of "law."[1]

Such a certificate may be used as evidence, although the original may be incomplete or imperfect, upon the theory, that the amended certificate relates back to a *right* of location accruing by virtue of the prerequisite discovery and an attempted compliance with the law.[2]

A distinction is drawn between cases where the original certificate is absolutely void, or where the amended certificate seeks to appropriate new and additional ground, and one where the original is simply defective. In the former class of cases, a proper relocation or intervening appropriation cuts off the right of amendment. In the latter, where the object is to simply cure imperfections and obvious defects, the amended certificate will relate back to the original in spite of intervening locations.[3] This is equivalent to the doctrine, that mere imperfections in location certificates do not render them void so as to make the ground subject to relocation. Where new territory is added by amendment, it cannot be said, that as to such addition the rights relate back to the original location. That is not the intent of the law. As to such new territory, the amended certificate

[1] Strepey v. Stark, 7 Colo. 614, 620.

[2] McGinnis v. Egbert, 8 Colo. 41, 45; Moyle v. Bullene, 7 Colo. App. 308; Becker v. Pugh, 9 Colo. 589.

[3] McEvoy v. Hyman, 25 Fed. 596; Tombstone Townsite Cases (Ariz.), 15 Pac. 26; Hall v. Arnott, 80 Cal. 348.

would operate only from the time the relocation is perfected. Said Judge Hallett:—

"Everyone who is at all familiar with mining locations "knows, that in practice the first record must usually, if "not always, be imperfect. Recognizing these difficulties, "it has never been the policy of the law to avoid a location "for defects in the record, but rather to give the locator an "opportunity to correct his record, whenever defects may "be found in it. . . . This is the function and proper "office of amendments: To put the original in as perfect "condition as if it had been complete in the first instance."[1]

In other words, a reasonable latitude of amendment is allowed, of which the locator cannot be deprived because some one has attempted to relocate his ground.

There is a distinction between amending an original location by re-forming lines and rectifying errors based upon a prior discovery and location, and the relocation of abandoned ground. The former, if properly made, and no other rights have intervened, takes effect, subject to the qualification heretofore stated, by relation, as of the date of the original; whereas, relocation of abandoned ground becomes operative only from the date of its perfection;[2] and whether a given certificate is a mere amendment or a relocation of abandoned ground, will depend upon the facts as they exist, and not upon the recitals of the certificate.[3] The second, or amended notice, is not an abandonment of the original.[4] An amended notice cannot, by the mere omission to insert names of the original locators, divest the title acquired by the original location,[5] unless done with their knowledge and consent.[6]

[1] McEvoy v. Hyman, 25 Fed. 596, 600. See, also, Craig v. Thompson, 10 Colo. 517.

[2] Cheesman v. Shreeve, 40 Fed. 787, 789.

[3] *Id.*

[4] Thompson v. Spray, 72 Cal. 528; Weill v. Luceme M. Co., 11 Nev. 200, 213.

[5] Thompson v. Spray, 72 Cal. 528; Hallack v. Traber (Colo.), 46 Pac. 110; Mono M. Co. v. Magnolia E. & W. Co., 2 Copp's L. O. 68.

[6] Morton v. Solambo C. M. Co., 26 Cal. 527; Gore v. McBrayer, 18 Cal. 583; Moore v. Hamerstag, 109 Cal. 122, 125.

Additional territory embraced within an amended location made by one co-tenant will inure to the benefit of all, on the principle, that the right to change the boundaries arises out of, and relates back to, the original location.[1]

Where the second, or amended, notice contains names other than those set forth in the original, in an action against strangers this fact cannot be taken advantage of. It may be treated as an original notice as to the persons whose names do not appear on the first, and as a supplemental, or amended notice, as to those whose names appear on both.[2]

Any radical change of the name of a claim might be construed as an attempt to hide its identity, and mislead adverse claimants in patent proceedings;[3] but the mere dropping of a descriptive prefix — as, for instance, naming a claim the "Tiger" instead of the "Little Tiger," "Shields" in place of "General Shields," or "Flag" instead of "Ameri- "can Flag,"— where the other descriptive portions of the notice are regular, is of no importance.[4]

It is not necessary that the purposes for which a certificate is amended should be specified. The filing of such certificate, if made under proper conditions, is effectual for all the purposes enumerated in the statute, whether such purposes are mentioned in the certificate or not.[5]

[1] Hallack v. Traber (Colo.), 46 Pac. 110.
[2] Thompson v. Spray, 72 Cal. 528, 529.
[3] Morr. Min. Rights, 8th ed., p. 89.
[4] Seymour v. Fisher, 16 Colo. 188, 199.
[5] Johnson v. Young, 18 Colo. 625, 629.

## Article XI. Relocation of Forfeited or Abandoned Claims.

§ 402. Circumstances under which relocation may be made.
§ 403. New discovery not essential as basis of relocation.
§ 404. Relocation admits the validity of the original.
§ 405. Relocation by original locator.
§ 406. Relocation by one of several original locators in hostility to the others.
§ 407. Relocation by agent or others occupying contractual or fiduciary relations with original locator.
§ 408. Manner of perfecting relocations—Statutory regulations.
§ 409. Right of second locator to improvements made by the first.

**§ 402. Circumstances under which relocations may be made.**—For a failure to perform labor or make improvements to the value of one hundred dollars annually, computing the periods from the first day of January next succeeding the date of location, the federal law provides, that "the claim, or mine "upon which such failure occurs, shall be open to relocation "in the same manner as if no location of the same had ever "been made, provided that the original locators, or their "heirs, assigns, or legal representatives, have not resumed "work upon the claim after failure and before such location."[1]

In dealing with the subject of relocations, it is not our purpose at this time to enter into a critical discussion of the subject of abandonment or forfeiture, or the restoration of the estate by a resumption of work. We defer this for a subsequent chapter. The scope of this article is limited to the manner in which claims may be relocated after the rights based upon the original location are unquestionably lost, or subject to forfeiture, for failure to comply with the requirements of the law.

The circumstances under which the estate created by the perfection of a valid location may be extinguished, so as to restore the land to the public domain, and the manner in which such estate may be revived by the delinquent locator, will be fully explained in a succeeding title.

[1] Rev. Stats., § 2324.

§ 403. **New discovery not essential as basis of relocation.**—It is a well-established rule, that there can be no valid location of a mining claim without a discovery;[1] but it has been held, that it is not necessary that the locator should be the first discoverer of a vein, but it must be known to him, and claimed by him, in order to give validity to the location.[2]

So, if the original location was based upon a valid discovery, and the relocator finds the vein exposed within the limits of the claim, this is sufficient upon which to base a relocation.[3]

The theory of the law upon which the relocation is permitted is, undoubtedly, that if the original locator who made the discovery manifests his unwillingness to proceed with the development of the ground, and his location becomes subject to forfeiture for failure to perform the necessary work, any one may succeed to the right based upon the original discovery by relocating the ground, so that successive relocations based upon successive forfeitures may all be founded upon the one discovery. A new discovery is not requisite for each relocation.

§ 404. **Relocation admits the validity of the original.**—A relocation impliedly admits the validity of the prior location. There can be no relocation unless there has been a prior valid location, or something equivalent, of the same property.[4]

The courts draw a distinction between a locator and relocator, classing the former as an original discoverer of mineral before unknown, and the latter as the mere appropriator of mineral discovered by another who had failed to exercise the privilege conferred upon him by law. The relocation is equivalent to an admission that the relocator claims a forfeiture by reason of a failure on the part of the

[1] See, *ante*, § 335.
[2] Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 108.
[3] Armstrong v. Lower, 6 Colo. 393, 395.
[4] Belk v. Meagher, 104 U. S. 279, 289.

first locator to comply with the law. Such being the case, the only inquiry is, as to whether or no the original locator performed the requisite labor.[1]

**§ 405. Relocation by original locator.**—In speaking of relocation by an original locator, we have no reference to locations made for the purpose of curing defects, or re-adjusting boundaries. We have called these *amended* locations, and as such, have dealt with them in the preceding article. What we now refer to are cases wherein the original locator seeks to evade the requirements of the law as to development and annual expenditure, and endeavors to perpetuate his estate by periodical relocations.

The question was presented to the supreme court of Utah in the following form: "Can the locator of a quartz "mining claim who has allowed his location to lapse by a "failure to perform the necessary work make a relocation "or new location covering the same ground?"[2]

The court failed to see any reason why such right should be denied. It based its ruling upon the following grounds:—

(1) That right is recognized by the circuit court of the ninth circuit[3] and by the land department;[4]

(2) The fact, that a prior locator, after his right has lapsed, may renew it by resuming work, would appear to be a favor or right granted to such prior locator, but to deny him the right to relocate is to deny him a privilege which is given to *strangers*.

The conclusion of the court is, that the prior locator, in addition to the right to resume work, and thus relieve himself from the danger of incurring forfeiture, should also have the same rights as strangers to relocate. Inferentially,

[1] Wills *v.* Blain, 4 New Mex. 378.

[2] Warnock *v.* De Witt, 11 Utah, 324. This case is now pending on appeal to the supreme court of the United States.

[3] Hunt *v.* Patchin, 35 Fed. 816.

[4] Acting Commissioner Holcomb, Copp's Min. Lands, 300.

at least, this doctrine receives some support from a case decided by the supreme court of Montana.[1]

We are fully aware of the weight to be given to the decisions of the supreme court of a state or territory, and for that reason it is with a great deal of hesitancy that we intrude our individual views in opposition to such a decision, in the absence of some authoritative ruling emanating from a court of equal dignity to support our theories. But the rule announced by the supreme court of Utah is so opposed to what we consider the true intent and spirit of the mining laws, that we feel justified in criticising it, and in doing so, to deferentially present our reasons for upholding a contrary doctrine.

In the first place, we think the fallacy of the rule is exposed upon the face of the decision, *ex visceribus suis*, considering the cases cited in it as a part of the decision:—

The doctrine asserted by the supreme court of Utah is *not* recognized by the circuit court of the ninth circuit in the case of Hunt *v.* Patchin.[2] That case involved a question between original co-locators, one of whom, by common consent of all, had relocated the claim in his own name, and afterwards undertook to claim the entire title as against his original co-tenants. This the court would not permit him to do. Under these circumstances, the relocating co-tenant could not, with any advantage to himself, deny the validity of the relocation, nor could he exclude his co-tenants from participating in such title as he acquired. In this case, a certificate of purchase was issued to the relocating claimant alone. The validity of the relocation was never questioned by the land department, which tribunal was probably never advised that the basis of the relocation was the dereliction of the relocator and his co-tenants. All that Hunt *v.* Patchin attempts to determine is, that whatever right accrues to one of several original locators under a relocation which is made

[1] Saunders *v.* Mackey, 5 Mont. 523.

[2] 35 Fed. 816.

in his name, by common consent, inures to the benefit of all. But that any such right accrues, the circuit court did not attempt to decide.

The ruling of the land department referred to[1] appears in the form of a letter addressed by Acting Commissioner Holcomb to a gentleman in Leadville. It was not a litigated case. The acting commissioner was of the opinion, that one of several co-locators, all of whom are in default, may relocate in his own name and hold it adversely to his former co-tenants.

As to the conclusion reached by the supreme court of Utah, there is every reason why the right to relocate should be given to strangers and should be denied to the original locator. Under the mining laws, discovery and appropriation are recognized as the sources of title to mining claims, and *development* by *working* as the condition of continued ownership until patent is obtained.[2]

After his discovery, the locator is allowed certain periods to perfect his location, and the period of one year from the first day of January next succeeding the date of his location in which to perform one hundred dollars' worth of labor.

Let us illustrate: A vein is discovered June 1, 1895. The locator has until January 1, 1897, in which to perform his work. He fails to do so; but on January 2, 1897, relocates the claim, basing his right to do so upon his own previous neglect to comply with the law. If he has the same right as a stranger to relocate under these circumstances, he has the same length of time allowed to a stranger to perform the first year's labor after the date of the relocation; that is, until January 1, 1899. On January 2, 1899, he may repeat this proceeding, and obtain an additional two years, and so on indefinitely. It seems to us, that this is a manifest fraud upon the government. It is a perversion of the law, and in direct violation of its spirit and intent, to say, that the original locator may take advantage

[1] Copp's Min. Lands, 300.

[2] Erhardt *v.* Boaro, 113 U. S. 527, 535.

of his own dereliction, and use his own neglect and wrong as a foundation to either perpetuate an estate or create a new one. The law under which he obtained his first privilege provides the only method by which his neglect can be condoned, and that is, by resuming work prior to relocation. It is illogical to say, that he may accomplish this result in any other way than by strictly pursuing the methods provided for by the statute.

There is another principle which seems to us to be decisive of the question: The forfeiture is not complete until a relocation has been made. It is the entry of a new claimant with intent to relocate the property, and not mere lapse of time, that determines the right of the original claimant.[1]

The right to enter and resume work prior to the relocation by another is evidence that the original estate is not wholly lost by the failure to do the work.[2]

To say that the original locator has the power within himself to make effectual a forfeiture arising from his own delinquency by perfecting a relocation, is to place in his hands the extraordinary privilege of holding mineral lands perpetually, without doing any work whatever, at least in those states where the relocator is not required to do preliminary work. Where he is required to perform such work, such performance might be treated as resumption, and no relocation is necessary. In any event, the rule upon this subject is uniform, because it is based upon the federal statute.

As was said by the supreme court of California, the work prescribed in the act must be done, or the claim is open to relocation, unless work is resumed before the second location is made. The conditions imposed by the act of congress are wise and salutary, and are by no means onerous. "It is the duty of the courts to hold the locators of "mining claims bound by them."[3]

[1] Little Gunnell M. Co. v. Kimber, 1 Morr. Min. Rep. 536, 539.
[2] Lakin v. Sierra Buttes G. M. Co., 25 Fed. 337, 343.
[3] Russell v. Brosseau, 65 Cal. 605, 608; Du Prat v. James, 65 Cal. 555.

The right to relocate is given to others as a *penalty* imposed on the original locator for failure on his part to perform the conditions required of him. It is not conceded to him as a reward for his neglect, or as an inducement held out to him to evade the law.

We think we are justified in the conclusion, that the original locator, while he may amend his original location for the purpose of curing defects, rectifying lines, and including overlapping surfaces, cannot relocate the claim when his right to make such relocation is asserted by reason of his failure to comply with the requirements of the law as to continued development. The relocation by one of several co-owners will be discussed in the next section.

**§ 406. Relocation by one of several original locators in hostility to the others.**—If we are right in the conclusions reached in the preceding section, that the original locator cannot treat his failure to perform or resume work as the basis of a valid relocation, it must necessarily follow, that one of several locators seeking to obtain the entire title by reason of the failure of any of them to fulfill the requirement of the law, is likewise prohibited from making such relocation.

The supreme court of Montana has held, that mining claims owned by several in common must be "represented" —that is, the work must be performed — as if owned by one person; that "representation" is a unity; that co-owners may cause representative work to be done on the claim according to their respective interests, but when completed, it must amount to one whole representation; otherwise, the claim is not protected from relocation, and that under such circumstances, one of the co-owners might relocate.[1] But we think that this doctrine is opposed to the views of the supreme court of the United States announced in Turner *v.* Sawyer,[2] wherein it is said, that the general rule, that the purchase of an outstanding title, or incumbrance, upon

[1] Saunders *v.* Mackey, 5 Mont. 523.
[2] 150 U. S. 578, 586.

the joint estate for the benefit of one tenant in common inures to the benefit of all, because there is an obligation between them arising from their joint claim and community of interest, and that one of them shall not affect the claim to the prejudice of others, should apply to a case where one co-tenant of a mining claim secures the entire title in his individual name.[1]

The courts generally concede the rule to be, that where one of several co-owners in a mining claim applies for a patent in his own name, the excluded co-tenants are not adverse claimants within the meaning of the law requiring them to intervene in patent proceedings, as they claim equities which are based upon the legal title thus conveyed.[2]

Be that as it may, although the views announced by the supreme court of Montana seem to give support to the doctrine of the supreme court of Utah, cited in the preceding section, we cannot see why the reasoning applied by us in that section to the case of an individual locator should not apply with equal force to one of several locators. In the latter case, the obligation rests upon all alike to perform the required work. One of the co-tenants might save the entire estate by himself performing the labor. In such event, he would have a right of contribution against his co-tenants for their proportion of expenditures made to save the common estate, which he might assert, either in an action for partition,[3] or, perhaps, by "advertising out" under the provisions of the Revised Statutes.[4] But to say that one co-owner can make his own delinquency, as well as that of his co-tenants, the basis for acquiring a new title, seems to us repugnant to the intent and spirit of the law.[5]

**§ 407. Relocation by agent or others occupying contractual or fiduciary relations with original locator.**—An agent, trustee, or other persons holding confidential relations

[1] See, also, Freeman on Co-tenancy, § 151.

[2] Sussenbach v. First National Bank, 5 Dak. 477; Brundy v. Mayfield, 15 Mont. 291; Doherty v. Morris, 11 Colo. 12.

[3] Holbrooke v. Harrington, 36 Pac. 365.

[4] § 2324.

[5] See, Royston v. Miller, 76 Fed. 50.

with the original locator, will not be permitted to relocate mining claims, and secure to themselves advantages flowing from a breach of trust obligations.[1] Where, however, a contractual or fiduciary relationship is terminated, the rule no longer applies, and a subsequent relocation by the former agent or trustee has been upheld.[2] An original locator cannot suffer forfeiture and relocate, or cause to be relocated by others in collusion with him, so as to cut off the rights of a mortgagee under a mortgage executed by such original locator.[3]

It has been suggested by the supreme court of Arizona, that an original locator, after sale by quitclaim deed to a third person who fails to perform the annual labor, may relocate and hold the claim.[4] But in such case, the obligation to perform the labor rested upon his grantee, and not upon the original locator, and by relocating, he does not profit by his own failure to perform the work. His grantee occupies the position of the original locator, and the latter, in relocating, that of a mere stranger to the title.

**§ 408. Manner of perfecting relocations—Statutory regulations.**—With the exception of the necessity for making a new discovery, the relocation of an abandoned mining claim is made in substantially the same manner as the original.[5]

The ground is "open to relocation in the same manner "as if no location of the same had ever been made."[6] By this is meant, that all the requirements of the law as to marking of boundaries, posting notices, recording certificates, performance of development work, and such other acts as are required by the federal or state laws, except the discovery, must be complied with in cases of relocation to

[1] Lockhart *v.* Rollins, 2 Idaho, 503, 514; Utah M. & M. Co. *v.* Dickert & M. S. Co., 6 Utah, 183; Largey *v.* Bartlett (Mont.), 44 Pac. 962.

[2] Page *v.* Summers, 70 Cal. 121.

[3] Alexander *v.* Sherman (Ariz.), 16 Pac. 45.

[4] Blake *v.* Theme (Ariz.), 16 Pac. 270.

[5] Armstrong *v.* Lower, 6 Colo. 393.

[6] Rev. Stats., § 2324.

the same extent as in original locations. The original locator and the relocator, in this respect, are on the same footing.[1]

Most of the precious-metal-bearing states have legislated upon the subject of relocating abandoned claims.

Colorado has enacted a law which provides, that the relocation of abandoned lode claims shall be by sinking a new discovery shaft and fixing new boundaries, in the same manner as if it were the location of a new claim; or the relocator may sink the original shaft ten feet deeper than it was at the time of the abandonment, and erect new, or adopt old, boundaries, renewing the posts, if removed or destroyed. In either case, a new location stake shall be erected. In any case, whether the whole or part of an abandoned claim is taken, the location certificate may state that the whole, or any part, of the new location is located as abandoned property.[2] Arizona,[3] Idaho,[4] Montana,[5] New Mexico,[6] North Dakota,[7] South Dakota,[8] and Wyoming[9] have statutes of the same general character. There is no legislation upon the subject in either California, Washington, Utah, Oregon, or Nevada.

The supreme court of Montana has held, that if an original locator resumes work before the relocator re-marks the boundaries, and performs *all* the acts required to perfect a valid relocation, the forfeiture is not worked, and the right to relocate is lost.[10] A like doctrine is supported in California[11].

[1] Pelican & Dives M. Co. *v.* Snodgrass, 9 Colo. 339, 342.
[2] Mills' Annot. Stats., § 3162.
[3] Laws 1895, p. 54, § xi.
[4] Laws 1895, p. 25, § vii.
[5] Rev. Code 1895, § 3615.
[6] Laws 1889, p. 42, § iii.
[7] Rev. Code 1895, § 1439.
[8] Comp. Laws of Dakota 1887, § 2010. Adopted by South Dakota — Laws 1890, ch. cv.
[9] Laws 1888, p. 89, § 21.
[10] Gonu *v.* Russell, 3 Mont. 358.
[11] Holland *v.* Mt. Auburn G. O. M. Co., 53 Cal. 149; Belcher Cons. G. M. Co. *v.* Deferrari, 62 Cal. 160; Pharis *v.* Muldoon, 75 Cal. 284.

It would seem, that in the case decided by the supreme court of Montana, the relocator had performed no act which by law was necessary to initiate a valid location. In California, until a very recent period, an original locator was not permitted any appreciable time whatever to mark his boundaries.[1] Where, however, under statutes which either contemplate or provide for a series of acts, the performance of which necessarily requires time, such as the sinking of a new discovery shaft ten feet deep, or an old one ten feet deeper, the performance of any one of these acts in the series ought to give the relocator the necessary time to complete the others. Otherwise, it is difficult to see how a valid relocation could ever be made, without the consent of the original locator. He could "resume work" at any time before the relocator had completed his development. Unless the relocator can be protected in his possession, for the purpose of completing his relocation, there is but little use in his attempting it. Each attempt at relocation would, at some stage, find the original locator in a state of "resumption." While forfeitures are odious, we think the courts are sometimes altogether too lenient in dealing with a class of people frequently found in mining camps, who will neither work themselves, nor permit others to do so.

Judge Hallett is of the opinion, that the right of the original locator to resume work and prevent forfeiture lapses, unless the right is exercised before another has taken possession of the property with intent to relocate it,[2] and Mr. Morrison shares these views,[3] which, in our judgment, are sound.

A discussion of what constitutes "resumption" is deferred for treatment in another chapter. Successive relocations may, of course, be made as often as the relocators fail on their part to comply with the law. Where one has made a relocation and permits the time to elapse without

[1] See, *ante*, § 339.
[2] Little Gunnell M. Co. *v.* Kimber, 1 Morr. Min. Rep. 536.
[3] Morr. Min. Rights, 8th ed., p. 69.

performing the requisite work, he should be debarred the same as an original locator from again relocating. Whether, or no, such is the law, depends upon the correctness of our theories advanced in a preceding section.[1]

**§ 409. Right of second locator to improvements made by the first.**— When the estate of the first locator becomes extinguished by his failure to comply with the law, and the second enters and perfects his relocation, the dominion and control over the property passes to the latter. If the former thereafter remains in possession, unless at the time of the relocation he has resumed work, he is a mere occupant without color of title, and the completion of the second location, if effected peaceably and in good faith, operates in law as an ouster of the prior occupant.[2] Thereafter, the relocator is clothed with "the exclusive right of posses- "sion and enjoyment of all the surface included within the "lines of the location."[3]

Such improvements or betterments as have been placed upon the property by the original locator, if they fall within the class designated as fixtures, become a part of the realty, and the subsequent appropriation of the land carries with it, necessarily, whatever may be affixed to it. Prior to the determination of his estate by the perfection of a relocation, it cannot be doubted that the prior locator may sever and remove all machinery, buildings, and other improvements which, by the manner of their attachment to the soil, have become a part of the freehold. But his right of entry for that purpose ceases when his estate is terminated.

It is a general rule of law, that all improvements of this character upon public lands of the United States pass to the purchaser from the government,[4] and the relocator of

[1] See, *ante*, § 405.

[2] Belk *v.* Meagher, 3 Mont. 65, 80; S. C. on Appeal, 104 U. S. 279, 284. See, *ante*, § 218, 219.

[3] Rev. Stats. § 2322.

[4] Collins *v.* Bartlett, 44 Cal. 371; Pennybecker *v.* McDougal, 48 Cal. 163; McKiernan *v.* Hesse, 51 Cal. 594; Treadway *v.* Sharon, 7 Nev. 37.

a mining claim holds his estate by purchase.[1] One cannot set up equities in improvements against the government, or a purchaser from it,[2] and state statutes which permit their removal after the land has passed into private ownership are void, as interfering with the primary right of disposal of the soil reserved to the United States upon the admission of the several states.[3]

It is unnecessary to enter into a detailed discussion of what constitutes fixtures. It has been frequently held, that machinery, such as engines, boilers, hoisting-works, mills, pumps, and things of a like character annexed to the soil for mining, become part of the freehold.[4] As such, they will pass to the relocator.

While this is undoubtedly true, upon application for a patent the relocator will not be permitted to include in his estimate of the value of improvements required by law to be made as a condition precedent to patent, any of the labor done or improvements made by the original locator.[5] Expenditures and improvements for such purpose must have been made by the *relocator* or his *grantors*.[6]

## Article XII. Lodes Within Placers.

§ 413. Right to appropriate lodes within placers.
§ 414. Manner of locating lodes within placers.
§ 415. Width of lode locations within placers.

**§ 413. Right to appropriate lodes within placers.**— That the two classes of mineral deposits, those falling within the designation of lodes, or veins, and those usually called placers, frequently exist in the same superficial area is a matter of common experience.

[1] Meyerdorf *v.* Frohner, 3 Mont. 282, 320. See, *ante*, § 233.
[2] Hawke *v.* Deffebach, 115 U. S. 392; Sparks *v.* Pierce, *Id.* 408.
[3] Collins *v.* Bartlett, 44 Cal. 371.
[4] Merritt *v.* Judd, 14 Cal. 60; Treadway *v.* Sharon, 7 Nev. 37; Roseville Alta M. Co. *v.* Iowa G. M. Co., 15 Colo. 29.
[5] Acting Commissioner Holcomb, Copp's Min. Lands, 300; Commissioner Burdett, 1 Copp's L. O. 179. [6] Rev. Stats., § 2322.

That when so found they may be held by the same or different persons, is well settled by both judicial and departmental decisions.[1]

While it is undoubtedly true, that a mining location, whether lode or placer, is property in the highest sense of the term, and when perfected is equivalent to a grant from the government,[2] yet it does not follow that the thing granted is the same in both classes of locations, nor that things reserved from the operation of one grant are likewise excepted from the operation of the other.

There is a marked distinction between the surface rights acquired by a lode location and those flowing from a placer location. In the former, there is a grant of the exclusive right of enjoyment of the surface and everything within vertical planes drawn downward through the surface boundaries, subject only to the extralateral right of outside apex proprietors to pursue their veins underneath such surface. No subsequent locator, either lode or placer, can invade such surface. On the other hand, lodes found within the placer surface, or underneath it, if their existence is known prior to the application for placer patent, are not the subject of a placer grant.[3] Therefore, the placer claimant may not own everything upon the surface or found within vertical planes drawn downward through the surface boundaries. The policy of the government with reference to lodes is, to sever them from the body of the public lands, and to deal with them and the land immediately inclosing them as separate and distinct entities.

The location of mining ground for placer purposes does not effect such severance. The placer claimant *may*, in the absence of a discovery and location by others, obtain the title to the lode, but he has not such right by virtue of his

[1] Reynolds v. Iron S. M. Co., 116 U. S. 687, 695; Aurora Lode v. Bulger Hill Placer, 23 L. D. 95.

[2] Belk v. Meagher, 104 U. S. 284; Gwillim v. Donnellan, 115 U. S. 45.

[3] Reynolds v. Iron S. M. Co., 116 U. S. 687; Iron S. M. Co. v. Mike & Starr M. Co., 143 U. S. 394; Dahl v. Raunheim, 132 U. S. 260; Clary v. Hazlett, 67 Cal. 286.

prior placer appropriation.[1] This right to appropriate the lode must flow from the discovery of the *lode*. Whosoever first discovers the lode may appropriate it by complying with the laws conferring privileges upon such discoverers. If he fails to do so, it is open to the next comer; and this rule applies to the placer claimant as well as to strangers. If, having discovered it, he fails to manifest his intention to *claim* it by appropriating it under the lode laws, it may be the subject of appropriation by others, the same as if it were upon the public domain; *provided*, always, that such appropriation is made and perfected peaceably and in good faith. In this respect, the same rules of law which govern the location of mineral land occupied or claimed by others under inchoate agricultural holdings, are to be applied. We have fully discussed this element in preceding articles. It is unnecessary to here repeat what is there said.[2]

The issuance of a placer patent containing within its limits a lode known to exist prior to the patent application, which lode is not claimed and applied for by the placer claimant as a *lode*, does not cut off the right to appropriate it in hostility to the patentee. His failure to include it in his placer application is a conclusive declaration that he has no right to it.[3]

While the land department at one time held, that with the issuance of the placer patent its jurisdiction terminated, and thereafter it had no right to entertain a subsequent application for a patent to a lode claim within the patented placer limits,[4] it subsequently changed its ruling to conform to the legal results necessarily flowing from the exposition of the law by the supreme court of the United States.[5]

[1] Aurora Lode v. Bulger Hill Placer, 23 L. D. 95.

[2] See, *ante*, §§ 206, 216, 219.

[3] Rev. Stats., § 2333; Sullivan v. Iron S. M. Co., 143 U. S. 431, 434; Reynolds v. Iron S. M. Co., 116 U. S. 687; Iron S. M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394, 402; Iron S. M. Co. v. Reynolds, 124 U. S. 374; United States v. Iron S. M. Co., 128 U. S. 673; Noyes v. Mantle, 127 U. S. 348, 353.

[4] Rebel Lode, 12 L. D. 683; Pike's Peak Lode, 14 L. D. 47; South Star Lode, 17 L. D. 280.

[5] South Star Lode (on review), 20 L. D. 204; Butte & Boston M. Co., 21 L. D. 125.

It is not our purpose to here define what is meant by a "lode known to exist within the boundaries of a placer "claim," as that phrase occurs in section twenty-three hundred and thirty-three of the Revised Statutes. This will be fully discussed when dealing with the subject of placer patents and the nature and extent of title conferred by placer locations. We are now concerned simply with the manner of locating lodes within placers, their existence being confessedly known prior to the application for the placer patent.

We are justified in deducing from the foregoing the following conclusions:—

(1) A perfected placer location does not confer the right to the possession of veins, or lodes, which may be found to exist within the placer limits at any time prior to filing an application for a placer patent;

(2) Such lodes may be appropriated (*a*) by the placer claimant, or (*b*) by others, provided the appropriation is effected by peaceable methods and in good faith;

(3) Where a lode is known to exist within the limits of a placer location at any time prior to the placer application for patent, and is not claimed in the application as a *lode*, the title to such lode does not pass by the patent, but it may be located by any one having the requisite qualifications, provided the location is made peaceably and in good faith.

§ 414. **Manner of locating lodes within placers.**— With the exception of determining the quantity of surface which may be taken in conjunction with a lode found within a placer claim, a question to be presented in the next section, there is no difference between the manner of locating such a lode and any other found within the public domain. It must be discovered and developed, the location must be marked upon the surface, and all other formalities required by federal or state legislation must be complied with to the same extent as in case of lodes

situated elsewhere. As the right necessarily flows from discovery, to perpetuate such right the subsequent acts resulting in a perfected location must be complied with.

As to the surface lines inclosing the lode, while the inclosed area may possibly be limited, yet their general direction with reference to the discovered vein must conform to the general rule governing lode locations.[1] In placer locations, except upon unsurveyed lands, and under certain specified conditions to be hereafter noted,[2] the boundaries must conform to the public surveys, without regard to the course or direction of veins which may be found therein. Such boundaries perform a different function from those required in the case of lode claims.

Whatever may be the dimensions of a placer location which, when participated in by an association of persons, may cover an area of one hundred and sixty acres,[3] a lode location within a placer cannot exceed the statutory limit as to length—that is, fifteen hundred feet. End lines must be established within this limit, and in order to acquire extralateral rights, should cross the located lode and be parallel to each other, or non-divergent in the direction of the dip. A placer boundary may be coincident with a lode boundary if so claimed and marked. But the rights upon the discovered lode will be defined only by the lode boundaries, established and marked as such. In this respect, the statute makes no distinction between lodes within placers and other lodes. In considering this class of lode location, the only debatable question is the quantity of surface which the locator may appropriate for the purpose of inclosing his lode. In all other respects the general rules apply.

§ 415. **Width of lode locations within placers.**—As to the amount of surface which may be appropriated in connection with a lode discovered within a placer, the question presents itself in two aspects:—

[1] Reynolds v. Iron S. M. Co., 116 U. S. 687, 694.
[2] See next chapter. [3] Rev. Stats., § 2330.

(1) Where the lode is located and claimed by the placer claimant;

(2) Where it is located and claimed by others.

As to the placer claimant, there is no reason why he should not be permitted to select as much of the surface inclosing the lode as the law will permit in case of other lode locations; that is, within the limit of fifteen hundred by six hundred feet, in the absence of state laws or local regulations restricting the right to less. There is no requirement that land contiguous to the lode, and appropriated with it, should be non-mineral in character. As he owns the surface of the placer, except as against a lode locator, no one can complain if the placer claimant takes any quantity within the prescribed limit. But he is required to take at least twenty-five feet on each side of the center of the vein, and pay therefor at the rate of five dollars per acre. The remainder he may enter as placer ground at half that rate.[1]

But let us assume a case of a lode discovered within a a prior placer claim by a stranger to the placer title, such discovery ante-dating the application for a placer patent. That such lode may be located and claimed by the discoverer seems to be well settled. But the extent of surface to which such locator may be entitled, with due regard to the rights of the prior placer claimant, is the subject of debate. The question assumes this form: What is in contemplation of law reserved out of a placer location? or, to what extent is the surface of a prior placer location subject to invasion and delimitation by a subsequent discoverer of a lode within the placer boundaries?

Section twenty-three hundred and thirty-three of the Revised Statutes furnishes no key to the solution of the question. We must, therefore, resort to the entire body of the mining law and consider its manifest intent before we may reach a satisfactory conclusion.

The question may be solved in two ways:—

[1] Rev. Stats., § 2333.

(1) Either the lode locator is entitled to the full width allowed to other lode locations, or

(2) He is allowed only such surface as may be reasonably necessary for the enjoyment of the lode.

The supreme court of the United States has held, in Noyes *v.* Mantle,[1] that a placer patent reserves a lode claim, located prior to the application for patent, to its full extent; but in that case, although the decision as reported is silent as to the date of the placer location, it is quite manifest that the lode was discovered and located prior to the location of the placer.[2] Such prior location withdraws the area covered, and the subsequent placer locator could, of course, obtain no rights as against the lode locator. This is not the case we have assumed. If, in the Noyes-Mantle case, the lode location in controversy had been the junior in date, we might infer from the decision that the subsequent lode locator was authorized to select, within the boundaries of the placer, a full surface claim. But as heretofore indicated, the lode location in that case ante-dated not only the application for placer patent, but the *location* of the placer. We are not aware that the precise point under discussion has ever been determined by the courts.

When we examine the rulings of the land department, we find that they are not uniform.

Originally, that department held, that the claimant of a lode within placer limits could only assert the right, as against a placer patentee, to twenty-five feet on each side of the center of the vein. If he sought to claim more, he could only protect his right to the increased area by adversing the placer applicant. Failing to do so, he was limited to a width of fifty feet.[3]

This was before the decision in Noyes *v.* Mantle (*supra*). Subsequent to this decision, the department reached the

[1] 127 U. S. 348.

[2] The record in this case, as filed, discloses the fact that the lode was located in April, and the placer the following October.

[3] Shonbar Lode, 1 L. D. 551; *Id.*, 3 L. D. 388.

following conclusions, after quoting from the cases of Noyes *v.* Mantle and Reynolds *v.* Iron S. M. Co.:—[1]

"It thus appears, that the limitation of the width of the "claim in section twenty-three hundred and thirty-three, "Revised Statutes, is only applicable where the same claim- "ant seeks a patent for a vein, or lode, included within the "boundaries of his placer claim, and has no application "to a lode claim properly perfected by another, prior "to the date of the application for patent for placer claim, "whose boundaries include the lode claim. If, therefore, "it shall appear from the record that there is a lode claim "within the boundaries of a placer claim, then that lode "claim in its full extent should be excepted from the placer "patent."[2]

But in this case the department declined to patent the lode claim at all for the reason, that its jurisdiction had been exhausted by the issuance of the placer patent — a ruling which, as heretofore noted,[3] was subsequently changed. The last expression of opinion by the land department upon the subject under consideration is found in a decision by Secretary Smith in the case of the Aurora Lode *v.* The Bulger Hill and Nuggett Gulch Placer.[4]

In this case, the placer claims were first located, the Bulger Hill on March 19th, and the Nuggett Gulch on April 6, 1881. The Aurora Lode was located April 9th of the same year. The properties had been in litigation, arising out of patent proceedings, the Aurora Lode claimant having applied for a patent, which was adversed by the placer claimant, the judgment being in favor of the latter.[5]

Notwithstanding this, the land department entertained the protest of the lode claimant against the issuance of a patent to the placer claimant, and after discussing the effect of the judgment of the court, and the relative rights of the two classes of claimants, the secretary of the interior thus expresses his views:—

[1] 116 U. S. 687; 124 U. S. 374.
[2] Pike's Peak Lode, 10 L. D. 200, 203.
[3] See, *ante*, § 413.
[4] 23 L. D. 95, 348.
[5] Bennett *v.* Harkrader, 158 U. S. 441.

"The only question which presents any serious difficulty "to my mind relates to the extent of surface area the lode "claimant will be entitled to in the event he sustains, by "proof in the regular way, the allegations of his protest. "His claim as originally located appears to be something "over five hundred feet in width at the points of conflict "with the placer locations. The extensive and valuable "improvements erected upon the claim are alleged to be "upon that part within the overlap. The surface ground "being, however, only an incident to the lode, and not a "part of it, I am of the opinion, that under the judgment "of the court, the placer claimant is entitled to the surface "area within the overlap, except so much thereof as is neces- "sary to the occupation, use, operation, and enjoyment of "of the lode claim by its owners. This may be more or "less, according to the extent and location of the present "improvement, if any, and other conditions peculiar to "this particular claim. I know of no established prece- "dent controlling in such a case as this, but in view of the "superior right of the placer claimant to the surface area "as established by prior location and by the judgment of "the court in the adverse proceedings, I do not think that "the superior right of the lode claimant to the possession "of his lode, if its discovery, location, and known existence "be true, as alleged, should be allowed to carry with it "more surface ground within the overlap than is necessary "for the occupation, use, operation, and full enjoyment "thereof. Having been defeated in the adverse proceed- "ings in the court, it would appear to be but just and right "that the lode claimant should be thus restricted as touch- "ing the surface area of his claim, and, indeed, such seems "to be necessary in order to give effect to the court's "judgment."

Without stopping to consider the binding effect of the judgment in the adverse proceedings as an estoppel upon the lode claimant, we think that the ruling of the secretary proceeds upon considerations of an equitable nature, rather than upon anything deducible from the mining laws. If we assume, that nothing is reserved out of the placer location but the lode itself, we practically concede that the reservation is of no substantial benefit to any one, as the right to enjoy it would be practically denied. The

placer locator would hold everything, except the ledge bounded by its inclosing walls, and no right of entry over or through the placer ground would be permitted.[1] Or, at the utmost, the lode claimant would only be entitled to an *easement* over the placer ground, upon the principle, that a reservation of a thing out of a grant is a reservation of whatever may be necessary to its enjoyment.

But the mining laws contemplate no such conditions. The only method by which the lode may be located is by defining a surface inclosing it.[2] The only clause which defines or limits this surface is found in section twenty-three hundred and twenty of the Revised Statutes. This is applicable to all lodes, or veins. No exception is made of such as exist, or may be found, in placers.

The conclusion seems logical, that if a lode within a placer is subject to appropriation at all, it may be appropriated the same as if it were situated elsewhere. The placer claimant locates with the full knowledge, that a lode discovered within the limits of his claim will not belong to him by virtue of his placer location; and that when such is discovered it may be located by those whose rights can only be defined by end and side lines carving out of the placer a surface area. The government says to him, in effect: "You may locate this ground which appears to "be placer, but you do so with the distinct understanding, "that if a lode is discovered therein before you apply for "a patent, such lode shall belong to him who first dis- "covers and locates it. Such discovery will entitle the "discoverer to all privileges which are accorded with "respect to lodes found elsewhere on the public domain."

If a patent issues for a placer claim which contains a lode, or vein, the existence of which was known to the placer claimant prior to his application for such patent, by failing to claim it, he cannot object to its subsequent appropriation by others.

We do not understand that, in such an instance, the

[1] Dower v. Richards, 73 Cal. 477, 480.
[2] See, *ante*, §§ 71, 361.

patent to the placer claimant affects the question. The right acquired by the placer location in legal contemplation is, as against strangers, as great as that conveyed by patent.[1] A lode claimant cannot carve out of the placer surface any greater area before the placer patent issues than he could if he located the excepted lode after the patent. The patent confirms to the placer locator all the rights enjoyed under the location — no more — no less.

Therefore, the existence, or non-existence, of a patent is of no moment if it be conceded that the lode is one that is subject to location.

While the suggested solution on this subject of width of lodes within placers is open to some criticism, in our judgment it is the only one logically deducible from a full consideration of the entire body of the mining laws in connection with the adjudicated cases upon the subject.

Is there anything in the adjudicated cases which inferentially militates against this view?

Our attention is again directed to the controversies arising out of the blanket deposits of Leadville, and in construing the decisions on the subject of lodes within placers, regard must be had to the circumstances of each particular case.

In the case of Reynolds *v.* Iron Silver Mining Company,[2] there was no surface conflict between the lode claimants and the placer patentee. There was no attempt by anyone to locate the lode within the placer boundaries. The lode claimants sought to justify their presence underneath the Wells and Moyer placer, on the ground that they were following a vein on its downward course, having the apex outside of the placer and within the Pinnacle and Crown Point lode claims. They failed in this at the first trial for the reason, that the trial court found that they had located across the vein instead of along it. The court decided in favor of the placer claimants, although the evidence tended to show that the placer claimants at the time

[1] Chambers *v.* Harrington, 111 U. S. 347, 353.
[2] 116 U. S. 687.

of their application for patent knew that this blanket vein existed underneath the surface, thus holding, that the placer patent would carry that portion of the lode on its *dip* underlying the placer surface as against one failing to show a superior right, and that the possession of the lode by the lode claimants underneath the placer surface was not such superior right. When the case reached the supreme court of the United States, that court assumed that the evidence was sufficient to establish the existence of a known lode, and overruled the trial court, holding, that as the lode was reserved out of the placer patent, the *possession* of it was a right superior to that granted by the placer patent. As the placer patent did not cover any part of the apex of the vein, it is difficult to see how anyone could locate it within the placer boundaries. How could the placer claimant assert a right to it at the time of applying for patent, and draw side lines equidistant from the *center* of the vein if the placer location had no part of the apex? This state of facts explains the following language of the court:—

"We are of the opinion, that congress meant that lodes "and veins known to exist when the patent was asked for "should be excluded from the grant, as much as if they "were described in clear terms. It was not intended to "remit the question of their title, to be raised by some one "who had, or might get, a better title, but to assert that no "title passed by the patent, and in such case it does not "pass to the patentee.

"He takes his *surface land* and his placer mine, and such "lodes, or veins, of mineral matter within it as were un-"known, but to such as *were known* to exist, he gets by that "patent no right whatever. The title remaining in his "grantor, the United States, to this vein, the existence of "which was known, he has no such interest in it as author-"izes him to disturb any one else in the peaceable posses-"sion and mining of that vein.

"When it is once shown that the vein was *known to exist* "at the time he acquired title to the placer, it is shown "that he acquired no title or interest in that vein by his "patent."

How can a vein be described "in clear terms," except by metes and bounds? How can it be described by metes and bounds unless it is located? And how can it be located unless its top, or apex, is found,[1] and its center line established for the purpose of determining the position of the side lines?

At the second trial, the lode claimants abandoned the apex theory, and disavowed their right to lateral pursuit, resting on their possession. The placer claimants attempted to fortify their right to the ore bodies by showing ownership of the Rock and Dome lode claims containing the apex of the vein, adjoining the Pinnacle and Crown Point on the north, and sought to trace their vein in its downward course from its apex to the point of the alleged trespass. This the trial court refused to permit. The supreme court of the United States held this to be error. It also found, that no vein was known to exist within the limits of the placer at the time of the placer application. Therefore, the placer patent prevailed.[2]

Judge McCrary was of the opinion, that to be excepted out of a placer patent a lode must have been *located* and defined by metes and bounds before the application for patent.[3]

In this view he was upheld by a dissenting opinion of Chief Justice Waite in Reynolds *v.* Iron S. M. Co.,[4] and by a specially concurring opinion of Judge Field in Sullivan *v.* Iron S. M. Co.;[5] but this doctrine has been repeatedly denied by the supreme court of the United States.[6]

After a full consideration of all the cases of which we have any knowledge, we think the current of authority supports, rather than negatives, our conclusions.

While the result of these conclusions, when applied to the case of a known lode within a patented placer, is

[1] See, *ante*, § 394.
[2] Iron S. M. Co. *v.* Reynolds, 124 U. S. 374.
[3] Iron S. M. Co. *v.* Sullivan, 16 Fed. 829.
[4] 116 U. S. 698.
[5] 143 U. S. 436.
[6] Sullivan *v.* Iron S. M. Co., 143 U. S. 431, 433, and cases there cited.

seriously opposed to our pre-conceived notions as to the inviolability of a government patent, yet the difficulty flows from the decisions of the courts holding that such lodes are reserved from the patent, whether located or not. If so reserved, they may be located; if located, they must be inclosed within a defined surface area, and there is but one section of the law which limits the quantity of such surface.

We shall have occasion to again refer to this subject when dealing in subsequent chapters with the force and effect of a government patent, and the proceedings by which it is obtained.

# CHAPTER III.

## PLACERS AND OTHER FORMS OF DEPOSIT NOT "IN PLACE."


ARTICLE I. CHARACTER OF DEPOSITS SUBJECT TO APPROPRIATION UNDER LAWS APPLICABLE TO PLACERS.

II. THE LOCATION AND ITS REQUIREMENTS.

III. THE DISCOVERY.

IV. STATE LEGISLATION AS TO POSTING NOTICES AND PRELIMINARY DEVELOPMENT WORK.

V. THE SURFACE COVERED BY THE LOCATION — ITS FORM AND EXTENT.

VI. THE MARKING OF THE LOCATION ON THE GROUND.

VII. THE LOCATION CERTIFICATE AND ITS RECORD.

VIII. CONCLUSION.


## ARTICLE I. CHARACTER OF DEPOSITS SUBJECT TO APPROPRIATION UNDER LAWS APPLICABLE TO PLACERS.


§ 419. The general rule.

§ 420. Specific substances classified as subject to entry under the placer laws.

§ 421. Building stone and stone of special commercial value.

§ 422. Petroleum.

§ 423. Natural gas.

§ 424. Brick clay.

§ 425. Phosphatic deposits.

§ 426. Tailings.

§ 427. Subterranean gravel deposits in ancient river beds.

§ 428. Beds of streams.


**§ 419. The general rule.**—In a preceding chapter,[1] in determining what constitutes "mineral land," which as such is susceptible of appropriation under the mining laws, we have to some extent anticipated much that might be properly said in defining the character of deposits which are subject to appropriation under the laws applicable

[1] See, *ante*, tit. iii., ch. i., §§ 85-98.

to placers, and we have there endeavored[1] to formulate general rules by which the mineral character of substances is to be established. In conformity with these rules, land of the public domain may be entered under the laws applicable to placers when it is shown to have upon or within it such a substance as falls within the classification named in section ninety-eight, if such substance is found in the form of superficial or other deposits not *in place*. If a discovered deposit satisfies the law as to its mineral character, and it is not found in veins of quartz, or other rock in place, it may be appropriated under the laws applicable to placers. What constitutes "rock in "place" has been fully discussed.[2]

We say that all forms of deposit, other than those occurring in veins of rock in place, must be appropriated under the laws applicable to *placers*, for the reason, that *placers* present, in popular estimation, the highest type of deposits which do not occur in veins of rock in place, and are the only class of such deposits as are individualized and specially named in the statute.[3]

The right to acquire title to "claims usually called "placers" was granted for the first time by the mining act of July 9, 1870.[4] This has always been familiarly called the "placer law," in contradistinction to the "lode law" of July 26, 1866. The subsequent legislation preserved the distinction, so that, colloquially speaking, mineral deposits are to be treated either as lodes or placers. In time, *placer*, which was the name given by the Spaniards to the auriferous gravels of America,[5] has become a generic term, in which all forms of deposit, other than those occurring in veins, are popularly included.

Dr. Raymond, in his "Glossary of Mining and Metal-"lurgical Terms,"[6] defines the word *placer* as, a deposit of

[1] See, *ante*, § 98.
[2] See, *ante*, §§ 299–301.
[3] Rev. Stats., § 2329.
[4] 16 Stats. at Large, 217.
[5] Moxon v. Wilkinson, 2 Mont. 421.
[6] Trans. Am. Inst. Min. Eng., vol. ix., p. 164.

valuable mineral found in particles in *alluvium*, or *diluvium*, or beds of streams, and enumerates gold, tin ore, chromic iron, iron ore, and precious stones, as being found in placers. He adds to the definition the statement, that by the United States statutes, all deposits not classed as veins of rock in place are considered *placers*.

As was said by the supreme court of the United States, in distinguishing the two classes of deposits: "Placer "mines, though said by the statute to include all other "deposits of mineral matter, are those in which this "mineral is generally found in the softer material which "covers the earth's surface, and not among the rocks be- "neath."[1]

Assuming that our definition of "mineral," outlined in a previous chapter,[2] is based upon a correct interpretation of the law, there should be but little difficulty in determining whether land containing a given substance not in place is subject to entry under the placer laws, or not. The element of commercial value, its susceptibility of being extracted and marketed at a profit, and not its metallic or chemical character, are the controlling factors in determining the question.

This is clearly shown, not only by the evolution of denotation, illustrated in the history of English jurisprudence and the decisions of the American courts, but by a long line of departmental rulings, uniform, except as to certain specific substances. As was said by the supreme court of the United States: "The construction given to a "statute by those charged with the duty of executing it, is "always entitled to the most respectful consideration, and "ought not to be overruled without cogent reasons."[3]

While this element of profit, or commercial value, has generally pervaded the rulings of the land department, we

[1] Reynolds *v.* Iron S. M. Co., 116 U. S. 687, 695.

[2] See, *ante*, §§ 85–98.

[3] United States *v.* Moore, 95 U. S. 760; Hastings & Dakota R. R. *v.* Whitney, 132 U. S. 357; Hahn *v.* United States, 107 U. S. 402; Brown *v.* United States, 113 U. S. 568; Doe *v.* Waterloo M. Co., 70 Fed. 455.

find, that in dealing with certain specific substances, either by reason of their common-place character, or the other extreme, their unique and peculiar properties, the department has lost sight of this controlling factor, and leaned toward strict and, frequently, we think, strained rules of construction. Owing to the infinite variety in nature, the application to individual instances of general laws framed and construed on broad theories may seem to produce absurd results. But this in no sense proves that the law or the general rule of construction is absurd. We cannot conceive of any class of deposits of the general character under consideration which may not fairly be tested by the general rules announced in section ninety-eight.

That the true position of the land department upon this subject may be fairly presented, it is necessary to consider its rulings as to specific substances.

**§ 420. Specific substances classified as subject to entry under the placer laws.**— Among the substances, other than those of a metallic character, which have been classified as mineral, and when occurring in the form of deposits not in place, lands containing them have been held to be subject to appropriation under the placer laws, we note the following:—

Alum;[1] asphaltum;[2] borax;[3] diamonds;[4] gypsum;[5] kaolin, or china clay;[6] marble;[7] mica;[8] soda, carbonate and nitrate;[9] slate, for roofing purposes;[10] umber.[11]

As to these substances, we understand the rule is uniform, the elements of quantity and quality being present,

[1] Copp's Min. Lands, 50; 2 L. D. 707.
[2] Copp's Min. Lands, 50.
[3] *Id.* 50, 100; 2 L. D. 707; Copp's Min. Dec. 194; 1 Copp's L. O. 11.
[4] Copp's Min. Lands, 88.
[5] *Id.* 309.
[6] *Id.* 121, 176, 209; 1 L. D. 565; Montague *v.* Dobbs, 9 Copp's L. O. 165.
[7] Copp's Min. Lands, 176.
[8] *Id.* 182.
[9] *Id.* 50; 2 L. D. 707.
[10] Copp's Min. Lands, 143; 1 Copp's L. O. 132.
[11] Copp's Min. Lands, 161.

by which the value of the land, for the purpose of removing and marketing the product, is determined. Other substances require specific mention.

**§ 421. Building stone, and stone of special commercial value.**—As heretofore observed,[1] congress, on August 4, 1892, enacted a law, wherein it provided, that any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims.[2] The previous rulings by the land department, as to whether land containing stone of this character was subject to entry under the placer laws, were not uniform.

In the case of Bennett,[3] Commissioner McFarland expressed the opinion, that lands of such character were subject to such entry.

Some years later, Assistant Secretary Chandler declined to accept the views of the commissioner, and established the contrary doctrine.[4] The following year, the same assistant secretary "explained" and "distinguished" his previous ruling, and practically adopted the views of Commissioner McFarland in a case involving the interpretation of the law as it existed prior to the passage of the act of August 4, 1892.[5]

Secretary Noble held, that this class of land was not "mineral land" so as to preclude its entry under the agricultural land laws, although the proof showed that the tract in question was more valuable for the building stone it contained than for agricultural purposes, following the first ruling of Assistant Secretary Chandler.[6]

A few months later, Secretary Smith held, that under the law as it existed, prior to the passage of the act of

[1] See, *ante*, § 139.
[2] 27 Stats. at Large, 348.
[3] 1884, 3 L. D. 116.
[4] Conlin *v.* Kelly (1891), 12 L. D. 1.
[5] McGlenn *v.* Wienbroeer, 15 L. D. 370.
[6] Clark *v.* Ervin (Feb. 1893), 16 L. D. 122.

August 4, 1892, land containing a deposit of sandstone of a superior quality, for building and ornamental purposes, and valuable only as a stone quarry, might be entered as a placer claim under the general mining laws,[1] which ruling was practically ignored by Assistant Secretary Sims in a later case.[2]

The passage of the act of congress referred to, occurring as it did subsequent to Asssistant Secretary Chandler's first ruling, was a legislative affirmance of the theory of interpretation applied to other classes of non-metallic substances, and a recognition of the rule which has for its foundation the element of commercial value. More than once, congress has intervened when the department has undertaken to disregard this element, by applying arbitrary rules to individual cases. A notable instance will be found when we reach the subject of petroleum.

The supreme court of Montana followed the ruling of Commissioner McFarland in the Bennett case.[3] The supreme court of Washington declined to accept the reasoning of the supreme court of Montana, and held, that the term "mineral" was intended to embrace only deposits of *ore*, and the idea of a non-mineralized deposit was excluded.[4]

As the law now stands, lands containing deposits of building stone in such quantities as to render them more valuable for quarrying purposes than any other, may be entered as placers under the mining laws, or purchased under the stone and timber act of June 3, 1878.[5]

Lands containing limestone used for fluxing in metallurgical operations, or for the purpose of manufacturing the lime of commerce, have been held to be subject to entry under the placer laws.[6]

[1] Van Doren v. Plested, 16 L. D. 508.

[2] *In re* Delaney, 17 L. D. 120. See, also, *In re* Simon Randolph, 23 L. D. 329.

[3] Freezer v. Sweeney, 8 Mont. 508.

[4] Wheeler v. Smith, 5 Wash. 704.

[5] 20 Stats at Large, 89. See, *ante*, § 210.

[6] Commissioner Burdett (1875), Copp's Min. Lands 176; Maxwell v. Brierly (1883), 10 Copp's L. O. 50; Shepherd v. Bird (1893), 17 L. D. 82; Johnston v. Harrington, 5 Wash. 93.

**§ 422. Petroleum.**— Petroleum has always been recognized as a mineral.[1] As was said by the supreme court of Pennsylvania: "It is a mineral substance obtained from "the earth by the process of mining, and lands from which "it is obtained may, with propriety, be called mining "lands;"[2] although that court had previously held, that while admitting petroleum to be mineral, it was not included in a reservation of "mineral" in a deed.[3]

Judge Ross, sitting as circuit judge in the ninth circuit, held, that public land containing petroleum could only be acquired pursuant to the provisions of the mining laws relating to placer claims.[4] Until a comparatively recent period, it would seem that this view was entertained by the land department.[5]

As heretofore noted in a previous section,[6] Secretary Hoke Smith, in August, 1896, ruled, that petroleum lands were not mineral lands, could not be entered under the mining laws,[7] and might be selected by the states in lieu of lost sixteenth and thirty-sixth sections.[8]

Congress promptly intervened, as it had on a previous occasion in reference to building stone,[9] and by act approved February 11, 1897, ordained:—

"That any person authorized to enter lands under the "mining laws of the United States may enter and obtain "patent to lands containing petroleum, or other mineral oils, "and chiefly valuable therefor, under the provisions of the "laws relating to placer mineral claims: *Provided*, That "lands containing such petroleum, or other mineral oils, "which have heretofore been filed upon, claimed, or

[1] See, *ante*, § 93.

[2] Gill *v.* Weston, 110 Pa. St. 316. See, also, Stoughton's Appeal, 88 Pa. St. 198; Thompson *v.* Noble, 3 Pittsb. 201.

[3] Dunham *v.* Kirkpatrick, 101 Pa. St. 36.

[4] Gird *v.* California Oil Co., 60 Fed. 531, 532.

[5] *In re* A. A. Dewey, 9 Copp's L. O. 51; Downey *v.* Rogers, 2 L. D. 707; *In re* Samuel Rogers, 4 L. D. 284; Roberts *v.* Jepson, 4 L. D. 60; Peru Oil Co., 16 L. D. 117.

[6] See, *ante*, § 138.

[7] *Ex parte* Union Oil Co., 23 L. D. 222.

[8] Chandler *v.* State of California, Oct. 27, 1896.

[9] See, *ante*, § 421.

"improved as mineral, but not yet patented, may be held "and patented under the provisions of this act the same as "if such filing, claim, or improvement were subsequent to "the date of the passage hereof."[1]

This, of course, settles the question for the future. We think the act was but a legislative recognition of the law as it previously existed.

**§ 423. Natural gas.**—Natural gas is as much an article of commerce as iron ore, oil, coal, petroleum, or any other of the like products of the earth.[2]

"It is true," said the supreme court of Pennsylvania, "that gas is a mineral, but it is a mineral with peculiar "attributes, which require the application of precedents "arising out of ordinary mineral rights, with much more "careful consideration of the principles involved than the "mere decision."[3]

It was held by the court of appeals of Ontario, that natural gas is a mineral within the meaning of a statute which gives corporations power to sell or lease mineral rights under highways;[4] and the circuit court of the United States, for the northern district of New York, has decided, that this commodity, when brought into this country from Canada through pipes, was exempt from duty as "crude "mineral."[5]

While, owing to its "fugitive and wandering existence "within the limits of a particular tract,"[6] the appropriation of it under the mining laws applicable to placers suggests an apparent absurdity, yet, as it is a mineral, is an article of commerce, and of great utility in an economic sense, we do not see why lands shown to contain it in

[1] This act was approved after § 138 of this treatise had been printed.

[2] State *v.* Indiana & Ohio O. G. & M. Co., 2 Int. St. Com. Rep. 758. See interesting note in 25 Law. Rep. Annot. 222.

[3] Westmoreland & Cambria Nat. Gas Co. *v.* De Witt, 130 Pa. 235; S. C., 5 Law. Rep. Annot. 731.

[4] Ontario Nat. Gas Co. *v.* Gosfield, 18 Ont. App. 626.

[5] *In re* Buffalo Nat. Gas Fuel Co., 73 Fed. 191.

[6] Brown *v.* Vandergrift, 80 Pa. 147.

quantities sufficient to make them more valuable for that purpose than any other should not be entered under the placer laws. The difference between asphaltum, mineral tar, petroleum, and natural gas, is only one of degree.

§ 424. **Brick clay.**—If lands containing kaolin, or china clay, are subject to entry under the placer laws, it is difficult to see upon what principle lands chiefly valuable for deposits of brick clay should be excepted from such entry. But Secretary Vilas held, that although a given tract was undoubtedly more valuable as a "clay placer" than for any other purpose, it was not mineral land, and could not be appropriated under the mining laws.[1]

The manufactured product from a bed of brick clay is more common-place than the porcelain obtained from kaolin, or china clay, but we cannot understand why this should make any difference. The element of value in both cases rests upon the marketability of the manufactured product. Under the English decisions, brick clay is classified as a mineral under the "railway clauses act,"[2] and we can conceive of no logical reason why, in the administration of the federal mining laws, any discrimination should be made as between the finer and coarser grades of a substance, if it can be extracted, removed, and marketed at a profit.

§ 425. **Phosphatic deposits.**—The only public land state in the Union where the phosphatic deposits occur in appreciable quantities is Florida. They have been extensively mined in South Carolina since 1868, but their existence in Florida was not known until 1887, since which time they have come into prominence, and have assumed considerable economic importance. They are, in general, most abundant in ancient river bottoms, where they have

[1] Dunluce Placer Mine, 6 L. D. 761. See, also, Jordan *v.* The Idaho Aluminum M. & M. Co., 20 L. D. 500.

[2] See, *ante*, § 92, p. 100, note 3 and 4.

been washed together from their original beds.[1] Since 1890, mining has been conducted upon a large scale, the shipments constituting a heavy item in the freights of the several railroads of the state. The raw material is consumed in large quantities in the United States, and it is exported to the various parts of Europe.[2]

Secretary Smith held, that land chiefly valuable for phosphate deposits is mineral in character,[3] although, under a special act of congress, a homestead claimant who had initiated a right in ignorance of the existence of such deposits within the tract might perfect his entry, notwithstanding their discovery prior to the final entry,[4] thus changing the rule governing ordinary mineral lands within inchoate homestead claims, announced in a previous section.[5]

The same secretary also held, that under the land grant acts to the Florida Railway and Navigation Company, passed respectively in 1856 and 1874, lands containing this class of deposits might be selected in satisfaction of the grants.[6] The reasons assigned are:—

(1) That the act of 1856 did not in terms reserve mineral lands;

(2) That in the act of 1874, where mineral lands are reserved, the word "mineral" is used in a limited sense, and cannot be construed to include phosphates.

We have heretofore endeavored to show that this is an erroneous theory, and have fully explained the law as we understand it in the article on railroad grants.[7]

As a matter of *present* classification, Secretary Smith concedes that lands of this class are subject to entry under the mining laws.

[1] Dana's System of Mineralogy, 6th ed., p. 769.

[2] Preliminary Sketch of the Phosphates of Florida, by George H. Eldridge. Trans. Am. Inst. Min. Eng., vol. xxi., p. 196.

[3] Gary v. Todd, 18 L. D. 58.

[4] *Id.* (on review), 19 L. D. 475.

[5] See, *ante*, § 208.

[6] Tucker v. Florida Ry. & Nav. Co., 19 L. D. 414.

[7] See, *ante*, §§ 158, 159.

§ 426. **Tailings.**—To suffer tailings to flow where they list, without obstructions to confine them, is equivalent to their abandonment.[1] If they lodge on the lands of another, they are considered as an accretion, and belong to him.[2] If they accumulate on vacant and unappropriated public land, it has been the custom in the mining regions of the west to recognize the right of the first comer to appropriate them by proceedings analagous to the location of placer claims.[3] As was said by the supreme court of Nevada: "Although not a mining claim within the strict "meaning of the expression as generally used in this coun- "try, a 'tailings claim' is so closely analagous to it, that "the propriety of subjecting the acquisition and mainte- "nance of the possession of it to the rules governing the "acquisition of the right to a strictly mining claim, at once "suggests itself."[4]

The land department has recognized this possessory right, and permitted entries to be made of lands containing beds of tailings, under the laws applicable to placers. There are no adjudicated cases in the reports of department decisions which have come under our observation, but we have knowledge of several instances where patents for this class of claims have been issued under the mining laws.

§ 427. **Subterranean gravel deposits in ancient river beds.**—Subterranean channels of ancient streams into which beds of auriferous gravels have been deposited are sometimes called deep, or ancient, placers. The most noted of these are found in California.[5]

[1] Jones v. Jackson, 9 Cal. 238, 245.

[2] *Id.*

[3] Dougherty v. Creary, 30 Cal. 291.

[4] Rogers v. Cooney, 7 Nev. 213.

[5] For interesting and valuable discussion on the subject of these deep gravels, see, Monographs of Mr. Ross E. Browne, The Ancient River Beds of The Forest Hill Divide, Cal. State Mineralogist's Report, 1890, p. 435, and of Mr. John Hays Hammond, The Auriferous Gravels of California, in the report of 1889, p. 105.

These gravel beds lie upon a "bed-rock" which, at some period of geological history, formed the bed of an ancient river. They are usually immediately overlain by a formation of clay gouge, and on this clay covering is a capping of lava, sometimes hundreds of feet in thickness. These subterranean deposits are reached by means of tunnels to the bed-rock, and thence following the meanderings of the channel. These deposits certainly occupy a fixed position in the mass of the mountain, although they do not fall within the popular definition of lodes, or veins. The land department, at an early period, classified them as "placers," and patents have uniformly been issued upon locations made under the placer laws.[1]

The supreme court of California has upheld this classification.[2]

The inconvenience of this rule will be shown when we come to consider the requirements of the department as to discovery within the limits of each twenty-acre tract. But this is an argument which should address itself to congress, in order that this class of deposits may receive separate consideration, and be relieved from conditions which are not unreasonable when applied to superficial placers, but become exceedingly onerous and burdensome when applied to these subterranean deposits.

§ 428. **Beds of streams.**— As to whether gravel deposits lying on the beds of watercourses may be appropriated under the placer laws, will depend on circumstances. If the stream is navigable, certainly no right to appropriate its bed for mining purposes can be sanctioned, for two reasons:—

(1) The shores and beds of such rivers belong to the state, and not to the federal government. They were not granted by the constitution to the United States, but were reserved to the states respectively, and the new states have

[1] Com'rs' Letter, Copp's Min. Dec. 78.
[2] Gregory v. Pershbaker, 73 Cal. 109, 115.

the same rights of sovereignty and jurisdiction over this subject as the original states;[1]

(2) The conduct of mining operations in navigable streams is incompatible with the public uses to which such streams are dedicated.

If unnavigable, there is no reason why the gravel deposits lying on the beds cannot be appropriated[2] (as the banks can, for it is there that placers are usually found,) if the title to the bed resides in the general government. No subsequent appropriation of the bed of an unnavigable stream can interfere with the rights of the prior riparian proprietor. In other words, the question to be considered is, whether the bed sought to be appropriated is a part of the public domain, or not.

## ARTICLE II. THE LOCATION AND ITS REQUIREMENTS.

§ 432. Acts necessary to be performed to constitute a valid placer location under the Revised Statutes, in the absence of supplemental state legislation and local district rules.

§ 433. Requisites of a valid placer location where supplemental state legislation exists.

**§ 432. Acts necessary to be performed to constitute a valid placer location under the Revised Statutes, in the absence of supplemental state legislation and local district rules.**—Generally speaking, the acts required to be performed in order to complete a valid location under the federal laws applicable to placers, are the same as are required in cases of lode locations. Section twenty-three hundred and twenty-nine of the Revised Statutes provides:—

"Claims usually called placers, including all forms "of deposit, excepting veins of quartz, or other rock in "place, shall be subject to entry and patent under like

[1] Pollard *v.* Hagan, 3 How. 212; Pollard's Heirs *v.* Kibbe, 9 How. 471; Commissioner Burdett's Letter, 1 Copp's L. O. 155.

[2] Rablin's Placer, 2 L. D. 764.

"circumstances and conditions as are provided for vein, "or lode, claims."

This has been construed to mean:—

(1) That there must be a discovery upon which to base the location;[1]

(2) The location must be marked upon the ground so that its boundaries can be readily traced.[2]

As was said in a previous section, referring to lode claims, no notice need be posted, no particular kind of marking is required, nor is any record made necessary. No preliminary development work is prescribed. In the absence of supplemental state or local regulation the discovery and marking the boundaries perfect the location.[3]

**§ 433. Requisites of a valid placer location where supplemental state legislation exists.**—As in the case of lodes,[4] most of the states within the purview of this treatise have enacted laws prescribing certain acts to be done, in order to perfect a placer location, in addition to the requirements of the federal law. These supplemental provisions vary in the different states. Taking the Colorado statutes as a type (although the laws of some of the states are more elaborate), the following acts are required to complete a location of this class:—

(1) Discovery;

(2) Posting a notice of location;

(3) Marking the boundaries in a specified manner;

(4) Recording a certificate of location.

As these features are common to both lode and placer claims, what we have heretofore said with reference to the

[1] McDonald v. Montana Wood Co., 14 Mont. 88; Lincoln Placer, 7 L. D. 81; Ferrell v. Hoge, 18 L. D. 81; 19 L. D. 568; Louise M. Co., 22 L. D. 409; Rhodes v. Treaz, 21 L. D. 503; S. P. R. R. v. Griffin, 20 L. D. 663; Reins v. Murray, 22 L. D. 409; Union Oil Co., 23 L. D. 222.

[2] White v. Lee, 78 Cal. 593; Sweet v. Webber, 7 Colo. 443; Anthony v. Jillson, 83 Cal. 296; McDonald v. Montana Wood Co., 14 Mont. 88.

[3] See, *ante*, § 328.

[4] See, *ante*, § 329.

necessity of complying with these conditions,[1] the order in which the acts may be performed,[2] and the effect of locations made by agents,[3] need not be here repeated.

## Article III. The Discovery.

§ 437. Rules governing discovery the same as in lode locations.

§ 438. Unit of placer locations — Discovery in each twenty-acre tract.

**§ 437. Rules governing discovery the same as in lode locations.**— The subject of discovery has been fully considered, when dealing with lode locations, in a previous article.[4] The principles there announced apply with equal force to placers, in so far as the character of the deposits will admit. Discovery is just as essential in case of placers as it is in lode locations, and the rules as to what constitutes a valid discovery in the latter apply with equal force to the former, with such modifications only as necessarily flow from the different form in which the deposits occur. It is, therefore, useless to repeat what has heretofore been fully explained.

According to a ruling of the department, the fact that land has been returned as mineral by the surveyor-general does not obviate the necessity of a discovery as the basis of a placer location. Without such discovery the location is void.[5]

**§ 438. Unit of placer locations — Discovery in each twenty-acre tract.**— We have heretofore observed that the unit of lode locations is a surface area aggregating a fraction over twenty acres, and that it is immaterial how many or how few locators participate in that class of locations.[6]

We shall see in a succeeding article that the rule in regard to placers is somewhat different. In placers, the

[1] See, *ante*, § 329.
[2] See, *ante*, § 330.
[3] See, *ante*, § 331.
[4] See, *ante*, §§ 335–339.
[5] Reins *v.* Murray, 22 L. D. 409.
[6] See, *ante*, § 361.

unit of the location is twenty acres to each individual, with a maximum of one hundred and sixty acres to an association of persons. In other words, unless limited by local rules,[1] a single individual may locate a twenty-acre tract, but no more. Where more than one person (not exceeding eight) participates, an area equivalent to twenty acres to each is permitted; but they locate the whole area jointly, and are not, according to the practice, required to each locate a particular specified twenty-acre tract, becoming tenants in common of the entire area. Such being the case, the question has arisen as to whether one discovery within the limits of the entire area appropriated by an association of persons would be sufficient upon which to base a location as to such area, or whether a discovery is necessary upon each twenty-acre tract or unit of location. In case of lode locations, where an appropriation in excess of the statutory limit of a single location is desired, a separate discovery and separate location are necessary.[2]

In applying the law to this class of cases, the rule adopted by the land department seems to be now well settled. As stated by Secretary Smith, it is as follows: —

"It will be conceded, that the individual is required to "make a discovery on the twenty acres he is permitted "to take. This being true, it is difficult to conceive "of a construction of the law that would discriminate "against the individual in favor of the many. Such was "surely not the intention of the law-makers. In my opin- "ion, there must be a discovery upon each twenty-acre "tract included in a placer location of one hundred and "sixty acres, and a location made of that amount of land "upon a single discovery is made void, except as to the "twenty acres immediately surrounding it. To construe "the law otherwise, is to open the doorway for the "appropriation of the public lands, that would be doing "great violence to the intent and meaning of the mining "law."[3]

[1] Copp's Min. Dec. 164.
[2] See, *ante*, § 361.
[3] Ferrell v. Hoge, 18 L. D. 81.

That this has not always been the rule, the department itself admits,[1] but all the recent decisions of that department promulgated during the incumbency of Secretary Smith follow the views above expressed.[2]

In one of the decisions of the supreme court of California, there is found the following *dictum:* "It is insisted by "counsel for respondents, that no location of mineral land "is valid unless valuable mineral had been actually discov- "ered in the land before the location was made. As to "placer claims, we find no such condition in the acts of "congress, in the local laws, or in the practice of miners."[3]

We characterize this as *dictum*, because the court in the next sentence finds, that in the case under consideration there was a discovery.

At all times in the history of mining in the west, discovery was recognized as the source of mining titles,[4] without distinction as to the character of the deposit,[5] and we do not think the supreme court of California intended to overthrow this doctrine.

The supreme court of Montana does not agree with the rule established by the land department. It has held, that a single discovery within the limits of a tract of one hundred and sixty acres, located by an association of eight persons, is sufficient upon which to base a location of the entire tract.[6]

Secretary Smith's attention was invited to this decision, but he declined to accept it as a correct exposition of the law.[7]

There is this to be said in favor of the departmental ruling: In placer entries, the department must be satisfied as to the mineral character of the entire tract. There is

[1] Ferrell v. Hoge (on review), 19 L. D. 508. See, also, Lincoln Placer, 7 L. D. 81.

[2] S. P. R. R. v. Griffin, 20 L. D. 485; Rhodes v. Treas, 21 L. D. 502; Louise M. Co., 22 L. D. 663; Union Oil Co., 23 L. D. 222.

[3] Gregory v. Pershbaker, 73 Cal. 109, 117.

[4] Jackson v. Roby, 109 U. S. 440.

[5] See, *ante*, § 335.

[6] McDonald v. Montana Wood Co., 14 Mont. 88.

[7] Ferrell v. Hoge (on review), 19 L. D. 508.

no legal inference, that because a given twenty-acre tract within an area of one hundred and sixty acres is mineral in character, that the adjoining tracts, or others more remote, are of the same character.[1] And we cannot conceive how this essential fact can be established without showing a discovery within each tract.

The ruling of the land department, however, is not altogether consistent with decisions upon other requirements of the law. If the theory upon which the rule rests is the correct one, it would follow, that each twenty-acre tract should be marked upon the ground, and that, prior to patent, the equivalent of five hundred dollars in labor or improvements must be shown to have been expended for the benefit of each twenty acres; that is, an aggregate of four thousand dollars for one hundred and sixty acres.

This, according to Secretary Smith, would be required in the case of eight contiguous lode claims.[2]

But in case of placers, it seems that the expenditure of five hundred dollars alone will be sufficient to carry to patent any extent of contiguous area that may be embraced in the application.[3]

It is not our present intention to discuss the correctness of either of the two propositions last announced. This will be reserved for discussion when dealing with the patent proceedings. We cite them simply to show the inconsistency existing between the two classes of rulings.

While the supreme court of Montana may be right in its theory that one discovery is sufficient to hold one hundred and sixty acres of placer ground when located in the names of eight persons, it is quite manifest that its decision does not control the land department. As the courts cannot interfere with that department while in the discharge of its duties in disposing of the public lands, either by injunction or mandamus,[4] or exercise any direct appellate

[1] Dughi v. Harkins, 2 L. D. 721. Quoted in Davis v. Weibbold, 139 U. S. 507.
[2] Sweeney v. N. P. R. R., 20 L. D. 394; Ferguson v. Hanson, 21 L. D. 336.
[3] Good Return P. M. Co., 4 L. D. 221.
[4] Marquez v. Frisbie, 101 U. S. 473; Litchfield v. Richards, 9 Wall. 575; Gaines v. Thompson, 7 Wall. 347; Cox v. McGarrahan, 9 Wall. 298.

jurisdiction for the purpose of reversing or correcting its errors,[1] it is safer to assume the correctness of its rulings in this respect, at least, than to insist upon a contrary doctrine. In ordinary placer claims, it is by no means difficult to comply with the rule established by the department.

In the case of deep placers, some inconvenience will be encountered,[2] but no more so than to establish the mineral character of the land containing this class of deposits for purposes of final entry and patent.

## Article IV. State Legislation as to Posting Notices and Preliminary Development Work.

§ 442. State statutes requiring posting of notices on placers.
§ 443. Preliminary development work required by state laws upon placer locations.

**§ 442. State statutes requiring posting of notices on placers.**—The general observations upon the subject of posting notices following lode discoveries, found in a preceding section,[3] apply with equal force to all classes of locations upon the public mineral lands. With the exception of the common custom generally observed, as there indicated, the posting of a notice is the subject of state or local regulation, in the absence of which none is required.

Some of the states have enacted laws upon the subject with regard to placers, a brief epitome of which will not be out of place:—

*Colorado.*—Before recording (thirty days from discovery) the discoverer must post upon the claim a notice containing: (1) the name of the claim; (2) the name of the locator; (3) date of discovery, and (4) number of feet or acres claimed.[4]

[1] Quinby v. Conlan, 104 U. S. 420; Shepley v. Cowan, 91 U. S. 330.
[2] Louise M. Co., 22 L. D. 663.
[3] See, *ante*, § 350.
[4] Mills' Annot. Stats., § 3136.

*California.*—The discoverer must immediately post, in a conspicuous place at the point of discovery, a notice or certificate of location containing: (1) the name of the claim; (2) the name of the locator or locators; (3) date of discovery and posting of notice, which shall be considered as the date of location; (4) a description of the claim, by reference to legal subdivisions of sections, if the location is made in accordance with the public surveys; otherwise, a description with reference to some natural object or permanent monument as will identify the claim.[1]

*Idaho.*—Requirements are practically the same as in lode claims.[2]

*Montana.*—The same as in lode claims, except that the number of feet or acres claimed must be designated in the notice, instead of the length of the lode.[3]

*Wyoming.*—Provisions are the same as in Colorado.[4]

As to Arizona and New Mexico, if any notice is required to be posted, it is the same as in case of lode claims.[5] Placers are not specially named in the laws of either of these territories upon the subject of posting notices, and it is doubtful if they were intended to apply to placer locations.

We find no provisions on this subject in either Washington, Utah, South Dakota, Oregon, North Dakota, or Nevada.

**§ 443. Preliminary development work required by state laws upon placer locations.** — When speaking of the requirement of preliminary development work with respect to lode locations, we expressed the view that the object was two-fold:—

(1) To determine the lode character of the deposit;

(2) To compel the discoverer to manifest his intention to claim the ground in good faith under the mining laws.[6]

[1] Act of March, 1897, § 4.
[2] Laws of 1895, p. 25, §§ 1, 12. See, *ante*, § 354.
[3] Rev. Code 1895, § 3610. See, *ante*, § 352.
[4] Laws of 1888, pp. 89-90, § 22.
[5] See, *ante*, § 353.
[6] See, *ante*, § 341.

It is quite obvious that both of these reasons cannot be offered in support of similar requirements in cases of placers, although the latter applies with equal force to them. But three of the states, however, have attempted any legislation on this subject with respect to placers.

California requires, that within sixty days from the date of discovery, the discoverer shall perform labor upon his claim in developing it, to an amount equivalent to at least ten dollars' worth for each twenty acres, or fractional part thereof. A failure to perform such labor within the time shall work a forfeiture of all rights under such location, and open the land to location by any qualified locator, except the previous locators.[1]

In Idaho[2] and Montana,[3] the equivalent of the work done upon lode claims must be done upon placers.

The remaining states and territories have passed no laws upon the subject.

It must be remembered, that these requirements are not necessarily connected with the annual labor required by the laws of congress. While this preliminary development work might reasonably be considered in estimating the value of the annual labor for the first year next succeeding the date of location, its requirement is one of the acts of location, and we think such legislation is clearly within the power of the states.

## Article V. The Surface Covered by the Location — Its Form and Extent.

§ 447. Form and extent of placer locations prior to Revised Statutes.
§ 448. Form and extent under Revised Statutes.
§ 449. Placer locations by corporations.
§ 450. Locations by several persons in the interest of one — Number of locations by an individual.

**§ 447. Form and extent of placer locations prior to Revised Statutes.**—Previous to the act of July 9, 1870,

[1] Act of March, 1897, § 4.
[2] Laws of 1895, p. 25, § xii.
[3] Rev. Code, 1895, § 3611.

commonly known as the "placer law," congress imposed no limitation to the area which might be included in the location of a placer claim. This, as well as every other thing relating to the acquisition and continued possession of mining claims, was determined by rules and regulations established by miners themselves.[1] The size and shape varied according to the nature of the deposit, for in those days this class of claims embraced hydraulic "diggings," gulch or ravine claims, creek claims, and claims on bars and flats.[2] Locations of these claims were made without regard to the lines of public surveys, as there were none.

The placer law of 1870,[3] provided for the patenting of placer claims under like circumstances and conditions as were provided by the lode law of 1866 for vein, or lode, claims. It was required, however, that where locations were made upon surveyed lands, the entry in its exterior limits was required to conform to the legal subdivisions of the public lands. For this purpose, it was provided that forty-acre tracts might be subdivided into areas of ten acres, but no location thereafter to be made was permitted to exceed one hundred and sixty acres for any one person or association of persons.

Locations made prior to this act might, if located in conformity with local rules, be patented, whatever their form or area,[4] and any number of contiguous claims, of any size, might be purchased, consolidated, and applied for as one entry.[5]

Under this act, any one person might, unless inhibited by local rules, locate one hundred and sixty acres. An association of persons was limited to a like area.

The general mining act of May 10, 1872,[6] modified the original placer law by fixing the limit of twenty acres for

[1] St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 649.
[2] Yale on Mining Claims and Water Rights, 76, 77.
[3] 16 Stats. at Large, 217.
[4] Copp's Min. Dec. 40.
[5] St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 651.
[6] 17 Stats. at Large, p. 91, § 10.

each individual claimant. The limit which might be taken by an association of persons remained the same, as in this respect the act of 1870 was unrepealed.[1]

As to the form of the location, the later act provided that it should conform *as near as practicable* with the United States system of public land surveys and the rectangular subdivisions of such surveys; where it could not be conformed to legal subdivisions, it might be made the same as on unsurveyed lands. This was the state of the law when the federal statutes were revised.

**§ 448. Form and extent under Revised Statutes—** The Revised Statutes, which embrace the laws of the United States general and permanent in their nature, in force on December 1, 1873, contain the following provisions as to form and extent of surface area:—

"§ 2329. Claims usually called 'placers,' including "all forms of deposit, excepting veins of quartz, or other "rock in place, shall be subject to entry and patent, under "like circumstances and conditions, and upon similar pro- "ceedings, as are provided for vein, or lode, claims; but "where the lands have been previously surveyed by the "United States, the entry in its exterior limits shall con- "form to the legal subdivisions of the public lands.

"§ 2330. Legal subdivisions of forty acres may be sub- "divided into ten-acre tracts; and two or more persons, or "associations of persons, having contiguous claims of any "size, although such claims may be less than ten acres each, "may make joint entry thereof; but no location of a placer "claim, made after the ninth day of July, eighteen hun- "dred and seventy, shall exceed one hundred and sixty "acres for any one person, or association of persons, which "location shall conform to the United States surveys.

"§ 2331. Where placer claims are upon surveyed lands, "and conform to legal subdivisions, no further survey or "plat shall be required, and all placer mining claims located "after the tenth day of May, eighteen hundred and seventy- "two, shall conform as near as practicable with the United "States system of public-land surveys, and the rectangular

[1] See, *ante*, § 72; St. Louis Smelting Co. v. Kemp, 21 Fed. Cases, 205.

"subdivisions of such surveys, and no such location shall "include more than twenty acres for each individual "claimant; but where placer claims cannot be conformed "to legal subdivisions, survey and plat shall be made as "on unsurveyed lands; and where by the segregation of "mineral lands in any legal subdivision a quantity of "agricultural land less than forty acres remains, such frac- "tional portions of agricultural land may be entered by "any party qualified by law, for homestead or pre-emption "purposes."

It will thus be observed:—

(1) That the unit or individual location is twenty acres;

(2) That not to exceed one hundred and sixty acres may be embraced within one location by an association of persons, of which there must be at least eight;

(3) That the location, if upon surveyed lands, must conform as near as practicable to the lines of the public surveys.

As to whether it is practicable to make a location or survey conform to legal subdivisions, is a matter which rests entirely with the land department.

Commissioner McFarland held, that the only construction of the language of the act, "as near as practicable," which is consistent with the context of the act and the general intention of congress is, that placer locations upon surveyed lands must conform to the public surveys in all cases, except where this is rendered impossible by the previous appropriation or reservation of a portion of the legal subdivision of ten acres upon which the claim is situated. The location in this case was made in 1880, and covered the bed of Bear river, in California, for twelve thousand feet, following the meanderings of the river, and embraced a small quantity of surface ground along its banks. The entry was held for cancellation.[1]

This ruling of the commissioner, however, was reversed by Secretary Teller,[2] who held, that the placer law of 1870, which expressly required placer locations to conform to

[1] 10 Copp's L. O. 3. See, also, Copp's Min. Lands, 115.
[2] Rablin's Placer, 2 L. D. 764; Esperance M. Co., 10 Copp's L. O. 338.

the lines of the public surveys, was unreasonable, a hardship, and in contravention of the established custom of the mining regions; therefore, it was modified by the act of May 10, 1872, so as to provide for exceptional cases where reason and common sense required a different regulation.

The case of the Bear river claim was of this exceptional character. The placer deposit was in a cañon on the banks of a very crooked stream, and where the adjoining lands were totally unfit for mining or agricultural purposes. The placer applicant was permitted to proceed to patent.

There can be no question but that this ruling is in harmony with the custom of miners in California This particular river was, from 1852 to 1867, the scene of great mining activity, and for miles up and down the stream, during the season when the stage of the water would permit, miners claimed, occupied, and worked its bed, bars, and banks, under regulations defining the extent of their claims by a certain number of feet along the stream, and a width extending to the sides of the gulch.

The ruling of Secretary Teller was followed in a later case by acting Secretary Muldrow.[1]

While it is true that congress is not bound to shape its legislation so as to conform to the previously existing local customs, yet the history of federal mining legislation shows that great consideration has been paid to such customs. Evidently, there was some reason for the modification of the original placer act in this respect, and there can be no doubt that Secretary Teller states the "old law, the "mischief, and the remedy" correctly.

These gulch or river claims, as well as deep placers found in ancient river beds where the deposits follow the meanderings of the channel, certainly present instances where it would be unreasonable in all cases to insist that a mining claimant should take and pay for, at an increased rate, any considerable amount of land that is useless for mining purposes, for the sake of obtaining title to the

[1] *In re* Pearsall and Freeman, 6 L. D. 227.

small quantity which is useful.[1] The inconvenience to the government in administering its land system is no greater in this respect than that caused by the segregation of lode claims.[2]

Lands must be treated as unsurveyed until the plat is finally approved.[3]

Locations upon unsurveyed lands may be made in any form so long as the statutory area is not exceeded.

**§ 449. Placer locations by corporations.**—As heretofore noted,[4] the supreme court of the United States has determined, that a domestic corporation formed under the laws of a state may locate public mineral lands, but intimates that there may be some question raised as to the extent of a claim which a corporation may be permitted to locate as an original discoverer, suggesting that it might perhaps be treated as one person and entitled to locate only to the extent permitted a single individual.[5]

The placer law quoted in the preceding section permits an "association of persons" to locate not to exceed one hundred and sixty acres. A corporation is an association of persons; at the same time we must admit that it is but an artificial individual. We have intimated in a previous section, that if such a corporation had a constituency of eight stockholders it might be permitted to appropriate one hundred and sixty acres of land by location. We are not aware that the question has ever been judicially determined. Looking at the object of the statute in permitting consolidation of interests for purposes of development and operation, so clearly outlined by the supreme court of the United States in St. Louis Smelting Company *v.* Kemp,[6]

[1] Esperance Mining Claim, 10 Copp's L. O. 338.

[2] For illustration of manner of describing minor subdivisions located as placers, see, Mining Circular, Dec. 10, 1891, pars. 56, 57. See appendix.

[3] Copp's Min. Dec., 41. See, *ante*, §§ 104, 105, 142; Bullock *v.* Rouse, 81 Cal. 590, 595; Medley *v.* Robertson, 55 Cal. 396.

[4] See, *ante*, § 226, p. 274.

[5] McKinley *v.* Wheeler, 130 U. S. 630, 636.

[6] 104 U. S. 636.

we cannot say that by the use of the term "association of "persons" congress meant to exclude corporations from the designation. As eight individuals might locate and unite their interests in an incorporated company without violating the spirit of the law, it is not unreasonable to suggest, that a corporation composed of the eight may accomplish the same purpose by locating one hundred and sixty acres. Our suggestion is based upon the language of the statute. In the absence of any such provision granting privileges to an association of persons, undoubtedly a corporation would simply occupy the status of an individual. The question is not by any means easy of solution. It has not been judicially answered.

**§ 450. Locations by several persons in the interest of one—Number of locations by an individual.**—It is a matter of frequent occurrence, that an individual locator, desiring to obtain more ground than he is permitted under the law to appropriate in his individual capacity by a single location, resorts to the use of "dummies," and perfects locations in their names, subsequently obtaining conveyances therefor. The courts have held that this is a fraud upon the government.[1] The same object can be accomplished without violating the law. There is nothing to prevent a miner from locating, by separate location, as many twenty-acre tracts as he pleases, either contiguous or non-contiguous. The right to locate and develop mining ground is not exhausted by a single location, as in the case of pre-emption and homestead entries. If he can discover mineral within the eight twenty-acre subdivisions of a quarter section of land, and is willing to develop them to the extent required by law as a condition precedent to the acquisition of title by patent, or to annually perform labor to the extent required by law upon, or for the benefit of, each, he is clearly entitled to do so. The statute simply inhibits the acquisition by an individual of more than

[1] Mitchell v. Cline, 84 Cal. 409; Gird v. California Oil Co., 60 Fed. 535.

twenty acres by a single location. During the period when rights were governed exclusively by local rules, in certain districts the number of claims which one might locate and hold at one time within that particular district were defined. But there is no trace of this found in the legislation of congress.

## ARTICLE VI. THE MARKING OF THE LOCATION ON THE GROUND.

§ 454. Rule as to marking boundaries of placer claims in absence of state legislation.

§ 455. State legislation as to marking boundaries of placer claims.

**§ 454. Rule as to marking boundaries of placer claims in absence of state legislation.**—We have explained in a previous section the necessity for, and object of, marking lode locations upon the ground.[1] While the surface boundaries of a placer claim do not perform all the functions of end and side lines of lode locations, nevertheless the marking of a placer location on the ground is just as essential as in the case of lodes. Where the location is upon unsurveyed land, or if upon surveyed land is of such a character that it is not required to conform to the public surveys,[2] it has never been doubted but that this all-important act of location should be performed, and that such locations should be marked with the same care as in lode locations. Where, however, placer ground is located according to subdivisions of the public surveys, it has been contended that such marking is not necessary, and that a description in the posted or recorded notice by fractional subdivisions of the section, designating the township and range, serves the purpose of the law, and dispenses with this requirement as to marking on the ground.

This view has found support in a decision by Assistant Secretary Reynolds, wherein he holds, referring to the

[1] See, *ante*, § 371. [2] See, *ante*, § 448.

language of section twenty-three hundred and twenty-nine of the Revised Statutes, that the "like circumstances and "conditions" apply to discovery, location, and *where the location is made on unsurveyed lands*, marking the boundaries of the same, as of a lode claim.

He says: "It does not, in my judgment, mean that "when the placer is located on surveyed lands it is neces- "sary to mark the boundaries. There is no purpose that "can be subserved by so doing. The public surveys are "as permanent and fixed as anything can be in that line, "and any fractional part of a section can be readily found, "and its boundaries ascertained, by that method, for all "time to come, and is necessarily more stable and endur- "ing than marking it by perishable or destructible stakes "or monuments."[1]

The supreme court of Montana inclines to the same view.[2]

But it seems to us that these decisions overlook several important matters:—

(1) In the absence of any state legislation or local rule, no notice need be either posted[3] or recorded.[4] What evidence is there on the ground, or elsewhere, of any appropriation which will warn off subsequent intending locators, if there are no marks to indicate it?

(2) Minor subdivisions are not surveyed in the field, but are protracted in the surveyor-general's office on the township plats, and the lines are wholly imaginary.[5]

It seems to us that the supreme court of California presents the logical view of the law. Said that court:—

"The construction contended for does not seem to us to "be in harmony with the general purpose of the act. The "purpose of the requirement, that the claimant shall mark "the boundaries of his claim, is to inform other miners as "to what portion of the ground is already occupied. The "men for whose information the boundaries are required

[1] Reins *v.* Murray, 22 L. D. 409.
[2] Freezer *v.* Sweeney, 8 Mont. 508.
[3] See, *ante*, § 350.
[4] See, *ante*, § 273.
[5] See, *ante*, § 106, p. 120.

"to be marked, wander over the mountains with a very "small outfit. They do not take surveyors with them to "ascertain where the section lines run, and ordinarily it "would do them no good to be informed that a quarter-"section of a particular number had been taken up. They "would derive no more information from it than they "would from a description by metes and bounds, such "as would be sufficient in a deed. For the information "of these men, it is required that the boundaries shall be "'distinctly marked upon the ground.' The section lines "may not have been 'distinctly' marked upon the ground, "or the marks may have become obliterated by time or "accident. And to say, that the mere reference to the "legal subdivision is of itself sufficient, would, in our "opinion, defeat the purpose of the requirement."[1]

The views of the supreme court of Colorado are in harmony with those of the California courts.[2]

The supreme court of Montana has held, that a separate marking of the boundaries as to each twenty-acre tract within a larger area, located by an association of persons, is not necessary. It is sufficient if the exterior boundaries of the larger area be marked.[3]

We think we are justified in the conclusion, that placer locations must be marked on the ground with the same care, and for the same object and purpose, as in case of lode locations.

§ 455. **State legislation as to marking boundaries of placer claims.**—There is no legislation on the subject of marking placer locations in either Oregon, Nevada, South Dakota, North Dakota, Washington, or Utah. As to Arizona and New Mexico, it is difficult to determine whether their laws were intended to apply to placers, or not. Of course, the necessity for marking arises from the terms of federal law. State or territorial legislation may determine the character of marking within reasonable limits, but cannot dispense with the requirement of the federal laws.

[1] White *v.* Lee, 78 Cal. 593, 596; followed in Anthony *v.* Jillson, 83 Cal. 296.
[2] Sweet *v.* Webber, 7 Colo. 443.
[3] McDonald *v.* Montana Wood Co., 14 Mont. 88.

Colorado requires the boundaries to be marked prior to recording the certificate of location (thirty days from discovery) by placing a substantial post at each angle of the claim.[1]

California allows thirty days from date of discovery to complete the marking, "so that its boundaries can be read-"ily traced."[2]

Idaho[3] and Montana[4] require the same marking as in case of lode claims.

Wyoming requires surface boundaries to be designated before recording the location certificate (ninety days from discovery), by substantial posts or stone monuments at each corner of the claim.[5]

## Article VII. The Location Certificate and Its Record.

§ 459. State legislation concerning location certificates and their record.

**§ 459. State legislation concerning location certificates and their record.**—As in the case of lodes, certificates of location[6] and their record[7] are the subject of state or local regulation. Where such certificates are required, and their record is provided for, the same general rules apply as in the case of lodes. Where a record is made necessary, the requirements of the federal law as to contents of such record are mandatory.[8] There are no specific provisions on the subject in either Washington, Utah, South Dakota, North Dakota, Oregon, Nevada, Arizona, or New Mexico. It is possible that in the two territories and in Nevada the laws governing lode claims may be construed to cover placers, but it is extremely doubtful if such is the case. Other states make special provision for this class of cases.

[1] Mills' Annot. Stats., § 3136.
[2] Act of March, 1897, § 4.
[3] Laws of 1895, p. 25, § xii.
[4] Rev. Code 1895, § 3611.
[5] Laws of 1888, pp. 88-90, § 22.
[6] See, *ante*, § 379.
[7] See, *ante*, §§ 273, 328.
[8] See, *ante*, § 273.

*Colorado.*—Within thirty days from the discovery a certificate of location must be recorded in the county recorder's office, which must contain: (1) the name of the claim designating it as a placer; (2) name of locator; (3) date of location; (4) number of acres or feet claimed; (5) description of claim by reference to natural objects or permanent monuments.[1]

*California.*—Within thirty days from the date of discovery, the discoverer shall record the notice, or certificate of location (which must be similar to the posted notice),[2] in the office of the county recorder of the county in which the discovery is made.[3]

*Idaho.*—Every placer claim must be recorded within thirty days from the time of location, in the district in which the same is situated, or in the office of the county recorder. The location notice must contain: (1) date of location; (2) name of locator; (3) name and dimensions of the claim; (4) such description of locality, by reference to natural landmarks or fixed objects and contiguous claims, if any, as to render the situation of the same reasonably certain from the letter of the notice itself. An affidavit of one of the locators must be attached.[4]

*Wyoming.*—Within thirty days after date of discovery, the location certificate must be recorded with the district recorder, if there be one, and within ninety days from such discovery a record must be made with the county recorder. The certificate must contain: (1) the name of the claim, designating it as a placer; (2) the name of the locator; (3) date of location; (4) number of feet or acres claimed; (5) a description of the claim by designation of such natural or fixed objects as shall identify the claim beyond question.[5]

*Montana.*—The requirements in Montana are substantially the same as in case of lode locations,[6] substituting

[1] Mills' Annot. Stats., § 3136.
[2] See, *ante*, § 380.
[3] Act of March, 1897, § 4.
[4] Laws of 1895, p. 25, §§ xii., xiii.
[5] Laws of 1888, pp. 89-90, § 22.
[6] See, *ante*, § 380, p. 493.

the number of superficial feet or acres claimed in place of the number of linear feet and surface area embracing the lode.[1]

## Article VIII. Conclusion.

§ 463. General principles announced in previous chapter on lode locations apply with equal force to placers.

**§ 463. General principles announced in previous chapter on lode locations apply with equal force to placers.**— The architecture of existing mining legislation is a composite of incongruous elements—an aggregation of piecework, which does not present, in outline, that symmetrical form or structure which commends itself to the professional eye. There is a total lack of harmonious blending, and it is often difficult to determine what provisions of the law apply distinctively to lode locations, and what to placers; or what, in contemplation of law, is to be applied to both.

The laws governing both classes had a common origin, and during the period when local rules and customs held sway the only difference between them was as to the extent of property rights enjoyed, and such modified regulations as were required by the difference in the form in which the deposits occurred. But discovery and appropriation were the sources of the miner's title, and continuous development the condition of its perpetuation in the case of both lodes and placers. Congress manifestly recognized these as the basis of its mining legislation, and as a rule the courts have applied the general underlying principles applicable to one class of locations to the other, so far as the nature of the deposits would permit.

The previous chapter on the subject of lode locations, dealing with the location and its requirements, the discovery, the manner of locating, the marking of the boundaries, the changing of these boundaries, and amendment to location certificates, the relocation of forfeited or abandoned

[1] Rev. Code, 1895, § 3612.

claims, applies in the main to placers, except in so far as the nature of placer deposits obviously demand a discrimination. There is no extralateral right attached to a placer claim pure and simple. Therefore, the laws as they are construed by the courts, with reference to end and side lines and the pursuit of veins beyond vertical planes drawn through surface boundaries, have no reference to placers.

For the purpose of systematic treatment, owing to certain peculiar attributes pertaining to lode locations, it was necessary to consider the two classes and their mode of appropriation separately. But there are many things in common between them, as we think will be readily observed by a consideration of this and the two preceding chapters. Unnecessary repetition should, in our judgment, be avoided.

# CHAPTER IV.

## TUNNEL CLAIMS.

ARTICLE I. INTRODUCTORY.
II. MANNER OF PERFECTING TUNNEL LOCATIONS.
III. RIGHTS ACCRUING TO THE TUNNEL PROPRIETOR BY VIRTUE OF HIS TUNNEL LOCATION.

### ARTICLE I. INTRODUCTORY.

§ 467. Tunnel locations prior to the enactment of federal laws.
§ 468. The provisions of the federal law.

**§ 467. Tunnel locations prior to the enactment of federal laws.**—Tunnel locations, or as they are sometimes called, "tunnel sites," occupy a unique position in practical mining upon the public domain. They were not unknown during the period antedating the enactment of congressional mining laws. The discovery of a new mineral belt frequently gave birth to local rules upon the subject of tunnels, and it was by no means an uncommon occurrence for tunnel locations to be made on the four slopes of a mountain, their projected lines running into the hill from every conceivable point of the compass, and at different elevations above the mountain's base, from one hundred to several thousand feet. The practical development of the mines was, as a rule, from surface discoveries on the crest of the mountain, or its benches and sloping ridges. Strife or litigation between surface locators and tunnel proprietors rarely, if ever, arose, for the simple reason, that according to the popular view, priority of discovery, whether from the surface or in the tunnel, established a priority of

right. In many localities, the life of the camp was short, and most of the tunnel projects began and ended with the staking of a line, the incorporation of a company with a fabulous capital, and the tunnel bore barely entering under cover.

We think it may be fairly stated, that prior to any legistion upon the subject by congress, in popular estimation the purpose of a tunnel location was that of discovery of blind veins, or deposits, whose existence it might be difficult, if not impossible, to establish by surface exploration, and that such discovery, by means of the tunnel, should be treated as the equivalent of one made from the surface. As to questions of priority, it was a mere race of diligence. Rights upon the discovered lode dated from the discovery in the tunnel, and not from the date of the tunnel location. Surface prospecting within the vicinity of the projected tunnel line was not inhibited. The chances of a successful discovery in many formations was largely in favor of the tunnel method, and this was the inducement for projecting it; but the tunnel locator's privilege was not understood to be an exclusive one within any defined surface area. We do not assert that this was the universal rule, or that it was of such a general observance as to lead to the inference that congress had it in mind when it legislated upon the subject. We do not know that is the fact. We have strong convictions upon the subject, but it would be difficult to assert, that in construing congressional legislation, as we are about to do, these antecedent conditions, popular theories, and local experiences should, or could, legally be resorted to as an aid of interpretation. We must take the statute as we find it, and construe it according to ordinary rules of interpretation.

§ 468. **The provisions of the federal law.** — We are not at present concerned with the act of congress of February 11, 1875,[1] providing that development work performed in running a tunnel shall be estimated as work done upon

[1] 18 Stats. at Large, 315.

the lodes with like effect as if done from the surface. This act has no particular bearing upon the subject now under consideration. We are now called upon to construe section four of the act of May 10, 1872, which is embodied in the Revised Statutes, and is as follows:—

"§ 2323. Where a tunnel is run for the development "of a vein, or lode, or for the discovery of mines, the own- "ers of such tunnel shall have the right of possession of "all veins, or lodes, within three thousand feet from the "face of such tunnel on the line thereof, not previously "known to exist, discovered in such tunnel, to the same "extent as if discovered from the surface; and locations "on the line of such tunnel of veins, or lodes, not appear- "ing on the surface, made by other parties after the com- "mencement of the tunnel, and while the same is being "prosecuted with reasonable diligence, shall be invalid; "but failure to prosecute the work on the tunnel for six "months shall be considered as an abandonment of the "right to all undiscovered veins on the line of such tunnel."

## Article II. Manner of Perfecting Tunnel Location.

§ 472. Acts to be performed in acquiring tunnel rights.
§ 473. "Line" of tunnel defined.
§ 474. "Face" of tunnel defined.
§ 475. The marking of the tunnel location on the ground.

**§ 472. Acts to be performed in acquiring tunnel rights.**—The statute is silent as to the manner in which a tunnel location is perfected. The subject is regulated entirely by rules prescribed by the commissioner of the general land office, under the direction of the secretary of the interior, the authority for such regulation being found in the provisions of the Revised Statutes.[1] These rules, prescribed in pursuance of such authority, become a mass of that body of public records, of which the courts take judicial notice,[2] and when not repugnant to the acts of congress have the force and effect of laws.[3]

[1] § 2478.

[2] Caha *v.* United States, 152 U. S. 211.

[3] Poppe *v.* Athearn, 42 Cal. 607; Rose *v.* Nevada & G. V. Wood & Lumber Co., 73 Cal. 385; Chapman *v.* Quinn, 56 Cal. 266.

By these rules[1] the tunnel locator is required, as soon as his projected tunnel enters cover, to give notice by erecting a substantial board or monument at the "face" or point of commencement thereof, upon which must be posted a good and sufficient notice, containing:—

(1) The names of the parties claiming the tunnel right;

(2) The actual or proposed course or direction of the tunnel;

(3) The height and width thereof;

(4) The course and distance from such face or point of commencement to some permanent well-known objects in the vicinity, by which to fix and determine the *locus*, as in case of lode claims.

The "boundary *lines*" thereof are to be established by stakes and monuments along such lines, at proper intervals, to the terminus of the three thousand feet from the "face" or point of commencement.

At the time of posting the notice and marking out the lines, a full and correct copy of such notice, defining the tunnel claim, must be filed for record with the mining recorder of the district, to which notice must be attached the sworn statement or declaration of the owners, claimants, or projectors of such tunnel, setting forth the facts in the case, stating the amount expended by themselves and their predecessors in interest in prosecuting work thereon, the extent of work performed, and that it is their *bona fide* intention to prosecute work on the tunnel so located and described, with reasonable diligence. As to what *lines* are to be marked, we shall consider in a subsequent section.

**§ 473. "Line" of tunnel defined.**—The supreme court of Colorado has held, that the *line* of the tunnel mentioned in the act designates a width marked by the exterior lines or sides of the tunnel.[2] This view is accepted by the

[1] See, Circ. Instructions, Dec. 10, 1891, pars. 20–26. See appendix.
[2] Corning Tunnel v. Pell, 4 Colo. 507, 511.

supreme court of Montana,[1] and is in harmony with the rulings of the land department.[2] The circuit court of appeals for the eighth circuit, in the case of Enterprise M. Co. *v.* Rico-Aspen Cons. M. Co.,[3] undoubtedly coincides with this definition, as will be observed from the language of its decision taken in connection with the plat referred to and the plat accompanying the decision of Judge Hallett.[4] A like interpretation by the supreme court of Idaho is necessarily inferred from a reading of the opinion of that court in Back *v.* Sierra Nevada Cons. M. Co.[5]

We are entitled to assume, that there is no doubt as to what is meant by the "line of such tunnel"—that it is the width marked by the exterior sides of the tunnel throughout the length of three thousand feet in the direction claimed. This definition is an important factor in construing the other provisions of the act, and enables us to reach a plausible conclusion as to the extent of the privileges conferred upon the tunnel locator.

§ 474. **"Face" of tunnel defined.**—The land department construes the term "face of such tunnel" as used in the Revised Statutes to mean, the first working face formed in the tunnel, and to signify the point at which the tunnel actually enters cover; it being from this point that the three thousand feet are to be measured. There is no room for dispute as to this. While, in speaking of the face of a drift or tunnel in the conduct of active mining operations, as work advances the face recedes farther into the hill, and its *locus* is constantly changed, the word as used in the tunnel law can mean but the one thing, and that is, the first full exposure of height and width after entering

[1] Hope M. Co. *v.* Brown, 7 Mont. 550, 557; *Id.*, 11 Mont. 370, 379.

[2] *In re* David Hunter, 5 Copp's L. O. 130; Copp's U. S. Min. Lands, 231; Commissioner Drummond, Copp's U. S. Min. Dec. 144; Commissioner Williamson, Copp's Min. Lands, 222; Corning Tunnel M. & R. Co. *v.* Pell, 3 Copp's L. O. 130, 131.

[3] 66 Fed. 200.

[4] 53 Fed. 321. See, *post*, § 487, fig. 23.

[5] 2 Idaho, 396.

under cover. It was manifestly intended that the length of the open surface approach to where the tunnel enters cover was not to be considered in estimating the three thousand feet, and for that reason the term "face" was used.

§ 475. **The marking of the tunnel location on the ground.**— We have already noted the regulation of the land department requiring the locator of a tunnel to mark the boundary *lines* thereof. We have italicized the word *lines*, inviting attention to the fact that the statute refers only to a single *line*. Assuming that the regulation is authorized by the law, what is meant by the *lines* of the tunnel? The only answer to this question which is consistent with the construction of the act followed by the land department, as well as the courts,[1] is, that the *lines* are those drawn parallel to the course of the tunnel, at a distance from each other equal to the width of the tunnel, so that vertical planes drawn through them will, upon reaching the proper depth, be coincident with the sides of the tunnel. As marked upon the surface they would represent a parallelogram three thousand feet long, with a width equal to the width of the tunnel bore, which is usually six or eight feet. No sanction is found for marking any other lines. The department has held, that while the tunnel proprietor may, upon discovery in the tunnel, make a location upon the surface on either side of the tunnel line to the extent of fifteen hundred feet in length by the width allowed by law, there is no authority for staking out a superficies fifteen hundred feet, or three thousand feet wide by three thousand feet long.[2]

This view finds support in the decision of the supreme court of Colorado, in the case of Corning Tunnel Co. *v.* Pell.[3] The marking herein indicated is all that the law or regulations require.

[1] See, *ante*, § 473.
[2] Corning Tunnel M. & R. Co. *v.* Pell, 3 Copp's L. O. 130.
[3] 4 Colo. 507, 510.

## Article III. Rights Accruing to the Tunnel Proprietor by Virtue of His Tunnel Location.

§ 479. Important questions suggested by the tunnel law.
§ 480. Rule of interpretation applied.
§ 481. Length upon the discovered lode awarded to the tunnel discoverer.
§ 482. Necessity for appropriation of discovered lode by surface location.
§ 483. To what extent does the inception of a tunnel right and its perpetuation by prosecuting work with reasonable diligence operate as a withdrawal of the surface from exploration by others?
§ 484. The Colorado rule.
§ 485. The Montana rule.
§ 486. The Idaho rule.
§ 487. Judge Hallett's views.
§ 488. The doctrine announced by the circuit court of appeals, eighth circuit.
§ 489. Tunnel locations before the supreme court of the United States.
§ 490. Opinions of the land department.
§ 491. Conclusions.

**§ 479. Important questions suggested by the tunnel law.**—The provisions of the law upon the subject of tunnel locations present for consideration several important questions, the solution of which has engaged the attention of the courts, both state and federal. The results reached are by no means harmonious. The inquiries suggested may be thus formulated:—

(1) What are the rights accruing to the tunnel proprietor by virtue of a discovery made in the tunnel, in the absence of conflicting rights acquired by surface discovery?

(2) To what extent does the inception of a tunnel right and its perpetuation by prosecuting work with diligence operate as a withdrawal of the surface from exploration by others?

Some incidental questions necessarily arise, the correct solution of which depends upon reaching a satisfactory conclusion, by way of answers to one or the other of the foregoing inquiries.

§ 480. **Rule of interpretation applied.**—Section twenty-three hundred and twenty-three of the Revised Statutes provides, that the tunnel discoverer shall have the right of possession of all veins not previously known to exist, to the same extent as if discovered from the surface.

This is to be construed in connection with the entire body of the mining law, and not as if it stood as an isolated piece of legislation. It must be harmonized, if possible, with all existing legislation which is essentially *in pari materia*. The intention of the law-maker is to be deduced from the whole statute and every material part of the same.[1] To determine the extent of rights conferred by discovery from the surface, we must resort to other sections of the law.

§ 481. **Length upon the discovered lode awarded to the tunnel discoverer.**—Section twenty-three hundred and twenty of the Revised Statutes provides, that a mining location based upon a surface discovery may equal, but shall not exceed, fifteen hundred feet in length.

As to the length on the discovered lode to which the tunnel discoverer is entitled, Judge Hallett was of the opinion, that it was not fixed by the act of congress, but was left to local regulation, and that, in the absence of such regulation, nothing would pass but the line of the tunnel.[2]

Prior to the passage of the congressional law, a state statute was in existence in Colorado, fixing the length at two hundred and fifty feet each way from the tunnel, and Judge Hallett held this statute to be controlling after the enactment of the federal law. The supreme court of the United States has incidentally stated that such was the rule, but the case then under consideration arose out of a

[1] Pennington *v.* Coxe, 2 Cranch, 33; Washington Market Co. *v.* Hoffman, 101 U. S. 112; Platt *v.* Union Pac. R. R., 99 U. S. 48; Kohlsaat *v.* Murphy, 96 U. S. 153; Heydenfeldt *v.* Daney G. & S. M. Co., 93 U. S. 634; Neal *v.* Clark, 95 U. S. 704.

[2] Rico-Aspen Cons. M. Co. *v.* Enterprise M. Co., 53 Fed. 321.

location made in 1865, at a time when the statute was undoubtedly controlling.[1]

The supreme court of Colorado has determined that this state law was not in force after the passage of the congressional law, and that a discovery in the tunnel entitled the discoverer to fifteen hundred feet in length on the lode, under the provisions of section twenty-three hundred and twenty of the Revised Statutes,[2] which ruling was followed by the circuit court of appeals for the eighth circuit, overruling the decision of Judge Hallett above referred to.[3]

The supreme court of Montana has stated, that when veins, or lodes, are discovered in the tunnel, the claimant will be entitled, as a matter of right, to the vein, or lode, for fifteen hundred feet in length,[4] and this is the understanding of the law expressed by the commissioner of the general land office.[5]

We may therefore safely conclude, that the discoverer of a lode encountered in driving a tunnel is, in the absence of any conflicting claims, entitled to fifteen hundred feet in length on the discovered vein, and that this right is referable to section twenty-three hundred and twenty of the Revised Statutes.

How is this fifteen hundred feet to be measured? A proper answer to this question involves the correct determination of two others:—

(1) After discovery in a tunnel, is it necessary to mark the location of the discovered lode on the surface?

(2) If it is necessary to so mark the location, must the boundaries include the apex?

[1] Glacier Mt. S. M. Co. v. Willis, 127 U. S. 471, 481.

[2] Eliet v. Campbell, 18 Colo. 510.

[3] Enterprise M. Co. v. Rico-Aspen Cons. M. Co., 66 Fed. 200.

[4] Hope M. Co. v. Brown, 7 Mont. 550, 555.

At one time a state law existed in Montana, limiting the extent to three hundred feet on each side of the discovery, but this has since been repealed by implication. Civil Code 1895, § 4672; Pol. Code 1895, § 5186.

[5] Commissioner Drummond, Copp's Min. Dec. 144.

**§ 482. Necessity for appropriation of discovered lode by surface location.**—It being well established that the tunnel discoverer is entitled to fifteen hundred feet in length on his discovered lode, the inquiry naturally suggests itself: How is he to disclose his intention as to the extent and direction in which he shall take it, so as to inform others where his rights end and theirs may begin? How are other prospectors to find out where to search for or locate lodes, with due regard to the rights of the tunnel discoverer?

Judge Hallett, in the case of Rico-Aspen Cons. M. Co. *v.* Enterprise M. Co.,[1] ruled, that in case of a location based upon discovery made in a tunnel, it is as necessary to mark the boundaries on the surface and file a certificate for record, as in any other case. This is in accord with the views of Commissioner Williamson, who instructed the surveyor-general of Colorado, that "no patent can issue for a vein, "or lode, without surface ground, and as the surface which "overlies the apex of a vein, or lode, discovered in a tun-"nel can only be ascertained by sinking a shaft, or by "following a lode up on its dip from the point of discov-"ery, no survey of such lode will be made until the exact "surface ground is first ascertained;"[2] and this ruling has been uniformly adhered to by the land department.

The supreme court of Colorado, however, has taken a different view. It announces the rule that location on the surface by defining surface boundaries is not necessary. Its argument is based upon the following reasoning:—

"Section twenty-three hundred and twenty-three was "obviously designed to encourage the running of tunnels "for the discovery and development of veins, or lodes, of "the precious metals not appearing upon the surface and "not previously known to exist. Little encouragement "would the act give if the discoverer of a lode in a tunnel "were bound also to find the apex and course of such vein, "uncover the same from the surface, sink his location shaft

[1] 53 Fed. 321.

[2] 4 Copp's L. O. 102. See, also, *In re* David Hunter, Copp's Min. Lands, 231.

"thereon, mark the boundaries thereof, and record his certi-
"ficate of such surface location, the same as if he had made
"the original discovery from the surface.

"The location of a lode from the surface is always
"attended with more or less difficulty and uncertainty.
"Mistakes occur in the location of boundary lines, even
"where the apex and course of the vein lie comparatively
"near the surface. These difficulties and uncertainties are
"liable to be greatly increased where a lode is discovered
"by means of a tunnel driven hundreds and thousands of
"feet into the heart of the great mountain. To require
"the discoverer of a lode in a tunnel to prospect for the
"vein upon the surface, and uncover and mark its bound-
"aries so as to include the apex and course within the
"lines of the surface location, would be to require a work
"of supererogation, for no surface location is necessary for
"the convenient working of the lode discovered in a tun-
"nel location already made. Such requirement would
"unnecessarily burden the tunnel locator and discoverer:
"to the great labor and expense of tunneling as a means
"of a location and discovery, it would add the labor and
"expense devolving upon the ordinary surface discoverer
"and locator. Besides, such a requirement would sub-
"ject the discoverer of a lode in a tunnel to the hazard of
"a race for its surface location: and thus the discoverer
"might have the fruits of his labor wrested from him by
"a surface locator who had done nothing and expended
"nothing in the original discovery."[1]

The location of the lode discovered in the tunnel in this case was by posting a notice at the mouth of the tunnel, claiming seven hundred and fifty feet on each side of the discovery point in the tunnel, five hundred and ninety-four feet from its face. A notice was also recorded in the county recorder's office, corresponding with the posted notice.

It is a grave undertaking for an author to attack a decision of a court as pre-eminent in the mining world as the supreme court of Colorado. But whichever way we turn in construing this law we are met with like embarrassments. No solution can possibly be reached which will harmonize with all of the decisions of all the courts.

[1] Ellet v. Campbell, 18 Colo. 510, 519, 520.

Under the circumstances, we think we are justified in analyzing all of the decisions and deducing our conclusions. Unless such conclusions are based upon logic and reason, they will not be of any controlling force.

First addressing ourselves to the manner in which the lode discovered in the tunnel was located, *i. e.* by posting a notice at the mouth of the tunnel and recording a similar notice, we fail to find any sanction for such a proceeding. Neither posting nor recording are enjoined by the federal law. In the absence of state law or regulation none is necessary.[1]

Wherever in any state legislation a notice is required to be posted, it must be placed either upon the lode or in reasonable proximity to it.[2] In Colorado, it is to be posted at the point of discovery.[3] It performs a mere temporary function, protecting the discoverer in his possession during the time allowed for the completion of his location. It is succeeded by a certificate of location, which is the basis of the record. This certificate is required by law of Congress to contain such a description of the claim by reference to some natural object or permanent monument as will identify the *claim*, so as to permit others to determine its *locus on the surface*. Unless the recorded certificate considered by the supreme court of Colorado falls within the sanction of the state law, it is worthless. It would be irrelevant and inadmissible as evidence, and no constructive notice is imparted thereby.[4]

The federal laws do not provide for any method of appropriation of lodes, except by locating a surface inclosing them, and this requires the marking of the location on the ground so that the boundaries may be readily traced.[5]

How are the end lines of a lode claimed by discovery in a tunnel to be marked, so that the extralateral rights of others on another portion of the same vein located from

[1] See, *ante*, §§ 350, 389.
[2] See, *ante*, § 356.
[3] See, *ante*, § 352.
[4] See, *ante*, § 392.
[5] See, *ante*, § 371.

the surface, outside of any possible surface conflict with a tunnel claimant, may be defined?

If it should be answered that such end lines must be drawn parallel to the line of the tunnel, or at right angles to the general course of the discovered lode, we say that there is no warrant in the law for such methods. It would be judicial legislation for courts to so assert.

It seems to us, that in construing the entire body of the mining law there is but one logical conclusion to be reached, and that is, that the tunnel location is a means of discovery; that when discovery is made, the surface location must follow within a reasonable time, or within the period fixed by the state laws; that this location must cover the apex; and as to this, the tunnel and surface discoverer are placed in the same category—they both locate at their peril.[1]

But it will be urged, that the discovery being on the dip of the vein, as a rule it will be impossible to make the location upon the surface so as to include both the apex and place of discovery. In other words, the discovery will not be within the limits of the claim as required by section twenty-three hundred and twenty.

Our answer is, that the right granted by section twenty-three hundred and twenty-three to acquire the veins by tunnel discovery *to the same extent as if discovered from the surface*, necessarily implies an exception to the rule, that the discovery must be within the surface boundaries. Some legislation of this character was necessary to give any effect to a tunnel discovery.

When the apex is covered by the surface location, with proper direction given to the end lines, the place of discovery will be within the limits of, and covered by, the *grant*, *i. e.* the ownership of the vein in its entire depth, acquired by the surface location, and in contemplation of law it is *a part of the claim*.

In response to the suggestion that little encouragement

[1] See, *ante*, §§ 364-365.

would be given to exploitation by tunnel if the tunnel claimant were put to the inconvenience of locating the apex, we suggest, that the surface locator is put to this inconvenience, and his hardships are greater than a tunnel discoverer's. With a vein cut in a tunnel, it is far easier to trace its course by drifting, and its angle of declination by upraising, than it is to establish it from the surface, unless the outcrop is pronounced and well defined.

Be that as it may, individual hardships invariably flow from the application of many general laws, and this affords no substantial reason for ignoring them.

If the courts are compelled, as they concede that they are,[1] to resort to section twenty-three hundred and twenty of the Revised Statutes to determine the rights of a tunnel discoverer as to length along the discovered lode, why should they reject all the remaining elements contained in that section, which are the attributes of the location by which the right to a discovered lode to the length stated is established and perfected? It seems to us that the rule announced by the supreme court of Colorado violates the cardinal rule of construction announced in a previous section,[2] and that in reaching its conclusion, it fails to consider the entire body of the mining law.

As to the suggestion of that court that no surface is required for the convenient working of a lode discovered in a tunnel, the court overlooks two essential elements. In the first place, the theory which was prevalent prior to the passage of the act of May 10, 1872, that surface was to be granted in connection with the lode simply for convenient working purposes, finds no place in the act which contains the tunnel provisions. The act which permitted a patent in the form of the Idaho mine, shown in figure 1, page 67, gave place to a law framed on altogether different theories.[3]

The requirement as to surface delineation of a location under the later law, by marking the location on the ground so that its boundaries could be readily traced, was not for

[1] See, *ante*, § 481.
[2] See, *ante*, § 480.
[3] See, *ante*, §§ 68, 71.

the peculiar benefit of the discoverer and locator, but that others seeking in good faith to discover and locate unappropriated lodes might be able to ascertain exactly what had been theretofore appropriated.[1] If a tunnel locator is permitted to attach his permanent rights on a discovered lode to a point in the bowels of the earth absolutely inaccessible to any one else, without his voluntary consent, how can the *situs* of his discovered lode be fixed, so as to warn the subsequent prospector of the tunnel proprietor's rights?

The tunnel discoverer has the exclusive knowledge of the position of the vein in the earth. He alone has the facilities for determining the angle of declination, the course of the vein, and approximately, at least, the position and direction of the apex upon or near the surface. To say, that after a discovery in the tunnel, if the tunnel proprietor is compelled to mark his location upon the surface, he is subject to the hazard of a race of diligence against one who might stake out his boundaries on the surface, implies one of two legal absurdities: Either that a person in hostility to the tunnel discoverer may base a location without any discovery, or that he may make a location founded upon the discovery by another, which is only permitted in cases of abandonment by the discoverer.[2] A complete answer to this objection is found in the fact, that after discovery in a tunnel the discoverer would be protected for at least a reasonable time in which to mark his boundaries.[3]

We can conceive of no legal hardship flowing from the necessity for compliance with the requirements as to surface marking. A tunnel locator projects his tunnel with a full knowledge of the law. He starts with his eyes open as to its defects and ambiguities. He is charged with the knowledge of the regulations and rulings of the land department, which, from the beginning, have insisted upon a surface marking. If he projects his tunnel with this knowledge, we do not see what equities arise from expenditures made in prosecuting his work which may legally

[1] See, *ante*, § 371.
[2] See, *ante*, § 403.
[3] See, *ante*, §§ 339, 372.

address themselves to the "conscience of the chancellor." To uphold the views announced by the supreme court of Colorado requires us also to ignore an element of interpretation frequently announced and upheld by the supreme court of the United States.

The contemporaneous construction of a statute by the executive officers of the government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the courts.[1]

The fact that this construction by the land department originated in a letter, written perhaps informally, or in answer to an official inquiry, is not at all material if it is shown that the views therein expressed have uniformly been recognized by the land department, and that such is the fact in this instance it cannot be successfully denied.

We think we are justified in the conclusion, that a lode discovered in a tunnel must be located from the surface, the boundaries must be marked, and all other requirements pertaining to lode locations generally must be fulfilled. The rights upon such discovered lode will thereafter be defined by the surface boundaries and their relationship to the located lode. This rule permits some force to be given to all the provisions of the Revised Statutes. Any other interpretation violates many of them.

§ 483. **To what extent does the inception of a tunnel right and its perpetuation by prosecuting work with reasonable diligence operate as a withdrawal of the surface from exploration by others?**—It seems to have been assumed by many, if not all, of the courts, that a tunnel location once perfected in accordance with the departmental regulations has the effect of withdrawing from the body of the public domain a certain superficial area, within

[1] Pennoyer *v.* McConnaughy, 140 U. S. 1; United States *v.* Hill, 120 U. S. 169; United States *v.* Philbrick, *Id.* 52; Hahn *v.* United States, 107 U. S. 402; United States *v.* Moore, 95 U. S. 760; Brown *v.* United States, 113 U. S. 568; Barden *v.* N. P. R. R., 154 U. S. 288; Montana Co., Limited, *v.* Clark, 42 Fed. 629.

which, so long as work in the tunnel is prosecuted with reasonable diligence, surface exploration is prohibited. Before seeking for the justification of this assumption in the terms of the mining statutes, it is advisable to examine the adjudicated law upon the subject and determine, if possible, to what extent, if any, the various tribunals agree in their conclusions.

We find that this question, with others incidentally involved, has been before the courts of Colorado, Montana, and Idaho, and the federal courts in the eighth circuit.

§ 484. **The Colorado rule.**—The case of Corning Tunnel Co. *v.* Pell[1] involved a controversy between the tunnel company locating a tunnel in September, 1872, and the locators of the Slide lode, located August 17, 1875.

The Slide lode was fifteen hundred feet in length, and crossed the center line of the tunnel site nearly at right angles. The discovery shaft was near, but not on, the center line, being about fifty-five feet therefrom. The lode had not been reached or cut by the tunnel.

The tunnel site as claimed described a parallelogram, three thousand by fifteen hundred feet. The tunnel had been worked with reasonable diligence, and had not been abandoned. The owners of the Slide lode applied for a patent, and the tunnel company adversed. The action was in support of the adverse claim and to try the title to the Slide lode.

It was contended by the tunnel claimant, that the "line "of the tunnel" meant the entire width and length of the surveyed tunnel site, that is, fifteen hundred by three thousand feet; that within these limits, after the commencement of the tunnel and while it is prosecuted with diligence, no valid location could be made of a vein, or lode, not appearing upon the surface.

The supreme court of Colorado held:—

(1) That there was no law authorizing a tunnel location

[1] 4 Colo. 507.

of any such dimensions; that the line of tunnel was the width marked by the exterior lines or sides of the tunnel;[1]

(2) That the result contended for by the tunnel claimant forbids its adoption, unless the language clearly indicates such to have been the legislative intent. In this case, the tunnel-site location would withdraw from the exploration of prospectors over one hundred acres of mineral lands. A very limited number of tunnel locations would cover and monopolize, in most cases, an entire mining district, giving to a few tunnel owners all its mines, not upon the condition of discovery and development, but upon the easy condition of a *commencement* of work on the tunnel, and its prosecution with reasonable diligence. The policy of the general government has been to prevent monopoly of its mineral lands, or its ownership in large tracts. But for the existence of this policy, there was but little or no reason for an abandonment of its system of surveys and pre-emptions applicable to agricultural lands, and the adoption as to its mineral lands of a system that, as to surface claims at least, limits mining locations to an inconsiderable acreage, appendant to a discovered lode. The construction claimed is in contravention of this policy; nor can it be justified by the language of the section;

(3) No right of possession of a lode inures to the tunnel claimant until it is *discovered* in the tunnel;

(4) The Slide lode, not having been discovered in the tunnel by the tunnel proprietor, and the "location," *i. e. discovery*, not being on the line thereof, the tunnel proprietor had no right to the lode.

This is a clear enunciation of the rule, that the mere location of the tunnel site does not withdraw the surface adjacent to the tunnel *line* from exploration and location; that the tunnel is only a means of discovery, and that priority of discovery establishes a priority of right.

Fifteen years later the same tunnel site was again brought

[1] See, *ante*, § 473.

to the attention of the same court, in the case of Ellet *v.* Campbell[1] upon the following state of facts:—

The tunnel claimant, on February 3, 1875, discovered in the tunnel, on the line thereof, five hundred and ninety-four feet from the face, the Bonanza lode, and located it by posting a notice at the mouth of the tunnel and recording a similar notice as described in a preceding section.[2]

The Bonanza lode did not appear upon the surface of the ground, and was not known to exist prior to discovery in the tunnel. It was not staked on the surface. No discovery shaft was sunk, or work done upon the surface. The annual work on the lode was regularly performed. On July 10, 1886, Campbell, the defendant, and another made a location of the J. L. Sanderson lode, which was identical with the Bonanza lode. Their location was based upon a discovery made in a "cut," two hundred feet to the east of the east line of the bore of the tunnel. At the time of marking the Sanderson location, the locators knew of the discovery theretofore made in the tunnel. The locators of the Sanderson lode applied for a patent, the tunnel claimant adversed, and hence the suit.

Upon this state of facts, the supreme court of Colorado held, that having made a discovery in the tunnel, the discoverer is not bound to make another discovery and location of the lode from the surface, in order to be protected against a subsequent surface locator of the same lode.

Having determined that it was not necessary to mark the location on the surface, and that the manner of location heretofore described was sufficient, the appropriation of the lode having been perpetuated by continued performance of the annual work, no other conclusion could possibly have been reached by the court than the one announced. Our criticism of the decision in a previous section is based upon that part of the ruling which denies the necessity for a location upon the surface.

We do not see in what manner the doctrine announced

[1] 18 Colo. 510. [2] See, *ante*, § 482.

in Corning Tunnel Co. *v.* Pell is affected by the decision in Ellet *v.* Campbell.. Both cases sustain the claims of prior discoverers. In fact, priority of discovery is the foundation of both decisions. So far as the state courts of Colorado have thus far expressed themselves, the rule in Corning Tunnel Co. *v.* Pell, that the location of a tunnel does not operate as a withdrawal of the surface adjacent to the line of the tunnel from exploration, and that priority of discovery establishes priority of right, remains unchallenged.

§ 485. **The Montana rule.**—At the time the cases considered by the supreme court of Montana arose, there was a state statute, which had been enacted in 1872, and which contained among others the following provisions:—

"Any person or persons pre-empting any tunnel have "the exclusive right to three hundred feet on each side "from the center of said tunnel, on any and all lodes that "he or they may discover in the course of said tunnel."

In June, 1887, the Hope Mining Company located the Jubilee tunnel in Deer Lodge county, Montana. In the following December, Brown located a quartz claim within three hundred feet of the line of the tunnel, basing his location upon a *discovery in a tunnel*, and was engaged in extracting ore therefrom when the Hope Mining Company sought an injunction preventing further mining operations by the quartz claimant. The ledge in controversy had not been discovered in the Jubilee tunnel, although the complaint alleged that it appeared to cross it.

The supreme court of Montana held:—

(1) That a tunnel claimant upon discovering a vein, or lode, in his tunnel will be entitled as a matter of right to the vein, or lode, for fifteen hundred feet in length along its course, and to the extent of three hundred feet on each side thereof from the middle of the vein;

(2) Brown's location is valid, though liable to be divested by the subsequent discovery of the same vein in

the Hope tunnel, if such location is found to be within three hundred feet from the middle of, and fifteen hundred feet from the point of, the tunnel discovery, measured along the vein. That third parties have the right to locate any veins within three hundred feet of the line of the tunnel, which is held to be the width of the sides of the tunnel, but such locations so made are at the risk of the locators, for upon the discovery of the vein, or lode, in the tunnel all locations made subsequent to the commencement of the tunnel become invalid if they are within the distances above specified.

The court also adds the following:—

"As a matter of course, veins, or lodes, *discovered from "the surface*, or previously known to exist, are not affected "by the right of the tunnel claimant, *which we may here "remark to be most ample and sweeping.*"

The injunction was denied.[1]

It is extremely difficult to ascertain precisely what the court meant by the language used in the quoted paragraph. If a discovery from the surface made prior to discovery in the tunnel, but after the perfection of the tunnel location, would take precedence over the subsequent tunnel discovery, it is difficult to understand the closing remark, that the tunnel proprietor's rights are most ample and sweeping.

Another case between the same parties, involving the same relative rights, came before the same court a few years later, wherein it appeared that Brown had applied for a patent for his location made as indicated in the previous case. The tunnel company adversed, and the action was to determine the adverse claim.

The court held, upon the showing made, that the applicant for patent ought to be restrained from prosecuting his proceedings while the tunnel proprietor is prosecuting his tunnel as required by law, and until it is demonstrated that such vein, or lode, will not be discovered in the

[1] Hope M. Co. v. Brown, 7 Mont. 550.

tunnel, or until such tunnel rights are abandoned by failure to prosecute the tunnel as provided by law.[1]

It must be conceded that the views of the supreme court of Montana tend to support the doctrine, that a perfected tunnel site practically withdraws the surface to the extent of fifteen hundred feet on each side of the line of the tunnel, and that the withdrawal remains in force until it is either demonstrated that a given lode will not be cut in the tunnel or the tunnel site is abandoned.

§ 486. **The Idaho rule.**— In the case of Back *v.* Sierra Nevada Cons. M. Co.[2] the following state of facts appeared:—

The complaint alleged in substance that Back owned the Pilgrim tunnel, located April 5, 1886. On April 6, 1886, defendants grantors entered *upon the line* of the tunnel at a point where post number nine on said line was planted. They had full knowledge of the existence of the post and the location of the tunnel. They commenced to prospect for minerals, and at a depth of twelve feet discovered a ledge.

This ledge was blind, and would be intersected by the tunnel continued on the location line thereof. Defendants grantors located and recorded a mining claim called the Sierra Nevada, and afterwards made application for patent. Back filed an adverse claim, and the suit was brought to determine the rights of the parties. A demurrer to the complaint was sustained. Judgment passed for defendants on failure to answer. The appeal was prosecuted from the judgment.

It was held by the supreme court of Idaho, reversing the judgment:—

(1) That a tunnel location is a "mining claim," and may protect its rights by adversing application for patent to ledges asserted to have been located on the line of said tunnel subsequent to the tunnel location;

(2) It is evident that, in enacting section twenty-three

[1] Hope M. Co. *v.* Brown, 11 Mont. 370.
[2] 2 Idaho, 386.

hundred and twenty-three of the Revised Statutes, congress intended to withdraw from exploration for lodes not appearing upon the surface so much of the public domain as lay upon the *line* of the tunnel;

(3) The tunnel claimant has a right to the possession, for prospecting purposes, of the area in dispute, and to show that the respondent's location was upon the line of his tunnel.

No attempt is made to define what is meant by the *line* of the tunnel.

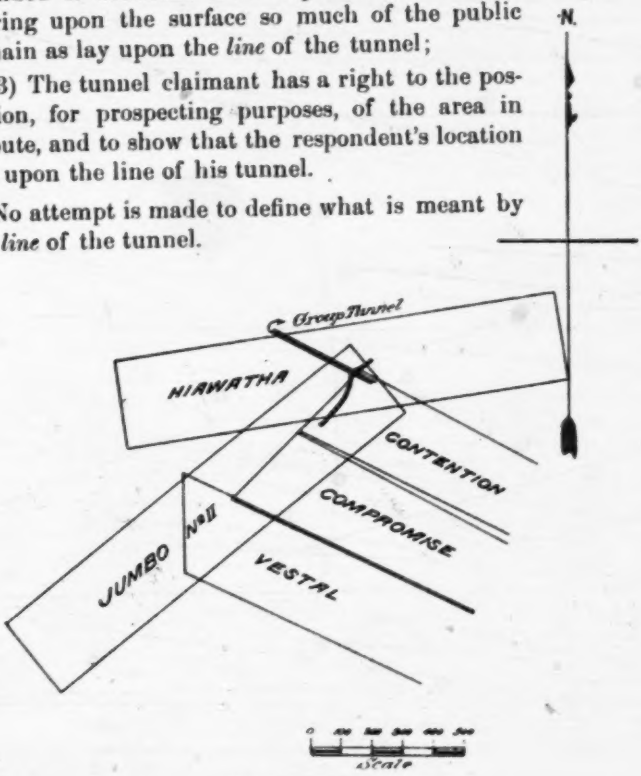



FIGURE 23.

§ 487. **Judge Hallett's views.**—The tunnel law came before Judge Hallett in the case of Rico-Aspen Cons. M. Co. *v.* Enterprise M. Co.[1] His decision is accompanied with a diagram, which we herewith reproduce (figure 23).

The facts were substantially as follows:—

The Rico-Aspen Company asserted title to three mining claims: the Vestal, located in 1879; Contention, January

[1] 53 Fed. 321.

1, 1888, and Compromise, November 18, 1889. The Hiawatha was not necessarily involved in the litigation, although it may be noted that its location was junior in point of time to the inception of the tunnel right.

The Enterprise Mining Company perfected its location of the Group tunnel in July, 1887; and in June, 1892, discovered and located the Jumbo II. claim, delineating it upon the surface as indicated on the diagram.

Said Judge Hallett, after quoting the language of section twenty-three hundred and twenty-three of the Revised Statutes:—

"Clearly enough, this is a grant of lodes and veins on "the line of the tunnel, and the only difficulty is in ascer- "taining the extent of the grant. The supreme court of "this state (referring to Corning Tunnel Co. *v.* Pell) inter- "prets the act as giving only so much of such veins and "lodes as may be in the tunnel itself. But this seems to "reduce the grant to a point of insignificance which de- "prives the act of all force and meaning. Certainly, no "one would be at the trouble and expense of driving a "tunnel through a mountain for such small segments of "lodes, or veins, as may be in the bore of the tunnel. On "the other hand, respondents contend that the grant is "of the length of a surface location in any direction from "the line of the tunnel, and as stated, almost the entire "length of the Jumbo II. is in a southwesterly direction "from that line. Under this construction, the location of "a tunnel, followed by some lazy perfunctory work twice "in the year, will have the effect to withdraw from the "public domain a tract three thousand feet square, or "something more than a half section of land; and this "in the face of the earlier declaration of the statute, "that 'no location of a mining claim shall be made until "'the discovery of the vein, or lode, within the limits "'of the claim located.' This view is so far inconsist- "ent with the general policy of the law which forbids "the granting of large areas of valuable mineral lands "to one person or company, that it seems impossible to "accept it."

The conclusions reached by Judge Hallett may be thus summed up:—

(1) The length of a location made upon a lode discovered in a tunnel is not fixed by the act of congress, but is left to local regulations;

(2) Without local regulation as to length of a claim founded on a discovery in a tunnel, nothing would pass but the line of the tunnel itself;

(3) The Colorado statute of 1861[1] is in force in Colorado, and secures to the tunnel locator two hundred and fifty feet each way from the tunnel, on all lodes discovered within the tunnel. As to the two hundred and fifty feet, the tunnel proprietor becomes the owner of the ledge, its location dating back to the inception of the tunnel right;

(4) As to the Vestal, owing to the priority of its location, decree passed for complainant. As to the Compromise and Contention, their location should, to the extent sanctioned by the state law, yield to the rights of the Jumbo II., which related back to the inception of the tunnel right.

**§ 488. The doctrine announced by the circuit court of appeals, eighth circuit.**— An appeal was taken from Judge Hallett's decree in the Rico-Aspen-Enterprise case, and the appellate court declined to adopt his views.[2] When the case was before Judge Hallett, the facts as they are recited in the opinion fixed 1879 as the date of the Vestal location, prior in point of time to the location of the Group tunnel. For this reason it received but little attention, the reasoning of the judge being particularly addressed to the Contention and Compromise, which were junior in point of time to the tunnel location, although senior with reference to the tunnel discovery.

The case as presented to the appellate court seems to be somewhat different, the controversy apparently centering within the conflict area between the Vestal and Jumbo II., and the record seems to give to the former a date of

[1] Mills' Annot. Stats., § 3141.

[2] Enterprise M. Co. *v.* Rico-Aspen Cons. M. Co., 66 Fed. 201.

location, *junior*, in point of time, to the inception of the tunnel right.

The principles involved, however, are, of course, the same.

The questions involved are presented by the appellate court in the following form:—

(1) Are the owners of a valid tunnel mining claim under section twenty-three hundred and twenty-three of the Revised Statutes, who have discovered a blind vein in their tunnel and have duly located and claimed it, entitled, as against the owners of a lode mining claim located from the surface after the location of the tunnel site, but before the discovery of the vein in the tunnel, to the possession of the vein, or lode, thus discovered, when such vein was not known to exist prior to the location of the tunnel, but was first discovered in another lode mining claim before its discovery in the tunnel?

(2) If the owners of a tunnel mining claim are entitled to the possession of any portion of such a vein, to what extent are they entitled to it?

Another question was also presented and decided, which refers to the effect of a patent issued upon the junior surface location where the tunnel claimant failed to adverse. The discussion of this branch of the case will be deferred until we reach, in another portion of the work, the subject of patent proceedings and the legal effect of a patent when issued.

As preliminary to a discussion of the principles involved, the court announced as follows:—

"There is no tenable middle ground under this section "between a holding that the diligent owner of a tunnel is "entitled to the possession of all blind veins he discovers "in his tunnel to the same extent along the veins as if he "had discovered them at the surface, and a holding that "by the discoveries and locations of others, subsequent to "the commencement of his tunnel and before it reaches "the veins at all, he may be deprived of every portion of "them, except possibly, the small segments within the bore "of the tunnel."

The conclusions reached by the court may be thus stated:—

(1) The location of a tunnel site, followed by the prosecution of work thereon with reasonable diligence, gives to the tunnel locator an inchoate right to all hitherto unknown or undiscovered veins which cross the line of the tunnel and are discoverable therein;

(2) That upon discovery in the tunnel, the tunnel locator will be entitled to fifteen hundred feet along the length of the vein, computed in either direction from his tunnel discovery, and that this right cannot be impaired by a discovery and location from the surface, junior, in point of time, to the inception of the tunnel right;

(3) The state statute of Colorado, fixing the limit in length at two hundred and fifty feet on each side of the tunnel line, is superseded by the act of congress;

(4) In determining what length on the vein is allowed to the tunnel discoverer, the court resorts to section twenty-three hundred and twenty of the Revised Statutes, but decides that such section performs no other function in determining the rights of the tunnel discoverers.

The court also holds, that the inchoate right given to the tunnel locator only extends to veins that strike the line of the tunnel and are discovered in the tunnel. Others may discover and hold all veins within fifteen hundred feet of the line of the tunnel that do not strike or cross its lines, and all that do strike it that are not discovered in it.

The reasoning applied by the court which, in its judgment, justified the results reached may be thus epitomized:—

(A) Section twenty-three hundred and twenty-three construes itself, and it is unnecessary to resort to public policy in aid of its interpretation;

(B) If the question of public policy is to be resorted to, the rights guaranteed to the tunnel locators are in accord with such policy, which is to encourage the discovery and development of the mineral resources of the country;

(c) The work of driving tunnels thousands of feet into the side of a mountain for the purpose of discovering a vein, or lode, that is not known to exist at all, is an extremely hazardous and expensive undertaking; that this is common knowledge, and congress must be taken to have had this knowledge when they enacted the law. They must have known that such a hazardous enterprise was not likely to be undertaken unless rewards commensurate with the risk and expense were offered.

It is to be added, by way of a side light on this decision, that the discovery on which the Vestal location was based was not upon the vein which was discovered in the tunnel. The right of the tunnel locator to the vein discovered in the tunnel, in so far as it was found within the Vestal location, was also defended on the ground that it was a cross lode, and that under the rule in Colorado, which we will discuss fully in a subsequent chapter, owners of cross lodes may follow their vein into, and underneath, even a prior location.

**§ 489. Tunnel locations before the supreme court of the United States.**—The case of Glacier Mountain Silver Mining Company *v.* Willis[1] was an action of ejectment, wherein the plaintiff sought to recover possession of the Silver Gate tunnel claim, located in 1865, alleged to be five thousand feet long and five hundred feet wide, described by metes and bounds, which was alleged to embrace many valuable lodes, or veins, which had been discovered, worked, and mined by the plaintiff and his grantors. Possession and payment of taxes for a period in excess of the statute of limitations prescribed by the laws of Colorado were averred, together with a general allegation of ownership of the tunnel claim described. The ouster alleged was an entry by defendants upon the premises and *into the tunnel*, claiming said tunnel as the War Eagle, and the location of a lode claim across the tunnel, claiming a discovery *in the tunnel* of such lode, which they named the Tempest.

[1] 127 U. S. 471.

A special demurrer was interposed upon the following grounds:—

(1) Insufficient description of the property sought to be recovered;

(2) Insufficient description of the lodes for which possession was asked;

(3) Failure to show any valid subsisting pre-emption or location of the tunnel site;

(4) That the claim of plaintiff to a strip of ground five thousand feet in length by five hundred feet in width as a tunnel site is unwarranted and unprecedented, and was not, at the date of said pretended location, nor at any subsequent time, authorized by any local, state, or congressional law.

The court below sustained the demurrer. The supreme court of the United States, in reversing the judgment, held:—

(1) That the description in the complaint was sufficient, as it enabled the sheriff, in case of recovery, to execute a writ of possession, or a surveyor to ascertain the exact limits of the location;

(2) As to the second ground of demurrer, the court held, that though the lodes alleged to be embraced within the tunnel site location are not each separately described, the statement in the complaint that all the lodes in the tunnel claim have been worked and mined, comprehends every part of the property for the recovery of which the action is brought;

(3) That the claim for five thousand feet in length was void only as to the excess over three thousand feet;

(4) The tunnel location having been made prior to the passage of the act of May 10, 1872, the rights flowing therefrom are to be determined under the local rules and customs in force at the time the location was made.

It is manifest that this decision sheds no light upon the subject. We refer to it for the reason, that in several of

the decisions heretofore cited, it was stated that the conclusions there reached were not opposed to the doctrine of the Glacier Mountain-Willis case. This is quite true, for the simple reason, that the questions which we are now considering were not involved, discussed, or decided.

§ 490. **Opinions of the land department.**— We note the following views expressed by the land department:—

(1) A claim under a tunnel location is a mining claim, and should adverse a junior applicant for patent for a lode within its claimed limits;[1]

(2) Prospecting for lodes not previously known to exist is prohibited on the line of the tunnel (*i. e.* its width) while work on the tunnel is being prosecuted with reasonable diligence;[2]

(3) In no case can a tunnel proprietor record a claim so as to absorb the actual or constructive possession of other parties, on a lode which had been discovered and claimed outside the *line* of the tunnel before the discovery thereof in the tunnel.[3]

We have heretofore noted the decisions of this department defining the *line* of the tunnel to be the width of the bore.[4]

§ 491. **Conclusions.**—It is quite manifest, that the decisions and rulings heretofore reviewed are so conflicting, and the results reached so divergent, that it is impossible to formulate any rule which will be acceptable to all the courts. The questions involved are essentially federal in their nature, and will only cease to be so when the supreme court of the United States shall have finally determined them.[5]

[1] Secretary Kirkwood, Bodie Tunnel & M. Co. *v.* Bechtel Cons., 1 L. D. 584.

[2] Commissioner Williamson, *In re* David Hunter, Copp's Min. Lands, 231.

[3] Commissioner Drummond's letter to Chaffee, Copp's Min. Dec. 144. See, also, Corning Tunnel Co. *v.* Pell, 3 Copp's L. O. 130.

[4] See, *ante*, § 473.

[5] State of Kansas *v.* Bradley, 26 Fed. 289; Bluebird M. Co. *v.* Largey, 49 Fed. 291.

The conclusions reached by the state court of last resort in construing the statutes of the state within which it exercises jurisdiction, if the rule of interpretation has been uniform and there is no conflict with the federal constitution or laws, are binding upon all other courts, state and federal. But its decisions construing federal statutes, have, as such, no binding force outside of courts of that particular state. They may be accepted as precedents if the reasoning upon which they are based commends itself to other tribunals, but not otherwise. The decisions of the federal courts upon the construction of federal statutes are, when the construction has been approved by the supreme court of the United States, unquestionably binding upon all tribunals. But the state courts are not compelled to follow a rule of interpretation adopted by a circuit court, or a circuit court of appeals of the United States. In fact, the decision in one circuit is not necessarily controlling in other circuits. While, in cases arising out of infringement of patents, comity requires that a rule announced in one circuit, involving a particular patent and its infringement, shall be followed in all other circuits where the same patent is involved, we do not understand that this doctrine extends to any other class of cases. So we cannot say, that either the supreme court of a state or the circuit court of appeals are courts of unequal dignity, and that a precedence should be given to the decisions of one over the other, even upon federal questions.

Therefore, while the true rule of interpretation of the law, as expounded in the several jurisdictions, is left in a state of uncertainty, we are persuaded that the field of discussion is an open one, and we are at liberty to investigate on independent lines, or to select the rule announced in one court in preference to another. In doing so, we may not be able to add anything to the weight of the argument presented in favor of the rule accepted, or to satisfactorily disclose inherent infirmities in the reasoning applied to that with which we may not coincide. If we do not add

anything to the development of the subject, or demonstrate that there are cogent reasons for the views adopted by us beyond those already advanced and considered by the several courts, our arbitrary sanction given to one rule or the other will not turn the scales, although they be ever so evenly balanced.

We have heretofore observed, that the courts and the land department have reached a harmonious conclusion as to what is meant by the *line* of the tunnel. It is the width marked by the exterior sides of the tunnel throughout the length of, and in the direction claimed.[1] Recurring to the language of the statute: "Locations on the line "of such tunnel of veins, or lodes, not appearing on the "surface, made by other parties after commencement of the "tunnel and while the same is being prosecuted with reasonable diligence, shall be invalid."

It thus appears that locations upon the surface contiguous to the line are not inhibited. They may therefore be lawfully made anywhere, so that the *lines of the location* do not intersect the *line* of the tunnel. What was the object of this inhibition? A valid perfected lode mining location is a grant of the exclusive right of enjoyment of the surface and everything within vertical planes drawn downward through the surface boundaries, subject only to the extralateral right of outside apex proprietors to pursue their veins underneath such surface.

If a mining location could be permitted to cross the line of the tunnel, it would effectually cut off the tunnel claimant's rights to drive his tunnel through and beyond it. Such a location, if permitted, made across the tunnel line a short distance from its face, would effectually deprive the tunnel locator of a right to explore, by means of his tunnel, any considerable portion of the mountain. In this aspect of the case, the estate given to the tunnel locator is in the nature of an easement, or right of way, to the entire length claimed for discovery purposes.

[1] See, *ante*, § 473.

We are aware, that it is contended that any mining proprietor has a right to tunnel underneath his neighbor, and that this class of easements is granted by local rules and customs independent of questions of priority. Whatever may have been the rule sanctioned by local regulations during the period when all engaged in mining on the public lands were technically trespassers, since a perfected mining claim has been given the dignity of an estate of freehold no such right exists. Easements and rights of way may be acquired over the public domain, but after it passes into private ownership, no such rights can be asserted, except for public purposes or for limited private uses, if provided for by the state constitution. In such cases, unless consent is obtained, condemnation proceedings are necessary.[1] Therefore, it is not unreasonable to suggest, that congress intended to withdraw the line of the tunnel from any subsequent appropriation, that the tunnel proprietor might have a clear right of way throughout the entire length claimed. Congress might have accomplished the same result by permitting locations to be made regardless of the tunnel line, preserving to the tunnel claimant a right of way; but it adopted the more certain and direct method of reserving a strip the width of the tunnel for the length claimed.

It will be observed, that the privilege granted, based upon a discovery in the tunnel, is not only granted to one who locates a tunnel site for discovery purposes, but the same rights are given to those who develop located claims by means of a tunnel. Let us illustrate: A. locates a mining claim based upon a surface discovery. Its position is advantageous for development by tunnel. He projects and locates such a tunnel, and thereafter work done therein is considered as work performed upon the located claim. If the construction of the act announced by the circuit court of appeals is correct, he not only perpetuates his estate in the located lode by prosecuting his tunnel, but is

[1] See, *ante*, §§ 252-264. See, *post*, ch. viii., of this title.

enabled to practically withdraw from exploration the surface for a width of fifteen hundred feet on each side of his tunnel, for the distance between the tunnel face and the boundaries of the located lode, and for such a distance beyond it as will cover the three thousand feet measured from the face.

We say *practically* withdraws such area, for the reason, that no subsequent appropriator would be safe in exploiting anything within these limits, for the reason that his located lode *might* at some time be cut by the tunnel.

To say that lodes that would not be cut by the tunnel may be located within this area, is to give but little encouragement to the surface prospector. It might take several years to determine this. At the rate of three hundred feet per annum, which in hard ground might require over six months to excavate, it would take ten years before the fact would be developed to a certainty, so as to give the prospector on the surface any assurance in the ownership of anything definite. A much less rate of speed would probably satisfy the law on the subject of diligence. Such a tunnel may be nothing more than a threat, but it is sufficient, if the doctrine of the circuit court of appeals is upheld, to drive away others, and practically secure to tunnel locators a monopoly of mining lands in a mineral belt. If such a rule is to obtain, what is the use of attempting any surface exploration? Any ordinary mining camp could be easily covered by tunnel projectors, who might take advantage of the practical withdrawal effected by their tunnel locations to use the idle six months, which the statute seems to permit, to make surface explorations and discoveries, to the exclusion of every one else.

A glance at a map of the surveyed mining claims in the region of Cripple Creek, Colorado, a section of which is shown in this treatise in connection with the subject of "cross lodes," will demonstrate what appalling results may be accomplished by accepting the doctrine of the Enterprise-Rico-Aspen case.

It is asserted that the object of the tunnel act is to encourage the development of the mining resources. As a matter of fact, the discovery and development of such resources, stimulated by the rewards offered by the mining laws to individual prospectors, have been accomplished almost entirely by discovery and development from the surface.

Any construction of the law which has a tendency to limit the number who may be permitted to engage in the search for the precious metals, and to concentrate the privileges in the hands of the few, retards such development.

The supreme court of the United States, speaking through Judge Field, has said:—

"What is termed the policy of the government with "reference to any particular legislation, is generally a very "uncertain thing, upon which all sorts of opinions, each "variant from the other, may be formed by different per- "sons. It is a ground much too unstable upon which to "rest the judgment of the court in the interpretation of "statutes."[1]

And yet we find the same court, in a later case, speaking through Justice Miller in reference to the different classes of mineral deposits, and the variation in the government price between lode and placer entries, announcing that this distinction was not made "in special regard to "the revenue of the government from this source, but to "prevent too much of this rich public mineral land falling "into the hands of one successful explorer, to the exclu- "sion of others."[2]

As heretofore observed, the tunnel law itself permits locations anywhere, except on the *line* of the tunnel. Such location must be based upon a discovery. A location to be valid must be valid at the time it is made.[3] If valid, an estate vests which cannot be divested by subsequent discoveries by others. It is useless to say that a location may be made, subject to the title to the discovered lode being

[1] Hadden v. The Collector, 5 Wall. 107, 111.
[2] Reynolds v. Iron S. M. Co., 116 U. S. 687, 695.
[3] See, *ante*, § 363.

divested by a subsequent discovery of the same vein by some one else.

We can conceive of the existence of geological conditions which congress had in mind when the tunnel law was passed. In many localities, veins occupying a more or less vertical position in the earth are capped with country rock. Sedimentary deposits of limestone frequently lie unconformably upon the blind apices of mineral veins. A slight exposure caused by fortuitous erosion induces the miner to locate and exploit it. A hundred vertical shafts might be sunk within as many acres, with fruitless results. Discovery from the surface was the rule. The tunnel act gave to prospectors, under such circumstances, the assurance, that if they projected a tunnel, which was the most rational, if not the exclusive, method of ascertaining the existence of such veins, they would be permitted to utilize any discovery made to the same effect as if they had been discoverable from the surface.

If they were discoverable from the surface, the tunnel act was not intended to apply. This seems to be borne out by the provisions of the law authorizing veins appearing on the surface to be located across the tunnel line.

The rule announced by the circuit court of appeals places the meagre, scant provisions of the law on the subject of tunnels on a higher plane than the other portions of the statute which provide a complete system for the discovery and location of lodes. It resorts to one clause of the statute for the purpose of defining the length on the lode discovered in the tunnel, but rejects all the other provisions. It violates the fundamental principle which is the basis of mining jurisprudence in all countries, that discovery is the basis and origin of all mining rights.

It seems to us that the rule, that priority of discovery establishes a priority of right, so permeates the federal mining system that it will be impossible to sustain the extraordinary privileges sanctioned by the decision under consideration without shattering the entire system and sapping its very foundation.

Let us illustrate by means of a diagram certain other phases of this tunnel law considered in the light of the doctrine applied by the circuit court of appeals. A. locates a tunnel site on the line *x x*, and perfects his location prior to the surface discoveries and locations indicated by B., C., and D. The veins of these surface locators—any one of

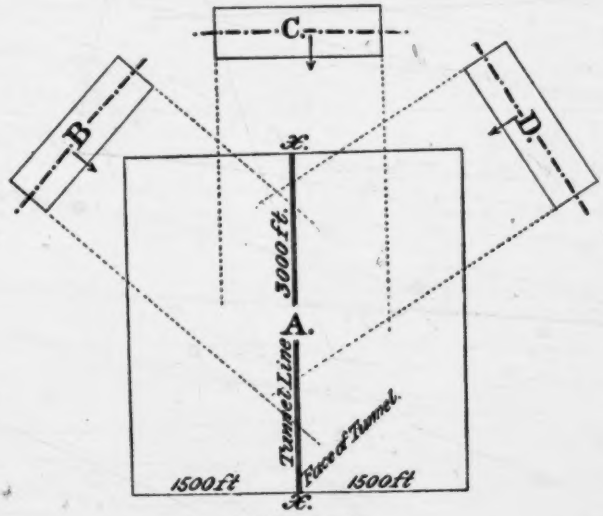



FIGURE 24.

them may be singled out for illustrative purposes—dip in the direction of the tunnel, as indicated by the arrows and extended end line planes. It is very evident that the planes of each one of these veins will, on their downward courses, intersect the plane of the tunnel, and it requires no stretch of the imagination to assume that at some point, as the tunnel is driven into the hill, it may cut one or all of these veins. What will be the rights of the parties? The angle at which the tunnel must intersect these veins is not specified in the law. Nor does the law specify in terms that the apex of the vein must cross the line of the tunnel.

According to the doctrine of the supreme court of Colorado, in the Ellet-Campbell case, heretofore considered, these veins may be located by posting a notice at the mouth of the tunnel. What are the tunnel locator's rights upon these discovered veins? How far upward may they be followed from the discovery point? Is there to be a horizontal partition between A. and the surface locators? If so, where is the plane to be drawn?

These veins may all be encountered in the tunnel within three thousand feet from its face. If A. may locate them by describing a parallelogram on the surface vertically over his point of discovery in the tunnel, he locates on the dip of the vein. What right has he to locate anything, unless that right is referable to section twenty-three hundred and twenty of the Revised Statutes? What becomes of that maxim of the law having its origin in this section, which says, that a location cannot lawfully be made on the middle part of a vein, or otherwise than on the top, or apex?[1]

In the absence of the locations by B., C., or D., why should A. not be permitted to locate these apices, if the veins are cut by his tunnel, bearing such locations upon his tunnel discoveries? When the statute says that he shall be entitled to veins within three thousand feet of the tunnel, it must mean that he is entitled to such veins as are discovered within that distance. The statute does not limit his rights to lodes having their *apices* within three thousand feet of such face.

Every theory we adopt in considering this part of the mining statutes leads us to chaos and inextricable confusion, except the one that we have suggested, that the entire body of the mining law is to be taken by its four corners and construed; that priority of discovery establishes a priority of right; that a tunnel is a means of discovery; that the chances of making such discovery by tunnel of the class of veins contemplated by the statute

[1] See, *ante*, § 364, and cases cited in note 4, p. 469.

are so much greater than the possibilities flowing from surface exploration that they afford sufficient inducement and promise of reward to the tunnel proprietor to proceed with his enterprise; that a location based upon any discovery can only be made upon the top, or apex, and whoever succeeds in making such location peaceably and in good faith before any one else acquires a right by virtue of an antecedent discovery is entitled to all the rights and privileges conferred upon a valid location. Such rights may not be disturbed or invaded by any subsequent discovery of the same vein on its dip.

# CHAPTER V.

## COAL LANDS.

ARTICLE I. INTRODUCTORY.

II. MANNER OF ACQUIRING TITLE TO COAL LANDS.

## ARTICLE I. INTRODUCTORY.

§ 495. Classification of coal as a mineral — History of legislation — Characteristics of the system.

§ 496. Rules for determining character of land.

§ 497. Geographical scope of the coal land laws.

**§ 495. Classification of coal as a mineral — History of Legislation — Characteristics of the system.**—As observed in a previous section,[1] prior to the passage of the coal land act of July 1, 1864, the land department did not regard coal as a mineral within the meaning of the prior legislation of congress, yet this substance, although essentially of vegetable origin, has, generally speaking, been classified as mineral, as it came within the etymological signification of the term, being obtained from underground excavations, or "mines."[2] The act above referred to[3] was the first legislation by congress providing a method for the disposal of coal lands. It was followed in the succeeding year by a supplemental act,[4] and in 1873 congress passed a law which is the basis of the existing system.[5]

Whatever may have been the rule as to the classification of coal lands prior to the passage of the act of 1864,

[1] See, *ante*, § 140.
[2] See, *ante*, § 88.
[3] 13 Stats. at Large, 343.
[4] March 3, 1865, 13 Stats. at Large, 529.
[5] Rev. Stats., §§ 2347, 2352.

since that date they are classified as mineral by legislative construction.[1]

As heretofore noted,[2] lands containing coal are not, as a rule, excepted from the operation of the railroad grants,[3] nor are they considered by the department as mineral lands within the meaning of the act of June 3, 1878,[4] granting the privilege of cutting timber upon mineral lands of the public domain in certain states.[5]

It will serve no useful purpose to retrace the history of congressional legislation on this subject. The coal land laws form a system peculiar to themselves, having nothing in common with the general mining laws, and strictly speaking, are not *in pari materia*. The ownership and possession of this class of public lands were never subject to regulation by local rules and customs, and from the passage of the first act in relation to them to the present time, the method of acquiring title to them has been simple, and unaccompanied by the perplexities that have arisen in the administration of the laws relative to lands containing lodes and placers. Such questions as have arisen in reference to coal have been adjudicated entirely within the land department. No controversies arising out of the proper constructions of these laws are, in the process of obtaining title, relegated to the courts for determination. The coal land system, like that applicable to homestead, pre-emption, and other agricultural entries, is administered by the executive department of the government. For this reason we note the almost total absence of judicial decisions upon the subject, and must look exclusively to the land department for the rules of interpretation.

**§ 496. Rules for determining character of land.**— While the system prescribing the method for obtaining

[1] United States *v.* Mullan, 7 Saw. 466; S. C. on appeal, 118 U. S. 271.
[2] See, *ante*, § 152.
[3] See, Rocky Mountain C. & I. Co., 1 Copp's L. O. 1.
[4] 20 Stats. at Large, 88.
[5] Instructions to Timber Agents, 2 L. D. 827.

title to lands containing coal is different from that applicable to other mineral lands, the rules for determining whether a given tract is subject to entry under the coal land laws or not are analagous to those applicable to other classes of mineral deposits.[1]

They may be thus formulated with special reference to coal:—

(1) All classes of coal deposits, whether anthracite, bituminous, lignite, or cannel, are embraced within the coal land laws;[2]

(2) It must be shown, that as a present fact the land is more valuable for the purpose of its coal product than for any other purpose;[3] that the substance exists therein in paying quantities,[4] or that it is sufficiently valuable to be worked as a mine.[5]

These facts must be shown by the actual production of coal,[6] or by satisfactory evidence that, taking the tract as a whole, coal exists therein in sufficient quantities to make the same more valuable for mining than for agricultural purposes.[7]

The extent of the deposit may be shown by the testimony of geological experts and practical miners, taken in connection with the actual production of coal from some portion of the tract.[8]

In determining these facts, means of transportation cannot be taken into consideration as affecting the value of the coal shown to exist.[9]

That lands in the near vicinity,[10] or even those directly

[1] See, *ante*, § 98.
[2] Sickles Min. Dec., 397.
[3] Hamilton *v.* Anderson, 19 L. D. 168; Com'rs of Kings County *v.* Alexander, 5 L. D. 126.
[4] Smith *v.* Buckley, 15 L. D. 321.
[5] Jones *v.* Driver, 15 L. D. 514.
[6] Hamilton *v.* Anderson, 19 L. D. 168; Com'rs of Kings County *v.* Alexander, 5 L. D. 126.
[7] Mitchell *v.* Brown, 3 L. D. 65; Savage *v.* Boynton, 12 L. D. 612.
[8] Rucker *v.* Knisley, 14 L. D. 113.
[9] Smith *v.* Buckley, 15 L. D. 321.
[10] *In re* Williams, 11 L. D. 462; Scott *v.* Sheldon, 15 L. D. 361.

adjoining, are shown to contain coal,[1] is insufficient to establish the character of a tract upon which no coal has been developed.[2]

Mere outcroppings[3] or other surface indications will not, in the absence of proof of commercial value of the deposit, prevent the entry of such lands under the pre-emption or homestead laws.[4]

But it is not necessary to show actual development on each forty-acre subdivision,[5] nor upon all parts of a forty-acre tract.[6]

When, however, a conflict arises between an agricultural and coal claimant, the character of the land to the extent of the entire conflict area is involved, and, necessarily, proofs of a more specific character would be required than in the case of an *ex parte* application to enter under the coal laws.

The rules governing hearings to establish the character of lands are found in "General Land Office Regulations," issued October 31, 1881.[7]

The discovery of coal in paying quantities on land embraced within a homestead claim, precludes the completion of the entry;[8] but discovery after purchase, under commuted homestead entry, will not defeat the issuance of the patent.[9]

§ 497. **Geographical scope of the coal land laws.**—The system regulating the pre-emption and sale of coal lands has substantially the same geographical scope as the general mining laws. It is in practical operation wherever

[1] Com'rs of Kings County *v.* Alexander, 5 L. D. 126; *In re* Archuleta, 15 Copp's L. O. 256.

[2] See, also, Dughi *v.* Harkins, 2 L. D. 721.

[3] Frees *v.* State of Colorado, 22 L. D. 510.

[4] Colorado Coal & Iron Co. *v.* United States, 123 U. S. 307.

[5] Hamilton *v.* Anderson, 19 L. D. 168; McWilliams *v.* Green River Coal Assn., 23 L. D. 127.

[6] State of Montana *v.* Buley, 23 L. D. 116.

[7] 1 L. D. 688. See appendix.

[8] Harnish *v.* Wallace, 13 L. D. 427; Dickinson *v.* Capen, 14 L. D. 426.

[9] Arthur *v.* Earle, 21 L. D. 92.

coal is found in the precious-metal-bearing states and territories,[1] with the exceptions hereinafter noted, and in Arkansas, Louisiana, and Florida. As heretofore noted, Alabama,[2] Michigan, Minnesota, Wisconsin, Kansas, and Missouri[3] are excepted from the operation of the federal mining laws. Nor is the system operative in Oklahoma.[4]

The District of Alaska, however, is not subject to the coal land laws, as the act providing a civil government for this district[5] only extends the operation of the laws of the United States relating to mining claims, and appropriated coal lands are not "mining claims" within the meaning of the law.

## ARTICLE II. MANNER OF ACQUIRING TITLE TO COAL LANDS.

§ 501. Who may enter coal lands.
§ 502. Different classes of entries.
§ 503. Private entry under Revised Statutes, section twenty-three hundred and forty-seven.
§ 504. Preferential right of purchase under Revised Statutes, section twenty-three hundred and forty-eight.
§ 505. The declaratory statement.
§ 506. Assignability of inchoate rights.
§ 507. The purchase price.
§ 508. The final entry.
§ 509. Conclusions.

**§ 501. Who may enter coal lands.**—Entries of coal lands may be made by individuals or associations of persons. In the case of an individual, he must be above the age of twenty-one years and a citizen of the United States, or he must have declared his intention to become such.[6]

At one time, the department held that married women could not make entry of this class of lands,[7] but this con-

[1] See, *ante*, § 81.

[2] For method of acquiring coal lands in Alabama, see, Circ. Instructions, 10 Copp's L. O. 54. *In re* Robert Lalley, *Id.* 55.

[3] See, *ante*, § 20.

[4] Act of March 3, 1891, § 16, 26 Stats. at Large, 1026.

In § 81 we have erroneously included this territory in the list of precious-metal-bearing states which are subject to the general mining laws.

[5] May 17, 1884, 23 Stats. at Large, 24.

[6] Rev. Stats., § 2347.

[7] *In re* Nichol, 15 Copp's L. O. 255.

struction of the law, which was manifestly erroneous,[1] is no longer followed.

An association of persons, as the term is used in the coal land laws, is uniformly construed by the department to include corporations; but each individual of such association, whether incorporated or not, must possess the requisite qualifications. The law expressly so provides. The ownership, by one member of an association seeking to enter coal lands, of interests in other lands claimed under the coal land laws disqualifies the entire association.[2] The right to purchase coal lands can be exercised but once.[3]

If an association of persons makes a coal entry embracing a less area than it might have applied for, such entry is a bar to a second one.[4] Where a valid reason therefor exists, such as may be instanced by a case where the applicant was unable to complete an asserted right by reason of successful adverse claims to the land sought to be entered, the cancellation of his declaratory statement would be without prejudice to a second application for other lands.[5] The rule applies, generally speaking, to those who have perfected their entries, or when the failure to complete the entry is the result of their own neglect.[6] The rule has no application to a case where one buys, and, prior to entry, sells a preferential right.[7]

A coal entry may be made by one qualified person for the benefit of another,[8] provided the latter is himself qualified and has not exhausted his privilege. An entry sought to be made by one for the benefit of a disqualified person,[9]

[1] See, *ante*, § 224.

[2] *In re* Hawes, 5 L. D. 224; Kerr *v.* Utah-Wyoming Imp. Co., 2 L. D. 727.

[3] *In re* Kimball, 3 Copp's L. O. 50; *In re* Eiseman, 10 L. D. 539; *In re* Dearden, 11 L.D. 351; *In re* Smith, 16 Copp's L.O. 112; *In re* Negus, 11 L.D. 32.

[4] *In re* Kimball, 3 Copp's L. O. 50.

[5] *In re* Eiseman, 10 L. D. 539; *In re* Dearden, 11 L. D. 351; *In re* Conner *v.* Terry, 15 L. D. 310.

[6] *In re* Hutchings, 4 Copp's L. O. 142; *In re* John McMillan, 7 L. D. 181; *In re* Smith, 16 Copp's L. O. 112.

[7] *In re* McConnell, 18 L. D. 414.

[8] Lipscomb *v.* Nichols, 6 Colo. 290. See, also, Union Coal Co., 17 L. D. 351; *In re* Durango L. & C. Co., 18 L. D. 382; *In re* Allen, 8 L. D. 140.

[9] *In re* Adolph Peterson, 6 L. D. 371; Conner *v.* Terry, 15 L. D. 310.

or for one who, being originally qualified, has previously exhausted his rights,[1] or when made in the interest of a corporation or association of persons, some of whom are either disqualified or have once availed themselves of the privilege,[2] is a fraud upon the government, and may be annulled upon proper proceedings in that behalf. Contracts whereby such a result is sought to be accomplished are contrary to public policy, and therefore void.[3]

However, an entry by an association of persons, all of whom are qualified at the date of entry, is not vitiated by the fact that at some point of time previous thereto one or more of them was disqualified.[4]

**§ 502. Different classes of entries.**—Coal lands are disposed of:—

(1) By ordinary private entry, under the provisions of section twenty-three hundred and forty-seven of the Revised Statutes;

(2) By pre-emption or preference right of purchase, under section twenty-three hundred and forty-eight.

The two classes of entries have the following features in common:—

(A) The persons or associations must possess the same qualifications;

(B) The purchase price to be paid upon final entry is the same;

(C) Final entries may only be made upon surveyed lands. There can be no segregation of fractional parts;[5]

(D) The tracts applied for must be contiguous.[6]

[1] McGillicuddy *v.* Tompkins, 14 L. D. 633.
[2] United States *v.* Trinidad Coal & C. Co., 137 U. S. 160.
[3] Johnson *v.* Leonhard, 1 Wash. St. 564.
[4] Kerr *v.* Utah-Wyoming Imp. Co., 2 L. D. 727; Kerr *v.* Carlton, 10 Copp's L. O. 255.
[5] Mitchell *v.* Brown, 3 L. D. 65; *In re* Cameron, 10 L. D. 195; *In re* Lyon, 20 L. D. 556.
[6] *In re* Masterson, 7 L. D. 172; S. C. on review, *Id.* 577; Kendall *v.* Hall, 12 L. D. 419.

**§ 503. Private entry under Revised Statutes, section twenty-three hundred and forty-seven.**—The right to enter coal lands under section twenty-three hundred and forty-seven of the Revised Statutes may be exercised upon surveyed lands without previous occupation or improvement. Necessarily, the lands sought to be entered must be vacant, and otherwise unreserved and unappropriated. In other words, they must be public lands.[1] They may only be applied for by government subdivisions and in limited quantities; that is, an individual may not acquire to exceed one hundred and sixty acres, and an association of persons not to exceed three hundred and twenty acres.

To obtain title to lands under this section, the applicant is required to file with the register of the proper land office a verified application,[2] describing the lands sought to be purchased, his qualification under the law to make the entry, and such other facts as to the character and *status* of the land as will establish in the applicant a *prima facie* right of purchase.

If the land is clear on the tract books, the register certifies the fact to the receiver, and the price is determined according to the rule announced in a subsequent section.[3] Payment must then be made, whereupon the final certificate is issued, and in due time the patent follows.

Private entry will not be allowed so as to embrace one tract in the capacity of an assignee, and another under the individual right of the purchaser.[4]

Until application is made to enter and purchase under this section, the claimant has no right which is worthy of recognition. His possession, if he has any, must yield to one who complies with the law and files upon the land.[5]

**§ 504. Preferential right of purchase under Revised Statutes, section twenty-three hundred and forty-eight.**—In order to exercise the preferential right of purchase

[1] See, *ante*, § 112.
[2] See form in Circ. Instructions, 1 L. D. 688. See appendix.
[3] See, *post*, § 507.
[4] *In re* Ludlam, 17 L. D. 22.
[5] Leheart *v.* Dunker, 4 L. D. 522.

granted by section twenty-three hundred and forty-eight, there are two essential prerequisites:—

(1) The applicant must be in the actual possession of the lands applied for;[1]

(2) He must, prior to final entry, have opened and improved the mines situated thereon.[2]

The improvements made must be such as to clearly indicate good faith.[3]

In determining what constitutes good faith, the applicant's degree and condition in life may be considered.[4]

Priority of possession and improvement, followed by proper filing and development of the mine in good faith, are the foundation of the preferential right.[5]

This right may be exercised by an individual or an association of persons. When exercised by an individual, it is limited to one hundred and sixty acres, and by an association of persons, ordinarily to three hundred and twenty acres. Entries by associations consisting of not less than four persons may, however, be extended to six hundred and forty acres, after they shall have expended not less than five thousand dollars in working and improving such mines.

The preferential right may be initiated by entering into possession and improving unsurveyed lands. The right, however, may only be perfected after the lands shall have been surveyed and the township plat filed in the local land office.

§ 505. **The declaratory statement.**—If the preferential right is initiated upon surveyed lands, the claimant must present to the register of the proper land office, within sixty days after the date of actual possession, and the

[1] *In re* Negus, 11 L. D. 32; Walker v. Taylor, 23 L. D. 110; McDaniel v. Bell, 9 L. D. 15.

[2] Walker v. Taylor, 23 L. D. 10; Ouimette v. O'Conner, 22 L. D. 538.

[3] *In re* Negus, 11 L. D. 32.

[4] Watkins v. Garner, 13 L. D. 414.

[5] Bullard v. Flanagan, 11 L. D. 515.

commencement of improvements upon the land, his declaratory statement of the facts upon which he bases his right. Where the lands upon which the right is initiated by occupation and development are unsurveyed, the time within which the declaratory statement is to be filed commences to run from the date the approved township plat is received at the local land office.[1] Failure to file this instrument within the time specified renders the land subject to entry by another, if he has complied with the law;[2] but in the absence of an adverse claimant, the right to complete the entry is not forfeited.[3]

A second filing for the same tract will not be allowed to one who has failed to comply with the law in the first instance.[4]

The statement must be verified by the oath of the applicant. This duty cannot be delegated to others;[5] but after the same is filed, the subsequent acts required to complete the entry may be performed by a duly authorized agent, acting under a power of attorney.[6]

§ 506. **Assignability of inchoate rights.**—An inchoate right, or privilege, flowing from an accepted application or declaratory statement may be assigned to one who possesses the necessary legal qualifications;[7] but such assigment, if the assignee perfects the entry, would extinguish the right of both parties to purchase lands under the coal land laws, and both would thereafter be disqualified from making further entries.

[1] Rev. Stats., § 2349.

[2] Brennan v. Hume, 10 L. D. 160; O'Gorman v. Mayfield, 19 L. D. 508.

[3] *In re* Grunsfeld, 10 L. D. 508.

[4] *Id.*

[5] White Oaks Imp. Co., 13 Copp's L. O. 159; *In re* Hallowell, 2 L. D. 735.

[6] Par. 34, Circ. Instructions. See appendix.

For forms of declaratory statements, and the manner of procedure generally, see the Circ. Instructions, which appears in full in the appendix.

[7] Kerr v. Carlton, 10 Copp's L. O. 255; par. 37, Circ. Instructions. See appendix.

Where such assignments are made, the purchaser may avail himself of the improvement and development of his assignor.

§ 507. **The purchase price.**—The price fixed by law to be paid for coal lands depends upon the situation of the lands with respect to completed railroads.[1] If within fifteen miles of such road, the entryman must pay at the rate of twenty dollars per acre. If more than fifteen miles, ten dollars per acre.

The *status* of the land at the date of final proof and payment, with respect to this distance, determines the price thereof, irrespective of the *status* when the preference right is initiated or acquired.[2]

Where the land lies partly within fifteen miles and in part outside such limit, the maximum price must be paid for all legal subdivisions, the greater part of which lie within fifteen miles of such road.[3]

The term "completed railroad" is construed by the department to mean one which is actually constructed on the face of the earth.[4]

Final proofs must be made, and the lands must be paid for, within one year from the time prescribed for filing the respective claims. Upon failure to do so, the lands are subject to entry by any other qualified applicant.[5]

§ 508. **The final entry.**—Within the time fixed by the law, *i. e.* one year from filing the declaratory statement, the claimant must make his application to purchase, and submit proof showing compliance with the law. If there is no opposition, he is permitted to make entry and payment. If there are protests or adverse claims, a hearing is had, and the rights determined within the department.

[1] *In re* Foster, 2 L. D. 730.

[2] *In re* Colton, 10 L. D. 422; *In re* Largent, 13 L. D. 397; *In re* Burgess, 24 L. D. 11.

[3] Par. 14, Circ. Instructions. See appendix.

[4] Par. 15, *Id.*

[5] Rev. Stats., § 2350.

**§ 509. Conclusions.**—It will be observed that the nature of the inchoate estate created by compliance with the coal laws, bears a striking analogy to that conferred by the former agricultural pre-emption act. The same analogy exists as to proceedings to acquire the title. One essential difference, however, may be noted: A pre-emption claimant under the agricultural land laws could not assign his rights prior to final entry; a coal claimant may so assign at any stage of the proceedings.

The only feature in common between the coal land system and the general mining laws is, that in both, discovery is required as a condition precedent to the acqusition of title.

The extralateral right has no place in the coal laws. Although many coal veins occupy a more or less vertical position, the only class of entries allowed is by government subdivisions, and the entryman obtains title only to whatever lies within vertical planes drawn through his surface boundaries.

In the case of mining claims, certain prescribed work must be performed annually in order to perpetuate the estate acquired by location. A locator need never apply for a patent. Under the coal laws, no particular amount of expenditure is required, except where an association of not less than four persons seeks to enter six hundred and forty acres, when it is required that they must produce proof of improvements to the extent of five thousand dollars. A patent must be applied for within a year from the filing of the declaratory statement, in case of preferential rights, under section twenty-three hundred and forty-eight of the Revised Statutes. In the case of private entries under section twenty-three hundred and forty-seven, the first step is the application for patent.

As the regulations of the department on the subject of coal are clear and specific, it is not deemed necessary to enter further into the details. We think this and the preceding article present the salient features of the system, and are sufficiently comprehensive for all practical purposes.

# CHAPTER VI.

## SALINES.


§ 513. Governmental policy with reference to salines—Grants to states.

§ 514. The act of January 12, 1877—Territorial limit of its operation.

§ 515. What embraced within the term "salines."


**§ 513. Governmental policy with reference to salines—Grants to states.**—Properly speaking, the subject of salines and lands containing salt springs and salt deposits is foreign to this treatise. Salt is essentially a mineral,[1] and salt lakes and salt springs legitimately fall within the designation of mineral substances.[2] At one time the land department was of the opinion that this class of lands was subject to entry under the general mining laws;[3] but this doctrine was subsequently denied.[4]

Lands of this character are classed by themselves, and are not subject to entry under any law operative throughout the public land states. Yet they deserve at least a passing notice.

The policy of the government, since the acquisition of the northwest territory and the inauguration of the federal land system, has been to reserve salines and salt springs from sale.[5]

[1] Eagle Salt Works, Copp's Min. Lands, 336.

[2] State of Texas v. Parker, 61 Tex. 265.

[3] Com'rs' Letter, Copp's Min. Lands, 333; Eagle Salt Works, *Id.* 336.

[4] Hall v. Litchfield, Copp's Min. Lands, 333; Salt Bluff Placer, 7 L. D. 549; Southwestern M. Co., 14 L. D. 597; Utah Salt Lands, 13 Copp's L. O. 53.

[5] Morton v. State of Nebraska, 21 Wall. 660; Salt Bluff Placer, 7 L. D. 549; Cole v. Markley, 2 L. D. 847; Southwestern M. Co., 14 L. D. 597.

The object of this reservation was to preserve them for the future states. They have never been disposed of, except under specific acts of congress.

**§ 514. The act of January 12, 1877—Territorial limit of its operation.**—Some of the states, upon their admission to the union, received grants of a certain quantity of saline lands, to be selected usually within a stipulated time. Among these we note Oregon[1] and Colorado.[2] As the law now stands, there is no authority for the disposal of lands chiefly valuable for their salt deposits or salt springs, belonging to the United States, except the act of January 12, 1877.[3]

This act[4] provides for their sale at public auction at not less than one dollar and twenty-five cents per acre, or at private sale at the same minimum rate, in the event sales are not effected at public auction; but the operation of the act is confined to states which have had grants of salines which have been fully satisfied, or under which the right of selection has expired by efflux of time. The act, therefore, does not apply to the territories;[5] nor does it apply to Mississippi, Louisiana, California, Nevada,[6] North and South Dakota, Montana, Washington, Idaho, Utah, or Wyoming, none of which have received a grant of such lands.

**§ 515. What embraced within term "salines."**—Deposits of rock salt fall within the designation of salines, as do salt springs and salt beds,[7] although Commissioner

[1] State of Oregon v. Jones, 24 L. D. 146.

[2] State of Colorado, 10 L. D. 222.

For list of these states admitted prior to 1877, see Hall v. Litchfield, 2 Copp's L. O. 179.

[3] Hall v. Litchfield, Copp's Min. Lands, 333; Salt Bluff Placer, 7 L. D. 549; Southwestern M. Co., 14 L. D. 597.

[4] 19 Stats. at Large, 221.

[5] Utah Salt Lands, 13 Copp's L. O. 53; Circ. Instructions, Apr. 10, 1877, 4 Copp's L. O. 21.

[6] Southwestern M. Co., 14 L. D. 597; Public Domain, 696.

[7] Southwestern M. Co., 14 L. D. 597.

McFarland entertained the view that a *ledge* of rock salt might be located under the lode laws.[1]

As to other so-called mineral springs, Secretary Noble expressed an opinion, which is probably a mere *dictum*, that they also should be classified as salines;[2] but Secretary Teller ruled, that lands containing mineral springs not of a saline character are subject to sale under the agricultural land laws.[3]

Sulphur springs are not regarded as saline.[4]

Lands saline in character cannot be entered under the desert land laws.[5]

Tracts of land returned by the surveyor-general as saline may be shown to be agricultural in character, and will then be subject to entry under the agricultural land laws.[6] In other words, the return of the surveyor-general concludes no one.[7]

[1] *In re* Megarirrgle, 9 Copp's L. O. 113.
[2] Southwestern M. Co., 14 L. D. 597.
[3] Pagosa Springs, 1 L. D. 562. See, also, Morrill *v.* Margaret M. Co., 11 L. D. 563.
[4] Com'rs' Letter, Copp's Min. Dec. 22.
[5] Jermy *v.* Thompson, 20 L. D. 299.
[6] Cole *v.* Markley, 2 L. D. 847.
[7] See, *ante*, § 106.

# CHAPTER VII.

## MILLSITES.


§ 519. The law relating to millsites.
§ 520. Different classes of millsites.
§ 521. Right to millsite—How initiated.
§ 522. Location of millsite with reference to lode.
§ 523. Nature of use required in case of location by lode proprietor.
§ 524. Millsites used for quartz mill or reduction works disconnected with lode ownership.


**§ 519. The law relating to millsites.**—Millsites, while they are frequently important accessions to mining rights, occupy a relatively subordinate position in the federal mining system. Prior to the passage of the mining laws, they, in common with many other privileges asserted on the public domain, were regulated exclusively by neighborhood customs and local rules, not necessarily under the name of millsites, but as surface adjuncts to located lodes.

Until the act of May 10, 1872, was passed, there was no law by which title to them could be obtained. Section fifteen of that act provided a method, which is perpetuated in section twenty-three hundred and thirty-seven of the Revised Statutes. This section is as follows:—

"Where non-mineral land not contiguous to the vein, or "lode, is used or occupied by the proprietor of such vein, or "lode, for mining or milling purposes, such non-adjacent "surface-ground may be embraced and included in an ap- "plication for a patent for such vein, or lode, and the same "may be patented therewith, subject to the same prelim- "inary requirements as to survey and notice as are appli- "cable to veins, or lodes; but no location hereafter made of "such non-adjacent land shall exceed five acres, and pay- "ment for the same must be made at the same rate as

"fixed by this chapter for the superficies of the lode. The "owner of a quartz mill or reduction works not owning a "mine in connection therewith may also receive a patent "for his millsite, as provided in this section."

§ 520. **Different classes of millsites.**—It will thus be observed that the law divides patentable millsites into two classes:—

(1) Such as are used and occupied by the proprietor of a vein, or lode, for mining or milling purposes;

(2) Such as have thereon quartz mills or reduction works, the ownership of which is disconnected with the ownership of a lode, or vein.[1]

The limit as to area and price per acre is the same in both classes, and the requirement, that the lands embraced therein shall be non-mineral, applies equally to each class.

There is nothing to prevent one owning several lode claims from selecting a millsite for each one, provided that each is actually occupied and used for mining or milling purposes in connection with the lode to which it is appurtenant.

It has been held, that a lode proprietor may select more than one tract, if the aggregate does not exceed five acres,[2] provided, of course, that each tract is used for mining and milling purposes in connection with the lode.

There is no provision of law by which a millsite can be acquired as additional to, or in connection with, an existing millsite.[3]

§ 521. **Right to millsite—How initiated.**—The statute is silent as to the manner of locating millsites, but it is not unreasonable to suppose that a location thereof must be made substantially as that of a mining claim.[4] This is the universal practice throughout the mining regions, and this

[1] Rico Townsite, 1 L. D. 556; Hartman v. Smith, 7 Mont. 19; Hamburg M. Co. v. Stephenson, 17 Nev. 449.

[2] *In re* J. B. Haggin, 2 L. D. 755.

[3] Hecla Consolidated M. Co., 12 L. D. 75.

[4] Rico Townsite, 1 L. D. 556.

practice is recognized by the land department[1] and the courts.[2]

Some of the states have enacted laws prescribing the manner of locating millsites. California,[3] Montana,[4] and Utah[5] have passed laws providing for the posting and recording of notices, the latter state also requiring the boundaries to be marked with the same formality as in case of lode claims.

The mere location of a millsite does not of itself segregate the land from the body of the public domain. A right to be recognized must be based upon possession and use.[6]

Where the land is not in actual use, the claimant must show such an occupation, by improvements or otherwise, as evidences an intended use of the tract in good faith for mining and milling purposes.[7]

Mere intention or purpose on a certain contingency of performing acts of use, or occupation thereon, will not satisfy the law.[8]

It is unnecessary to remark, that the tract sought to be obtained for millsite purposes must not only be non-mineral,[9] but it must also be upon the unoccupied, unreserved, and unappropriated domain. As lands not mineral in character may be selected under various laws, the right to appropriate them for millsite purposes cannot be exercised if any lawful possession is held by others. Therefore, millsites may not be selected on lands within the limits of railroad grants after the line of the road has been definitely fixed,[10] nor within the limits of any valid, subsisting, agricultural, or other holding. As between millsite and

[1] Hargrove v. Robertson, 15 L. D. 499; *In re* George, 2 Copp's L. O. 114.
[2] Hartman v. Smith, 7 Mont. 19.
[3] Act of March, 1897.
[4] Rev. Pol. Code, 1895, §§ 3610, 3612.
[5] Act of March, 1897.
[6] Rico Townsite, 1 L. D. 556.
[7] Two Sisters Lode and Millsite, 7 L. D. 557; *In re* Lennig, 5 L. D. 190.
[8] Ontario S. M. Co., 13 Copp's L. O. 159.
[9] Rico Townsite, 1 L. D. 556; Alta Millsite, 8 L. D. 195; Patterson Quartz Mine, 4 Copp's L. O. 3; Copp's Min. Dec., 129.
[10] Mongrain v. N. P. R. R., 18 L. D. 105; Copp's Min. Dec., 147.

agricultural claimants, the rights of the parties are determined by priority of possession.[1]

**§ 522. Location of millsite with reference to lode.**—As to the requirement that the land selected for millsite purposes should be non-contiguous to the *lode*, it has uniformly been held by the land department that land contiguous to the surface ground of a lode claim was not within the prohibition named. Millsites may abut against the side lines of a lode claim if the land is non-mineral.[2] Ordinarily they cannot adjoin the end lines,[3] upon the theory that the lode suppositiously crosses these lines, and must, to some extent, at least, exist in the adjacent ground beyond them. But as the character of the land is always a question of fact, if it should be determined that the tract contiguous to the end lines is in fact non-mineral, there is no objection to appropriating it for millsite purposes.[4]

**§ 523. Nature of use required in case of location by lode proprietor.**—The statute does not mention any particular mining purpose for which a millsite, selected by a lode proprietor, shall be used. If used in good faith for any mining purpose at all in connection with a quartz lode, such use would be within the meaning of the statute.[5]

The erection on the tract of a cabin, using the same for storage of tools and supplies, and ores in small quantities, has been held to be within the intent of the law.[6]

It has been said, that using land for deposit of tailings, or storing ores, or for shops, or houses for workmen;[7] for collecting water for motive power,[8] or for pumping

[1] Sierra Grande M. Co. *v.* Crawford, 11 L. D. 338; Adams *v.* Simmons, 16 L. D. 181; *In re* Moore, 11 Copp's L. O. 326.

[2] *In re* Freeman, 7 Copp's L. O. 4.

[3] *Id.*; *In re* Long, 9 Copp's L. O. 188.

[4] National Mining and Exploring Co., 7 Copp's L. O. 179; *In re* Long, 9 Copp's L. O. 188.

[5] Hartman *v.* Smith, 7 Mont. 19.

[6] *Id.* See, also, Eclipse Millsite, 22 L. D. 496.

[7] Satisfaction Extension Millsite, 14 L. D. 173; *In re* Lennig, 5 L. D. 190.

[8] *Id.*

works,[1] or for obtaining water for use in developing the mine,[2] might be considered proper uses in connection with a located lode, but this does not seem to be a generally accepted rule.[3]

But land cannot be entered as a millsite simply because it has timber growing thereon which is valuable for use on a located lode claim,[4] although the millsite locator may cut the timber growing on the millsite for the purpose of constructing his mill thereon.[5]

The department has permitted the entry of ground for dumpage purposes in tracts of greater area than five acres,[6] on the theory, that it was necessary for use in connection with mining, the land being more valuable for that purpose than any other; but this seems to us an unwarranted interpretation of the law. If ground on which tailings are deposited may be entered as a millsite, dumpage grounds may also be entered for like reasons. It is quite clear, that unless they may be entered under the millsite laws for this purpose, they cannot be entered at all.

The fact, that the lode claim in connection with which the millsite is used is patented, is immaterial. A millsite may be appurtenant to a patented, as well as an unpatented, claim, and patent for the millsite may subsequently be applied for separately.[7]

**§ 524. Millsites used for quartz mill or reduction works disconnected with lode ownership.**—The right to patent a millsite under the last clause of section twenty-three hundred and thirty-seven of the Revised Statutes depends upon the existence on the land of a quartz mill or reduction works.[8]

[1] Sierra Grande M. Co. *v.* Crawford, 11 L. D. 338.

[2] Gold Springs and Denver City Millsite, 13 L. D. 175.

[3] Peru Lode and Millsite, 10 L. D. 196. See, also, Iron King Mine and Millsite, 9 L. D. 201.

[4] Two Sisters Lode and Millsite, 7 L. D. 557.

[5] *In re* Page, 1 L. D. 614.

[6] 4 Copp's L. O. 102.

[7] Eclipse Millsite, 22 L. D. 496.

[8] *In re* Lennig, 5 L. D. 190; *In re* Cyprus Millsite, 6 L. D. 706; Two Sisters Lode and Millsite, 7 L. D. 557; Le Neve Millsite, 9 L. D. 460.

While the nature of the use required in case of the appropriation of a millsite as an adjunct to a located lode is not specified, and the law is satisfied so long as the purposes are reasonably associated with the lode to which it is appurtenant, in the case of sites selected under the last clause of section twenty-three hundred and thirty-seven, the character of the use is distinctly specified.

Land not improved or occupied for mining or milling purposes may not be appropriated as a millsite for the purpose of securing the use of water thereon.[1]

Reservoirs, dams, and plants for generating power do not fall within the designation of quartz mills and reduction works.[2]

Water rights upon the public domain may not be acquired under the millsite laws.

[1] *In re* Cyprus Millsite, 6 L. D. 706; Mint Lode and Millsite, 12 L. D. 624.

[2] Le Neve Millsite, 9 L. D. 460; *In re* Lennig, 5 L. D. 190; Two Sisters Lode and Millsite, 7 L. D. 557.

# CHAPTER VIII.

## EASEMENTS.

§ 529. Scope of the chapter.
§ 530. Rights of way for Ditches and canals — Highways.
§ 531. Location subject only to pre-existing easements.

**§ 529. Scope of the chapter.**—It is not our present purpose to deal with that class of easements and privileges which are created by the acts of individuals, nor with those which are necessarily appurtenant to all land acquired and held in private ownership. The scope of this chapter is limited to a consideration of those burdens which the government permits to be imposed upon its public lands, and subject to which it subsequently conveys its title.

**§ 530. Rights of way for ditches and canals — Highways.**—During the early period of mining in the west, a system was established by common consent, enabling the miner, in connection with his located mining claim, to exercise certain privileges with respect to the means of working it. Water was essential; therefore, the right to appropriate it, divert it from its natural channel, and conduct it over the public lands by means of flumes and ditches to the place of intended use, became fully recognized and established. The government was not consulted, but it passively recognized these rights, as it did the larger privilege of extracting gold from the public mineral lands,[1] and by section nine of the act of July 26, 1866, gave legislative sanction to the exercise of these asserted rights. The section is as follows:—

[1] See, *ante*, § 45.

"That whenever, by priority of possession, rights to the "use of water for mining, agricultural, or manufacturing, "or other purposes, have vested and accrued, and the same "are recognized and acknowledged by the local customs, "laws, and the decisions of courts, the possessors and own- "ers of such vested rights shall be maintained and pro- "tected in the same, and the right of way for the construc- "tion of ditches and canals for the purposes aforesaid is "hereby acknowledged and confirmed; *provided, however*, "that whenever, after the passage of this act, any person "or persons shall, in the construction of any ditch or canal, "injure or damage the possession of any settler on the "public domain, the party committing such injury or "damage shall be liable to the party injured for such "injury or damage."

This section was substantially re-enacted in the Revised Statutes. There are some verbal changes, but none affecting its substance or meaning.[1]

It has been contended, that this act only undertook to confirm and protect rights vested prior to its passage, and that it did not necessarily sanction the future acquisition of such privileges. The opinion of the supreme court of the United States in Broder *v.* Natoma Water Company[2] would appear to support this contention, but as was said by the supreme court of California,[3] in construing this opinion, the question was not before the court. The ditch there involved was completed in 1853, and therefore was clearly within the confirmatory clauses of the act.

The supreme court of Nevada in construing the section in question, after referring to its "*turbid* style," and "gram- "matical solecisms," says:—

"In its adoption there appear to have been three dis- "tinct objects in view:—

"*First*—The confirmation of all existing water rights;

"*Second*—To grant the right of way over the public land "to persons desiring to construct flumes or canals for min- "ing or manufacturing purposes;

[1] Jennison *v.* Kirk, 98 U. S. p. 453, § 456.
[2] 101 U. S., 274.
[3] Jacob *v.* Lorenz, 98 Cal. 332, 336.

"*Third*—To authorize the recovery of damages by "settlers on such land, against persons constructing such "ditches or canals, for injuries occasioned thereby."[1]

The court adds:—

"That this section, granting rights of way over the "public land to all who may desire to construct ditches "or canals for mining or agricultural purposes, is about "as clear and certain as the objects and purposes of the "acts of congress usually are."

The supreme court of California coincides with the views of the supreme court of Nevada.[2]

We have no intention of entering into a discussion of water rights generally, the manner of appropriating them, the purposes for which they may be acquired, or relative rights between such appropriators and riparian proprietors. As water may be the subject of appropriation under certain conditions for many useful purposes, other than as an adjunct to mining operations, and as there is nothing peculiar in the manner of perfecting such appropriation in connection with this particular class of ventures, we shall not undertake to deal with it to any serious extent in this treatise. The law of waters is too broad in its scope to permit its treatment in a collateral way. All that we expect to demonstrate in reference to it is, that mining locations made upon the public lands must be made subject to any easements theretofore lawfully acquired and subsisting, and held for the purposes of conducting water over them. That this is the settled law there can be no doubt.[3]

This is but the reannouncement of the early doctrine, that the miner who selects a piece of ground to work must take it as he finds it, subject to prior rights which have an equal equity, on account of an equal recognition from the sovereign power.[4]

[1] Hobart *v.* Ford, 6 Nev. 77. See, also, Barnes *v.* Sabron, 10 Nev. 217.

[2] Jacob *v.* Lorenz, 98 Cal. 332, 336; Lorenz *v.* Waldron, 96 Cal. 243; Jacob *v.* Day, 111 Cal. 571.

[3] Jacob *v.* Day, 111 Cal. 571; Rockwell *v.* Graham, 9 Colo. 36.

[4] Irwin *v.* Phillips, 5 Cal. 140; Logan *v.* Driscoll, 19 Cal. 623; Stone *v.* Bumpus, 46 Cal. 218.

As to highways, section twenty-four hundred and seventy-seven of the Revised Statutes grants the right of way for the construction of highways over public lands not reserved for public uses. A mining location made subsequent to the laying out of a public road crossing it would be subject to the public easement.[1]

**§ 531. Location subject only to pre-existing easements.**—The right of the United States to grant easements and other limited rights on any portion of its public domain cannot be gainsaid, and subsequent purchasers must take it burdened with such easements or other rights.[2]

"But when it has once disposed of its entire estate in "the lands to one party, it can afterwards no more burden "it with other rights than any other proprietor of lands."[3]

The same doctrine applies to perfected mining locations. After such location has once been completed, the estate of its owner cannot be subjected to burdens, except for some public use; or if sanctioned by the state constitution for a private use, upon condemnation proceedings.[4]

This phase of the subject has been discussed by us in a preceding portion of the work,[5] and it is unnecessary to here repeat what was there said.

As to other privileges which may be said to be incident to the ownership of mines and mining claims, we shall consider them when discussing the nature of the title acquired and rights conferred by location.[6]

[1] Murray v. City of Butte, 7 Mont. 61.

[2] Amador-Medean G. M. Co. v. S. Spring Hill M. Co., 13 Saw. 523.

[3] Woodruff v. North Bloomfield Gravel M. Co., 9 Saw. 441. See, also, Dower v. Richards (Cal.), 15 Pac. 105; Amador Queen M. Co. v. Dewitt, 73 Cal. 482.

[4] Peo v. Dist. Court, 11 Colo. 147; Robertson v. Smith, 1 Mont. 410; Noteware v. Sterns, *Id.* 311.

[5] See, *ante*, §§ 252-264.

[6] See, *post*, tit. vi., ch. ii and iii.

# TITLE VI.

## THE TITLE ACQUIRED AND RIGHTS CONFERRED BY LOCATION.

CHAPTER

I. THE CHARACTER OF THE TENURE.

II. THE NATURE AND EXTENT OF PROPERTY RIGHTS CONFERRED BY LODE LOCATIONS.

III. THE EXTRALATERAL RIGHT.

IV. THE NATURE AND EXTENT OF PROPERTY RIGHTS CONFERRED BY PLACER LOCATIONS.

V. PERPETUATION OF THE ESTATE BY ANNUAL DEVELOPMENT AND IMPROVEMENT.

VI. FORFEITURE OF THE ESTATE, AND ITS RESTORATION BY RESUMPTION OF WORK.

# CHAPTER I.

## THE CHARACTER OF THE TENURE.


§ 535. Nature of the estate as defined by the early decisions.
§ 536. Origin of the doctrine.
§ 537. Actual and constructive possession under miners' rules.
§ 538. Federal recognition of the doctrine.
§ 539. Nature of the estate as defined by the courts since the enactment of general mining laws.
§ 540. Nature of the estate compared with copyholds at common law.
§ 541. Nature of the estate compared with the *dominium utile* of the civil law.
§ 542. Nature of the estate compared with inchoate preemption and homestead claims.
§ 543. Dower within the states.
§ 544. Dower within the territories.


**§ 535. Nature of the estate as defined by the early decisions.**—It is somewhat difficult to comprehensively classify the nature of the estate acquired and held by the possessor of a valid mining location, by the use of any definitive term recognized by the common law or employed in the United States to designate a particular tenure.[1]

In the early history of mining jurisprudence, the estate or interest acquired by the miner in his claim, held and worked under the local rules and customs, was treated as an interest in real property. It was liable to sale on execution,[2] and was subject to taxation.[3]

The supreme court of California thus announced its views:—

[1] Judge Knowles in Black *v.* Elkhorn M. Co., 49 Fed. 549.

[2] McKeon *v.* Bisbee, 9 Cal. 137.

[3] State of Cal. *v.* Moore, 12 Cal. 56; People *v.* Shearer, 30 Cal. 645; Hale & Norcross M. Co. *v.* Storey County, 1 Nev. 82; People *v.* Taylor, 1 Nev. 88; Forbes *v.* Gracey, 94 U. S. 762.

"From an early period of our state jurisprudence we "have regarded these claims to public mineral lands as "titles. They are so practically. . . . Our courts have "given them the recognition of legal estates of freehold; "and so for all practical purposes, if we except some "doctrine of abandonment not perhaps applicable to such "estates, unquestionably they are, and we think it would "not be in harmony with the general judicial system to "deny to them the incidents of freehold estates in respect "to this matter."[1]

And in a later case the same tribunal stated the rule to be,—

"That although the ultimate fee in our public mineral "lands is vested in the United States, yet, as between indi- "viduals, all transactions and all rights, interests, and "estates in the mines are treated as being an estate in fee "and as a distinct vested right of property in the claimant "or claimants thereof, founded upon their possession or "appropriation of the land containing the mine. They "are treated, as between themselves and all persons, but "the United States, as the owners of the land and mines "therein."[2]

As was said by the supreme court of Nevada, the courts and the laws adapting themselves to the necessity of the case, and governed by rules of common sense, reason, and necessity, have universally treated the possessory rights of the miner as an estate in fee. Actions for possession, similar to the action of ejectment, actions of trespass, bills for partition,[3] are constantly maintained. Such interests are held to descend to the heir, to be subject to sale on execution, and to be assets in the hands of executors and administrators for the payment of debts.[4]

[1] Merritt *v.* Judd, 14 Cal. 60, cited and approved in Roseville Alta Co. *v.* Iowa Gulch, 15 Colo. 29; Spencer *v.* Winselman, 42 Cal. 479.

[2] Hughes *v.* Devlin, 23 Cal. 502-507; Watts *v.* White, 13 Cal. 321.

[3] Dall *v.* Confidence S. M. Co., 3 Nev. 531; Aspen Mining, etc., Co. *v.* Rucker, 28 Fed. 220 (disapproving Strettell *v.* Ballou, 3 McCrary, 46; 9 Fed. 256).

But it is seldom that a division of mines may be made. Generally, partition suits must result in sale: Aspen M. & S. Co. *v.* Rucker, 28 Fed. 220; Lenfers *v.* Henke, 73 Ill. 405. See, also, Coleman *v.* Coleman, 19 Pa. St. 100.

[4] Hale & Norcross G. & S. M. Co. *v.* Storey County, 1 Nev. 83.

**§ 536. Origin of the doctrine.**—The dignity thus attaching to the miner's title had its genesis in the early history of mining in the west, and was founded upon the law of possession. It was the natural result of the recognition by local legislatures of mining rights in the public domain, and the exercise of such rights by appropriation under the local rules and customs. As no intruder upon the possession of a prior appropriator could successfully defend an action involving possessory rights, by asserting that the paramount title was in the general government, this antecedent possession was in itself sufficient evidence of title. This was nothing more than the application of a familiar rule of the common law, that as against a mere trespasser, title may be inferred from possession. The actual possessor of real property was so far regarded by law as the owner thereof, that no one could lawfully dispossess him of the same without showing some well-founded title of a higher or better character than such possession itself furnishes.[1]

The early announcement of the doctrine by the courts in the mining states, that controversies between occupants of the public mineral lands were to be determined by the law of possession, and that persons claiming and in the possession of mining claims on these lands were, as between themselves and all other persons, except the United States, owners of the same, having a vested right of property founded on their possession and appropriation,[2] was the declaration of no new canon of jurisprudence.

The enunciation of the rule, that the naked possessor of land was deemed in law the owner until the general government or a person showing title under it makes an entry upon the same, and that when this was done the right or claim of the possessor must yield to the paramount authority of the United States or its grantee,[3] was but a restatement of a well-established rule of law.

[1] 3 Washburn on Real Property, 3d ed., p. 114; 5th ed., p. 134.
[2] Hughes v. Devlin, 23 Cal. 502.
[3] Doran v. C. P. R. R., 24 Cal. 245.

It is also a familiar doctrine of the common law, that where one, under a title deed describing a parcel of land by metes and bounds, enters upon the premises, claiming to hold the same under his deed, he is constructively in possession of all that is included in his deed, though he actually occupies but a part;[1] and by the same rule, any instrument having a grantor and a grantee, and containing an adequate description of the lands to be conveyed and apt words for their conveyance, gives color of title to the lands described.[2]

The application of these elementary rules to the novel and peculiar conditions surrounding the early history of the mining industry in the west, evolved a new *color of title* by which the extent of a miner's right of possession was determined.

**§ 537. Actual and constructive possession, under miners' rules.**—It was early announced as a rule of property, that mining claims were held by compliance with local rules, and *pedis possessio* was not required to give a right of action. When the claim was defined, and a party entered into possession of a *part*, that possession was possession of the entire claim as against any one but the true owner or prior occupant,[3] and priority of occupation established a priority of right.[4]

This doctrine of constructive possession was even extended to instances where the right asserted was not referable to local rules. Thus it was held, that mining ground acquired by an entry under a claim for mining purposes upon a tract, the bounds of which were distinctly marked by physical marks, accompanied with actual occupancy of a part of the tract, was sufficient to enable the possessor to maintain ejectment for the entire claim,

[1] 3 Washburn on Real Property, 3d ed., p. 118; 5th ed., p. 138.

[2] *Id.*, 3d ed., p. 139; 5th ed., p. 167; Brooks v. Bruyn, 35 Ill. 392.

[3] Attwood v. Fricot, 17 Cal. 37; English v. Johnson, *Id.* 107; Roberts v. Wilson, 1 Utah, 292.

[4] Gibson v. Puchta, 33 Cal. 310.

although such acts of appropriation were not done in accordance with any local mining rule.[1]

In such case, however, the extent of such location was not without limit. The quantity taken must have been reasonable, and whether it was so or not was to be determined in such cases by the general usages and customs prevailing upon the general subject. If an unreasonable quantity was included within the boundaries, the location was ineffectual for any purpose, and possession under it only extended to the ground actually occupied.[2]

But as a rule, mere entry and possession gave no right to the exclusive enjoyment of any given quantity of the public mineral lands.[3]

Where an occupant relied upon constructive possession, it devolved upon him to establish three essential facts:—

(1) That there were local mining customs, rules, and regulations in force in the district embracing the claims;

(2) That particular acts were required to be performed in the location and working of the claims;

(3) That he had substantially complied with the requirements.[4]

This rule was somewhat relaxed in favor of a purchaser who entered under a deed which contained definite and certain boundaries which could be marked out and made known from the deed alone,[5] which was nothing more than a reiteration of the doctrine of the common law relative to entries under color of title, heretofore mentioned. The miner's title extended to such mining lands as were reduced to his actual possession, or to such as were constructively in his possession, according to the rules above enumerated.

[1] Table Mountain T. Co. v. Stranahan, 20 Cal. 199; Hess v. Winder, 30 Cal. 349.

[2] Table Mountain T. Co. v. Stranahan, 20 Cal. 199. See Mallett v. Uncle Sam M. Co., 1 Nev. 156.

[3] Smith v. Doe, 15 Cal. 101; Gillan v. Hutchinson, 16 Cal. 154.

[4] Pralus v. Jefferson G. & S. M. Co., 34 Cal. 558.

[5] Hess v. Winder, 30 Cal. 349.

§ 538. **Federal recognition of the doctrine.**—While the government passively encouraged and fostered the system of development of the mineral resources as practiced in the mining states and territories, it gave no legislative expression of its encouragement, or any recognition that the occupants of the public mineral lands were other than mere trespassers, until February 27, 1865, when congress passed an act providing for a district and circuit court for the state of Nevada, the ninth section of which provided as follows:—

"That no possessory action between individuals in any "of the courts of the United States for the recovery of any "mining title, or for damages to such title, shall be affected "by the fact that the paramount title to the land on which "such mines are, is in the United States; but each case "shall be adjudged by the law of possession."[1]

This was re-enacted in the Revised Statutes,[2] and forms a part of the general legislation of congress on the subject of mineral lands.

The supreme court of the United States, in the case of Forbes v. Gracey,[3] approved and confirmed the doctrine of the early decisions as to the nature of locator's estate.

"Those claims," said that court, "are the subject of bar- "gain and sale, and constitute very largely the wealth of "the Pacific Coast states. They are property in the fullest "sense of the word, and their ownership, transfer, and use "are governed by a well-defined code, or codes of law, and "are recognized by the states and the federal government. "These claims may be sold, transferred, mortgaged, and "inherited, without infringing the title of the United "States."

§ 539. **Nature of the estate as defined by the courts since the enactment of general mining laws.**—With reference to the character of the estate held by a mining locator since the passage of the act of July 26, 1866, the decisions of the courts, both state and federal, are quite

[1] 13 Stats. at Large, 441.
[2] § 910.
[3] 94 U. S. 762.

harmonious. They in no way antagonize the theories of the earlier decisions, but adopt them. Naturally, the definition is enlarged and perfected. A mere occupant of lands, who is technically a trespasser, has rights of less dignity than one who enters with the consent of the paramount proprietor under rules defining the terms of his occupancy and the extent and limit of his rights.

Prior to the issuance of a patent, the locator cannot be said to own the fee simple title. The fee resides in the general government, whose tribunals, specially charged with the ultimate conveyance of the title, must pass upon the qualifications of the locator and his compliance with the law. Yet, as between the locator and every one else, save the paramount proprietor, the estate acquired by a perfected mining location possesses all the attributes of a title in fee, and so long as the requirements of the law with reference to continued development are satisfied, the character of the tenure remains that of a fee. As between the locator and the government, the former is the owner of the beneficial estate, and the latter holds the fee in trust, to be conveyed to such beneficial owner upon his application in that behalf and in compliance with the terms prescribed by the paramount proprietor.[1]

Until patent issues, the locator's muniments of title consist of the laws under the sanction of which his rights accrue, the series of acts culminating in a completed valid location, and those necessary to be continuously performed to perpetuate it.

A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent. It has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. Actual possession is not more necessary for the protection of the title acquired to such a claim by a valid location than it is for any other grant.[2]

[1] Noyes v. Mantle, 127 U. S. 348, 32, 169.
[2] Belk v. Meagher, 104 U. S. 279; Gwillim v. Donnellan, 115 U. S. 45.

Although the locator may obtain a patent, this patent adds but little to the security of the locator.[1]

The owner of such a location is entitled to the exclusive possession and enjoyment, against every one, including the United States itself.[2]

As was said by the supreme court of Oregon,[3] the general government itself cannot abridge the rights of the miner. There are equitable circumstances binding upon the conscience of the governmental proprietor that must never be disregarded. Rights have become vested that cannot be divested without the violation of all the principles of justice and reason.

The doctrine hereinbefore enunciated has never been seriously questioned. It has been reiterated in many cases in both the state and federal courts.[4] It is too well settled to require further discussion.

**§ 540. Nature of the estate compared with copyholds at common law.**— It has been said, that the interest of a locator of a mining claim is, in some respects, not unlike that of a copyholder at common law: that both had their origin in local customs, and in each the custom crystallized into law; that the copyholder held his land by the custom of the manor, and while the fee remained in the lord, the right to the possession and enjoyment of the premises was in him. He might alienate his lands at will, and on his death they descended to his heirs; the copyholder was a fee holder, yet the fee was in the lord.[5]

The same authority states, that the estate of the copy-

[1] Chambers v. Harrington, 111 U. S. 350.

[2] McFeters v. Pierson, 15 Colo. 201; Gold Hill Q. M. Co. v. Ish, 5 Ore. 104; Seymour v. Fisher, 16 Colo. 188.

[3] Gold Hill Q. M. Co. v. Ish, 5 Ore. 104.

[4] Manuel v. Wolff, 152 U. S. 505; Black v. Elkhorn M. Co., 163 U. S. 445; S. C. before Judge Knowles, 49 Fed. 549; McFeters v. Pierson, 15 Colo. 201; Seymour v. Fisher, 16 Colo. 188; Wills v. Blain, 4 New Mex. 378; Harris v. Equator M. & S. Co., 3 McCrary, 14; Keeler v. Trueman, 15 Colo. 143; Houtz v. Gisborn, 1 Utah, 173; Talbott v. King, 6 Mont. 76; Silver Bow M. & M. Co. v. Clark, 5 Mont. 378.

[5] Black v. Elkhorn, 52 Fed. 859.

holder might be taken in execution for the payment of his debts. We are not sure that this is a correct statement of the rule of the common law. Blackstone says, speaking of this class of estates, that no creditor could take possession of lands, but could only levy upon the growing profits, so that if the defendant aliened his lands, the plaintiff was ousted of his remedy. Therefore, copyhold lands were not liable to be taken in execution upon a judgment.[1] The American authorities seem to support this view.[2]

Be that as it may, there is one essential difference between the two estates with reference, at least, to the extent of the thing possessed and enjoyed.

In copyhold, or customary lands, the lord of the manor is owner of the minerals, but the tenant is in possession of them, and consequently, in the absence of prescription or a special custom to the contrary, the one cannot explore mines without the consent of the other, although the tenant may continue the working of mines and quarries already opened.[3]

**§ 541. Nature of the estate compared with the dominium utile of the civil law.**—The nature of the estate held by a locator in a mining claim, bears some resemblance to the *emphyteusis* or *dominium utile* of the Roman or civil law. Although the *emphyteuta* did not become owner of the thing, yet he had nearly all the rights of an owner. It was *jus in re aliena*, which in its extent and effects nearly resembled ownership. He had the full right of enjoyment, consequently the right of possessing the thing and of reaping all the fruits thereof. He might dispose of the substance of the thing, transfer the exercise of his right to another, and alienate it, *inter vivos* or *causa mortis*. He might mortgage it and burden it with servitudes, without requiring the consent of the *dominus* thereto.

[1] 3 Blackstone, 418–419.

[2] Watson on Sheriffs, 208; Wildey v. Bonny, 26 Miss. 35; Colvin v. Johnson, 2 Barb. 206; Bigelow v. Finch, 11 Barb. 498; 17 Barb. 394.

[3] Rogers on Mines, 270; MacSwinney on Mines, 72; Arundell on Mines, 4; Bainbridge on Mines, 4th ed., p. 37.

His right to absolutely dispose of his estate was subject only to a preferred right of purchase in the *dominus* at the price offered. At the death of the *emphyteuta*, the *emphyteusis* descended to his heirs. The *emphyteutical* right was usually acquired by grant, although it might be acquired by prescription.[1]

"*Dominium utile* is a right which the vassal hath in the "land, or some immovable thing of his lord, to use the "same and take the profit thereof, hereditarily or *in per-*"*petuum.*"[2]

**§ 542. Nature of the estate compared with inchoate pre-emption and homestead claims.**—Judge Ross, in the case of Black *v.* Elkhorn,[3] makes a comparison between the estate held by a mining locator and a pre-emption claimant prior to final entry and payment. While for the purposes of the case then under consideration, where dower was asserted in an unpatented mining claim, the comparison was not wholly inapt, yet we think the inference which may be drawn, that the estate of a mining locator is of no greater dignity than that of an inchoate pre-emption right, should not pass unchallenged. What are the essential differences between the two estates?

(1) By their pre-emption laws, the United States do not enter into any contract with the settler, nor incur any obligation that the land occupied by him shall ever be offered for sale. They simply declare that *in case any of their lands are thrown open for sale* the privilege to purchase shall be first given to parties who have settled upon and improved them.[4]

With reference to its mineral lands, the government has declared that they are free and open to exploration and *purchase*,[5] and a positive compact is made between the

[1] Kaufman's Mackeldey, vol. I, §§ 324-325.
[2] 1 Spence Eq. Jur., 31, 33; Bowers *v.* Keesecker, 14 Iowa, 301.
[3] 52 Fed. 859.
[4] Hutchings *v.* Low, 15 Wall. 77; Campbell *v.* Wade, 132 U. S. 34; Black *v.* Elkhorn M. Co., 49 Fed. 549.
[5] Rev. Stats., § 2319.

government and the discoverer and locator, whereby the latter, upon compliance with the law, is clothed with the *exclusive* right of possession and enjoyment.[1]

If the government, after a valid mining location has been made, could deprive the locator of his rights, his right of possession certainly would not be *exclusive*.

(2) The pre-emptor is required to apply for patent within a fixed period of time. There is nothing in the mining law requiring a locator to proceed to patent at all. He may never do so, yet his estate is fully maintained in its integrity so long as the law which is a muniment of his title is complied with. The patent adds but little to the security of the locator.[2]

That the general government itself cannot deprive the locator of rights accrued under the mining laws, has, we think, been fully demonstrated.

(3) Prior to entry and payment, the pre-emptor cannot convey or assign his interest to others.[3]

Such a conveyance or assignment would extinguish the pre-emption right.[4]

The right to transfer a mining claim has never been questioned.

(4) It is not until entry and payment under a pre-emption claim that the land becomes subject to taxation by the state.[5]

As we have heretofore shown,[6] mining claims are so subject.

[1] Rev. Stats., § 2322; Erhardt v. Boaro, 113 U. S. 527; Black v. Elkhorn M. Co., 59 Fed. 549.

[2] Chambers v. Harrington, 111 U. S. 350; Gold Hill Q. M. Co. v. Ish, 5 Ore. 104; Chapman v. Toy Long, 4 Saw. 28; Shafer v. Constans, 3 Mont. 369.

[3] Dillingham v. Fisher, 5 Wis. 475; McLane v. Bovee, 35 Wis. 27; Trulock v. Taylor, 26 Ark. 54; Busch v. Donohue, 31 Mich. 482; Frisbie v. Whitney, 9 Wall. 187; Aiken v. Ferry, 6 Saw. 79; Lamb v. Davenport, 18 Wall. 307; Schoolfield v. Houle, 13 Colo. 394.

[4] Quinn v. Kenyon, 38 Cal. 499.

[5] Carroll v. Safford, 3 How. 441; Witherspoon v. Duncan, 4 Wall. 210.

[6] See, *ante*, § 539.

(5) Inchoate pre-emption claims are not subject to execution so as to enable the purchaser at the sale to obtain title from the government.[1] The contrary has always been the rule as to mining claims.

(6) An inchoate pre-emption could not be disposed of by will. Heirs alone would have the right to complete the entry. Devisees, as such, would not be recognized by the government.[2]

Even an administrator could not perfect the right, unless it was established that there was in existence some person for whose benefit the right might be perfected.[3]

We have heretofore shown[4] the analogy between the mine locator's estate and the *dominium utile* of the civil law. No such analogy exists with reference to pre-emption claims.[5]

What has heretofore been said in reference to inchoate pre-emption claims, applies with equal force to federal homestead claims prior to final entry. It seems to us that the distinction between the character of the estate held by a pre-emptioner or homestead claimant, prior to final entry, and the owner of a perfected mining location is decidedly marked.

It has been said that the mining laws provide for three classes of titles:—

(1) Possessory: a location prior to entry and payment;

(2) Complete equitable: a location after entry and payment and before patent;

(3) Fee simple: after patent.[6]

[1] Moore v. Besse, 43 Cal. 511; Bray v. Ragsdale, 53 Mo. 170; Cravens v. Moore, 61 Mo. 178; 1 Freeman on Ex., § 176; Dougherty v. Marcuse, 3 Head, 323; Crutsinger v. Catron, 10 Humph. 24; Rhea v. Hughes, 1 Ala. 219; 34 Am. Dec. 772; Hatfield v. Wallace, 7 Mo. 112; Brown v. Massey, 3 Humph. 470.

[2] Rev. Stats., § 2269.

[3] Elliott v. Figg, 59 Cal. 117.

[4] See, *ante*, § 541.

[5] Bowers v. Keesecker, 14 Iowa, 301.

[6] American Hill Quartz Mine, 3 Sickles Min. Dec. 377-383; Benson v. Alta M. Co., 144 U. S. 428.

While this may be true in one sense, yet a patent cannot confer any greater rights than those flowing from a valid perfected mining location. Pre-emption and homestead claims pass through the same gradations of title, but the nature and extent of the possessory right conferred are essentially different.

**§ 543. Dower within the states.**— Each state regulates for itself the laws of descent, the domestic relation, and property rights between husband and wife. The subject of dower is one upon which congress may legislate so far as the territories are concerned, but within the states it is powerless to grant the right, or deny its existence where the state creates it. Therefore, in determining what rights, if any, the wife has in the lands or possessions of the husband, in any given state, we must, as a rule, look to state legislation and the decisions of state courts. Of the precious-metal-bearing states, no dower right whatever exists in California, Colorado, Idaho, Nevada, North Dakota, South Dakota, Washington, or Wyoming. In Montana, a widow is entitled to the third part of all lands whereof her husband was seized of an estate of inheritance, and equitable estates are subject to such dower right.[1]

There can be no doubt that as to a patented mining claim, or one that has passed to entry and for which a certificate of purchase has been issued, the dower right would attach, the same as it would to any other class of lands; but as to whether such right could be asserted in a perfected mining location, prior to entry and payment, has been the cause of serious controversy.

In the case of Black v. Elkhorn Mining Co.,[2] Judge Knowles held, that such an estate was subject to the wife's dower, but where the husband had conveyed the property to a purchaser who subsequently applied for and received a patent, the wife having failed to assert her rights by adverse claim, the dower right was lost.

[1] Laws of Montana, 9th ed., § 1, p. 63; Chadwick v. Tatem, 9 Mont. 354; Black v. Elkhorn M. Co., 47 Fed. 600. [2] 47 Fed., 600.

The case was taken to the United States circuit court of appeals,[1] which court held, that a mere locator of a mining claim, owning only a possessory right conferred by the statute, has no such estate in the property as against the United States or its grantee, as will permit rights of dower to be predicated thereon by virtue of any state legislation. In other words, Judge Knowles gave the right judgment but the wrong reason for it. The supreme court of the United States affirmed the ruling of the circuit court of appeals[2] on parallel lines of reasoning.

To what extent the doctrine of the supreme court of the United States might be deemed binding on the conscience of the state courts is a question not necessary for us to determine. The result reached is manifestly in consonance with the preconceived notions of practitioners in the mining regions. A contrary rule would have disturbed many mining titles, and opened the door to vexatious litigation. If, in the process of reasoning by which the ultimate conclusion has been reached, the dignity of the mining locator's estate has suffered to a slight extent, it has suffered in a good cause. We are fully justified from the foregoing authorities in accepting as a settled doctrine, that in states where the dower right exists by virtue of state legislation, such right will not attach to a mining claim held simply by location.

The states of Oregon and Utah have dower laws similar to those of Montana. Nebraska and Florida, both of which states are nominally subject to the general mining laws of congress, but which are not classified as metal-bearing states, likewise make provision for dower rights in the wife.

**§ 544. Dower within the territories.**—The same rule as to the dower right existing in the states by virtue of state legislation applies with equal force in the territories, where that right is established by act of congress. Under the Edmunds-Tucker amendment to the anti-polygamy

[1] 52 Fed., 859.
[2] Black v. Elkhorn M. Co., 163 U. S. 445.

act,[1] congress provided that a widow should be endowed of a third part of all the lands whereof her husband was seized of an estate of inheritance. The act was, of course, applicable to the then territory of Utah. Whether or not it applied to the other territories, was a mooted question until recently. The question arose in Wyoming, which, while still a territory, passed a law abolishing dower.[2]

A widow asserted a right to dower under section eighteen of the Edmunds-Tucker act, claiming that the passage by congress of that act superseded the territorial law and restored the dower right. The supreme court of Wyoming[3] held, that the act applied only to Utah, and was not operative in any other territory.

This ruling was affirmed by the supreme court of the United States on writ of error.[4]

Dower has been abolished by action of the territorial legislature in Arizona. In New Mexico there is no specific mention of dower in any of its legislation. In this territory the law of community property prevails, which had its origin in the system of the civil law, and was adopted in California and most of the Pacific states and territories.[5]

It may be conceded, that with the exception of those states heretofore enumerated, the dower right does not exist in any of the states or territories within the purview of this treatise.

Whether or not it is necessary in any of the states or territories for a wife to join with the husband in a conveyance of real property, by which term we include mining locations, depends, of course, upon the laws of the several state and territorial jurisdictions. It is beyond the scope of this treatise to enter into a detailed statement of the rules of law regulating conveyancing in these different states. They are general laws, affecting all classes of real property without distinction.

[1] § 18, Act of March 3, 1887, 24 U. S. Stats. at Large, 638.
[2] Act of Dec. 10, 1869; § 2221, Rev. Stats. Wyo., 1887.
[3] France v. Connor, 27 Pac. 509.
[4] 161 U. S., 65.
[5] France v. Connor, 27 Pac. 509; S. C., 3 Wyo. 445.

## CHAPTER II.

### THE NATURE AND EXTENT OF PROPERTY RIGHTS CONFERRED BY LODE LOCATIONS.

ARTICLE I. INTRODUCTORY—INTRALIMITAL RIGHTS.
II. CROSS LODES.

### ARTICLE I. INTRODUCTORY—INTRALIMITAL RIGHTS.


§ 548. General observations.
§ 549. Classification of rights with reference to boundaries.
§ 550. Extent of the grant as defined by the statute.
§ 551. The right to the surface and presumptions flowing therefrom.
§ 552. Intralimital rights not affected by the form of surface location.
§ 553. Pursuit of the vein on its course beyond bounding planes of the location not permitted.


**§ 548. General observations.**—It has been satisfactorily established that the estate created by a valid perfected mining location, as between the locator and every one else, save the government, is in the nature of a fee simple. Under ordinary circumstances this would be a sufficient characterization of the estate. The attributes of a fee simple estate are well understood, and no explanation is required. But the peculiarites of the mining law render it necessary to elaborate and define with greater particularity than is possible by the use of a single descriptive term, the nature and extent of property rights conferred by perfected mining locations.

There are certain rights which may be said to be common to all classes of locations. There are others which are peculiar to one or the other. In order to treat the subject

analytically, we are compelled to deal with the two classes separately, first considering the subject of lodes, or veins.

**§ 549. Classification of rights with reference to boundaries.**—Property rights conferred by lode locations may be subdivided for the purpose of convenience into two classes:—

(1) Those which are confined to things embraced within the boundaries of the location. By the term boundaries as we here employ it, we include not only the surface lines, but the vertical planes drawn downward through them. If we may be excused for introducing into the mining vocabulary coined and eccentric words, we would classify these rights as *intralimital;*

(2) Those which, while depending for their existence upon the ownership of things within the boundaries, may be exercised under certain conditions and restrictions out of, and beyond, those boundaries. These rights may be classified as *extralimital.*

Whether these terms will ever come into general use or not, they will at least enable the author to formulate his views, express them according to his conception of the law, and group the different elements under distinctive and homogeneous titles. For the purpose of classification, therefore, we may say that property rights flowing from a valid lode location are either intralimital or extralimital. We will examine the nature and extent of these rights in the order named.

**§ 550. Extent of the grant as defined by the statute.**—Section twenty-three hundred and twenty-two of the Revised Statutes provides, that,—

"Locators shall have the exclusive right of possession and "enjoyment of all the surface included within the lines of "their locations, and of all veins, lodes, or ledges, through- "out their entire depth, the top, or apex, of which lies in- "side of such surface lines extended downward vertically, "although such veins, lodes, or ledges may so far depart from "a perpendicular in their course downward as to extend "outside the vertical side lines of such surface locations."

This section is replete with what Judge Lewis, in considering another portion of mining law, characterizes as "grammatical solecisms."[1]

In the language of Dr. Raymond,—

"This phraseology has the merit of clearly conveying "the meaning intended, though descriptive geometry and "the English language suffer somewhat in the operation. ". . . But the goal is reached, though the vehicle is "damaged."[2]

The section clearly grants the following intralimital rights:—

(1) Exclusive dominion over the surface;

(2) The right to certain parts of all veins whose tops, or apices, are found within vertical planes drawn downward through the surface boundaries. The extent to which the locator is entitled to such veins within his surface boundaries will depend upon a number of circumstances, to be fully considered in connection with the subject of extralateral right.

It is quite manifest from a reading of the section, that no title passes *by virtue of the location* to any part of any vein which has its top, or apex, wholly outside of the boundaries of such location.

**§ 551. The right to the surface and presumptions flowing therefrom.**—Whatever may be reserved out of the grant created by the perfection of a valid lode location, one thing is quite manifest. The right of a senior locator to the exclusive possession of the surface cannot be invaded, assuming, of course, that at the time to which the location relates, no rights of way or servitudes were imposed upon the land.[3] While, as we shall hereafter see, outside apex proprietors may penetrate underneath the surface in the lawful pursuit of their veins, the law expressly preserves the surface from invasion.

[1] Hobart *v.* Ford, 6 Nev. 77.

[2] Law of the Apex, Trans. Am. Inst. Min. Eng., vol. xii., p. 387, 392.

[3] See, *ante*, § 531.

What are the presumptions, if any, flowing from the ownership of the surface?

*Prima facie*, everything within the vertical bounding planes belongs to the locator.

In the language of Judge Hallett,—

"We may say, that there is a presumption of ownership "in every locator as to the territory covered by his loca- "tion, and within his own boundaries he is regarded as "the owner of all valuable deposits until some one shall "show a higher right."

While the courts do not altogether agree as to the weight of testimony necessary to overthrow this presumption, we think there is an undoubted concensus of opinion in support of the above rule.[1]

We may safely base our discussion of the more important elements of the law applicable to lode locations upon this presumption, and as we progress, endeavor to show the circumstances under which, and extent to which, it may be overcome, reaching ultimate conclusions by such gradations as the nature of the subject will permit.

**§ 552. Intralimital rights not affected by the form of surface location.**—We have heretofore suggested, that the ideal location, the one which confers the greatest property rights susceptible of being conveyed under the mining laws, contemplates a surface regular in form along the course of the vein, with end lines crossing it, substantially presenting the form of a parallelogram.[2] A departure from the ideal, however, if the statutory limit is not exceeded as to area, does not destroy or impair the intralimital rights of a locator. The requirement as to non-

[1] Leadville M. Co. *v.* Fitzgerald, 4 Morr. Min. Rep. 380, 385; Doe *v.* Waterloo M. Co., 54 Fed. 935; Cons. Wyoming M. Co. *v.* Champion M. Co., 63 Fed. 540; Duggan *v.* Davey, 4 Dak. 110; Iron S. M. Co. *v.* Campbell 17 Colo. 267; Cheesman *v.* Shreve, 37 Fed. 36; Montana Co., Limited, *v.* Clark, 42 Fed. 626; Cheesman *v.* Hart, 42 Fed. 98; Bell *v.* Skillicorn (New Mex.), 28 Pac. 768; Jones *v.* Prospect Mt. T. Co., 21 Nev. 339.

[2] See, *ante*, § 360.

parallelism of end lines affects only the extralimital or, strictly speaking, the extralateral rights.[1]

It frequently happens, that locations originally made to approximate the ideal are reduced to irregularly shaped surfaces by reason of conflicts with prior appropriators. In such cases, the right to pursue the vein on its downward course outside of the locator's vertical bounding planes may not exist; but in other respects the locator's rights to whatever may be found within such planes is the same as in the case of a location of the highest type. This is, of course, on the assumption that the location includes some part of the apex of a discovered vein. A location to be valid for any purpose must have within its boundaries such apex.[2] It is unquestionably true that neither the form of the surface location nor the position of the vein as to its course controls or restricts the intralimital rights.

According to Judge Ross,[3] this is the logical deduction flowing from the decision of the supreme court of the United States in the Elgin case.[4]

**§ 553. Pursuit of the vein on its course beyond bounding planes of the location not permitted.**—Subject to the extralateral right of outside apex proprietors, a locator may be said to own all those parts of such veins having their tops, or apices, within the boundaries as are found within such boundaries. Wherever a vein on its course, or strike, passes out of and beyond any one of these planes, the right of the locator to it ceases. Whatever may be his privilege with reference to the pursuit of his vein in depth, longitudinally it cannot be followed beyond any of the boundaries. We have fully explained the rights upon located veins as they were asserted under, and prior to, the passage of the act of 1866.[5] It having been definitely settled by the supreme court of the United

[1] See, *ante*, § 365.
[2] See, *ante*, § 364.
[3] Doe v. Waterloo M. Co., 54 Fed. 935, 938.
[4] Iron S. M. Co. v. Elgin M. Co., 118 U. S. 196.
[5] See, *ante*, § 58.

States in the Flagstaff-Tarbet case,[1] that under the act of 1866 a locator could not pursue his vein on its strike beyond the lines of his location, the application of the doctrine of that case to locations made under the act of 1872 was natural and logical. The rule may be said to be elementary.[2]

This being true, it follows that no other locator can, in the pursuit of his vein *on its strike*, pass through the bounding plane of a senior location. An entry underneath the surface of a prior location is only permitted in the exercise of a right to pursue a vein on its *downward course*. This suggests the subject of cross lodes.

## Article II. Cross Lodes.

§ 557. Section twenty-three hundred and thirty-six of the Revised Statutes and its interpretation.
§ 558. The Colorado rule.
§ 559. Cross lodes before the supreme court of Montana.
§ 560. The Arizona-California rule.

**§ 557. Section twenty-three hundred and thirty-six of the Revised Statutes and its interpretation.**— As we have observed in a previous chapter,[3] under local rules existing prior to the passage of the act of 1866, as well as under the act itself, the lode was the principal thing granted, and the adjacent surface, if any was actually appropriated, was a mere incident; that only one lode could be held by a single location, and that this could be followed on its course, or strike, wheresoever it might lead to the lawfully claimed limit, without the necessity of enclosing it within surface boundaries.

Where surface boundaries had been established by the prior locator for the convenient working of his lode, a subsequent locator appropriating a separate vein might pursue it into and through the surface ground of the senior locator, but no one was permitted to invade such surface for the purpose of searching for undiscovered veins.[4]

[1] See, *ante*, § 60. Fig. 3, p. 70.

[2] Argentine M. Co. *v.* Terrible M. Co., 122 U. S. 478; Wolfley *v.* Lebanon M. Co., 4 Colo. 112; Patterson *v.* Hitchcock, 3 Colo. 533; Hall *v.* Equator M. & S. Co., 11 Fed. Cases, No. 5931.

[3] See, *ante*, § 58.

[4] Atkins *v.* Hendree, 1 Idaho, 95.

Such being the recognized rules, it is not difficult to imagine instances of two lodes held in different ownership intersecting or crossing each other on their strike, or onward course, without creating any conflict of title, except at the place of lode intersection or within the space of actual lode crossing.

The act of 1866 made no provision in terms for the determination of rights growing out of such crossings or intersections.

Such were the conditions existing when the act of 1872 was passed, which contained the following provision, now preserved in section twenty-three hundred and thirty-six of the Revised Statutes:—

"Where two or more veins intersect or cross each other, "priority of title shall govern, and such prior location "shall be entitled to all ore or mineral contained within "the space of intersection; but the subsequent location "shall have the right of way through the space of inter- "section for the purposes of the convenient working of the "mine. . . ."[1]

This is the enunciation of a rule of law, the usefulness of which when applied to the conditions existing at the time of its passage cannot be denied. It established a rule of decision based upon the equitable maxim, that "priority in time establishes a priority of right." The application of this provision to locations made prior to its enactment is not involved in any serious embarrassment. It is only where attempts are made to apply the rule to locations made and rights asserted under the act of 1872 that apparent difficulties have been encountered, giving rise to a conflict of opinion and diversity of decision.

Whatever may have been the relationship existing between the lode, which was the subject of location, and the adjacent surface ground under the act of 1866, under the existing law the right to any portion of any lode is dependent upon its having its top, or apex, within the surface boundaries of the location. A regular valid location, which

[1] Act of May 10, 1872, § 14.

presupposes the absence of any conflicting surface rights at least, once perfected under the law, vests in the proprietor the ownership of not only the lode upon the discovery of which the location is predicated, but of all other lodes, the tops, or apices, of which may be found within such surface boundaries or within vertical planes drawn through them. The ownership of such other lodes so found is not made to depend upon their general direction or the position they may occupy with reference to the originally discovered lode.

The only limitation upon the grant authorized by section twenty-three hundred and twenty-two of the Revised Statutes is the extralateral right reserved to other locators to follow lodes having apices within their boundaries, on their downward course, outside of and beyond such boundaries, and underneath adjoining surfaces.

Instances may be conceived where two veins might intersect or cross on their strike outside of vertical planes drawn through the surface lines of the several locations. In other words, lodes may intersect on their strike without the existence of any surface conflict or the invasion of the territory included within vertical planes drawn through surface boundaries.[1]

To cases of this character the application of the rule under consideration is accompanied with no more difficulty than its application to cross lodes located under or prior to the act of 1866.

But it has been assumed by the courts of last resort of at least one state in the union that there is an apparent conflict between section twenty-three hundred and twenty-two of the Revised Statutes, defining the nature and extent of the grant to the lode locator, and section twenty-three hundred and thirty-six, relative to cross veins.

The subject under discussion has been considered by the supreme courts in the states of Colorado and California and in the territory of Arizona. The importance of the

[1] See concurring opinion of Chief Justice Beatty in Wilhelm v. Silvester, 101 Cal. 358, 364.

question, and the fact that the supreme courts of California and Arizona have, upon a state of facts more or less similar, reached conclusions diametrically opposed to those enunciated by the supreme court of Colorado, render it necessary to examine the adjudicated cases, the facts upon which they were founded, and the reasoning employed to reach the discordant results.

**§ 558. The Colorado rule.**—The inception of what may be termed the Colorado rule is found in an opinion given by Judge Hallett, sitting as circuit judge in the United States circuit court, district of Colorado, upon a motion to dissolve an injunction in the case of Hall *v.* Equator Mining and Smelting Co.[1]

The controversy arose between the Colorado Central lode owned by the plaintiff, and the Equator lode, owned by the defendant. The Equator was located in 1866. The date of the location of the Central is not disclosed by the reported decisions; but the court records establish the fact that it was discovered November 30, 1872.

Both parties claimed under United States patents issued after the passage of the act of 1872. Plaintiff held the senior patent, based on a junior location. The relative position of the two claims is shown in the following diagram (figure 25):—

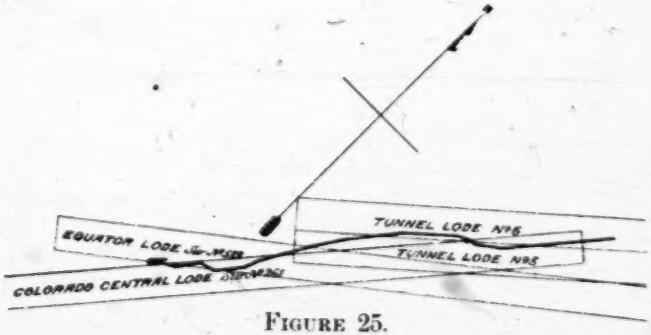



FIGURE 25.

[1] Fed. Cases, No. 5931, Morr. Min. Rights, 3d ed., p. 282.

The controversy related to a body of ore found in or under the east end of the Central location, and extending thence westward to and across the intersection with the Equator location.

The motion to dissolve the injunction was heard upon affidavits. There was a sharp conflict as to the facts. The learned judge, with respect to the showing made, uses this language:—

"As was anticipated when the bill was removed into "this court, there is no agreement between the parties as "to the structure of the lode or lodes and their outcrop. "The affidavits suggest several theories without giving cer- "tainty to any of them. There may be two veins uniting "in their onward course at some point east of the Central "location, and thence going westward as one vein, with "an outcrop in that location or south of it. And the vein "may be so wide at the top as to enter both locations at "the point where this controversy arose. And there may "be two veins uniting on the strike or on the dip at the "very place in dispute. But as to this, it is only necessary "to say, that the facts are not satisfactorily stated to lead "to a just conclusion. . . . It is enough that there is a "strong controversy in which the right of neither party "clearly appears. On that alone we interfere to preserve "the property for him who may at law prove his right "to it."

The motion to dissolve the injunction was denied, and the parties were relegated to the action of ejectment, then pending, for a trial of the questions of fact.

The court thereupon proceeds as follows:—

"What has been said relates mainly to a question of "fact, which it is the opinion of the court should be tried "by a jury. Some general remarks in addition, as to the "proper construction of the act of congress, may assist the "parties in that investigation."

And after "assuming that these are lodes crossing each "other in the manner indicated by the locations," the judge enunciates the following doctrine:—

"The general language of section twenty-three hundred "and twenty-two seems to comprehend all lodes having

"their tops and apices in the territory described in the "patent, whether the same lie transversely or collaterally "to the principal lode on which the location was made.

"Considered by itself, such would be the meaning and "effect of that section. But there is another section relat- "ing to cross lodes, which is of different import. It was "numbered fourteen in the original act of 1872, section "twenty-three hundred and thirty-six, Revised Statutes, "second edition, and is as follows: . . ." [Then follows quotation of section twenty-three hundred and thirty-six.] "It will be observed, that by this section the first locator and "patentee of a lode gets only such part of cross and inter- "secting veins as lie within the space of intersection, to "the exclusion of the remainder of such lodes and veins "lying within his own territory. So far, this section is in "conflict with section twenty-three hundred and twenty- "two, before mentioned, and the matter of precedence be- "tween them is settled by an arbitrary rule established "long ago. As between conflicting statutes, the latest in "date will prevail, so between conflicting sections of the "same statute, the last in the order of arrangement will "control.[1]

"The presumption that one section of a statute was "adopted before another, seems to be very slight, and per- "haps this rule has no other merit than to afford the "means of solving a difficult question. But the rule "appears to be well established, and to be applicable to "the present case. It gives to section twenty-three hun- "dred and thirty-six, Revised Statutes, or section fourteen, "as it stood in the original act, a controlling effect over "the prior section, and limits the right of the first locator "of a mine in and to cross and intersecting veins to the "ore which may be found in the space of intersection. If "there are in fact two lodes crossing each other in these "locations, the plaintiffs, having the elder title by patent, "have the better right, but it is limited as last stated. So "much as to the theory that there are two lodes intersect- "ing in their onward course."

There can be no question but that Judge Hallett, in rendering the foregoing decision, based only upon a hypothetical state of facts and presented in the form of a few

[1] Citing Bacon's Abr. Stat. D. Dwarris, 156; Brown *v.* County Com'rs, 21 Pa. 37; Smith *v.* Moore, 26 Ill. 392.

"general remarks," exceeded the necessities of the case under consideration.

Upon the trial of the case on the merits, a state of facts was developed entirely different from the hypothesis above assumed. Instead of two lodes intersecting each other in the manner indicated by the locations, there was but *one* lode, with part of its width in one location and part in the other.[1]

Yet a precedent had been established by these "few "general remarks" which has ever since been followed by the supreme court of Colorado in numerous cases, without even a criticism of the logic of its reasoning or a consideration of the circumstances under which the decision was rendered.

In Branagan *v.* Dulaney,[2] the question arose upon the sufficiency of the answer filed by the defendant, a junior locator, justifying a trespass within the lines of the plaintiff, a senior locator, on the ground that the defendant was the owner of a cross lode and had a right under Revised Statutes, section twenty-three hundred and thirty-six, to drift through the territory covered by the senior location.

The court below having sustained the demurrer to the answer, judgment passed for plaintiff.

On appeal, the supreme court reversed the judgment, basing its decision upon Hall *v.* Equator (*supra*), and the "arbitrary rule of construction suggested by the court" in that case, and holding in effect, that the answer stated a complete defense.

This doctrine has ever since been followed or sanctioned by the supreme court of Colorado.[3]

The circuit court of appeals, eighth circuit, in Oscamp *v.* Crystal River Mining Company,[4] gave its apparent sanction to the doctrine thus enunciated by declining to

[1] Carpenter's Mining Code, 3d ed., p. 65. See note to 11 Fed. Cases, No. 5931.

[2] 8 Colo. 408.

[3] Lee *v.* Stahl, 9 Colo. 208, 13 Colo. 174; Morgenson *v.* Middlesex M. & M. Co., 11 Colo. 176; Omar *v.* Soper, *Id.* 380; Coffee *v.* Emigh, 15 Colo. 184.

[4] 58 Fed. 293.

controvert it, and in a later case invoked it as an aid to the interpretation of the tunnel laws.[1]

It thus appears that a "few general remarks" made by a judge upon a motion for a preliminary injunction, upon a hypothetical state of facts which was subsequently determined to have had no potential existence, have ripened into a rule of property in at least one state, which, when applied to certain localities and conditions found in that state, is productive of unique results. An illustration of the practical application of the rule accepted by the supreme court of Colorado is shown by an inspection of the official map of the mining region of Cripple Creek in that state.

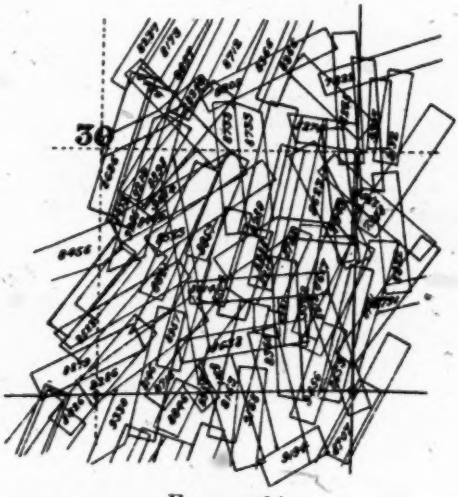


FIGURE 26.

In figure 26 we reproduce from that map a quarter section of land, upon the surface of which mining claims have been officially surveyed, many of which have been patented, overlapping in the manner indicated. Further comment is unnecessary.

[1] Enterprise M. Co. v. Rico-Aspen Cons. M. Co., 66 Fed. 200, 210.

§ 559. **Cross lodes before the supreme court of Montana.**— The subject of cross lodes came before the supreme court of Montana in the case of Pardee *v.* Murray.[1] This case involved a controversy between the Salmon, located in 1866, and the Cliff Extension, No. 2, located in 1867, on the one hand, and the Shark Town and Scratch All lodes,

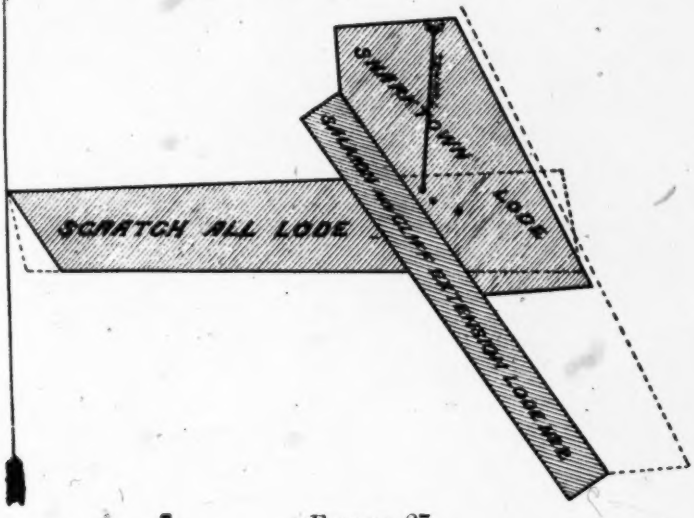



FIGURE 27.

discovered and located in 1875. The relative position of the claims of the contending parties is shown in figure 27.

The court thus expressed its views as to the meaning of the section of the Revised Statutes under consideration:—

"If a vein with a prior location crossed another, such "vein would not disturb the possession of the subse- "quent location, except as to the extent of the cross vein, "and would entitle the prior location to the ore and min- "eral contained in the space of intersection. If with a "subsequent location, the locator would be entitled only "to a right of way to the extent of his cross vein, for the "purpose of working his mine, and to no other right; and

[1] 4 Mont. 234.

"if he should take the ore contained in the space of inter-
"section, he would be a trespasser against whom the prior
"locator in possession of the surface ground might main-
"tain an action of trespass."

This suggests the view adopted by Mr. Morrison in his "Mining Rights,"—[1]

"That a cross lode takes no estate in the claim it crosses,
"and has no rights as against the crossed claim, except the
"mere right to drift through, leaving all the ore as the
"property of the crossed claim."

§ 560. **The Arizona-California rule.**—A case arose in Arizona out of the following facts, which are illustrated by a diagram, which we here reproduce as figure 28.

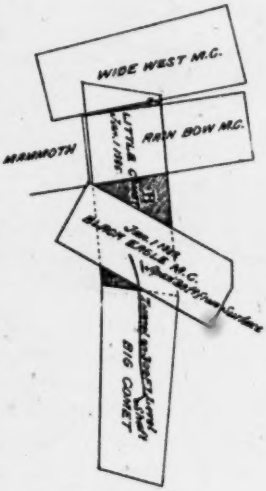



FIGURE 28.

The Black Eagle was the prior location, based upon the discovery of a vein having a southeast and northwest course. The Big and Little Comet are locations covering a vein with a course approximately north and south, the owners of which, through means of a tunnel originating in the Big Comet, had penetrated underneath the Black Eagle surface, justifying their right to do so under section twenty-three hundred and thirty-six of the Revised Statutes, claiming the Comet vein to be a cross vein. The surface conflict area is shown on the diagram. The Colorado rule was urged in support of their contention.

The supreme court of Arizona declined to follow the doctrine of the Colorado courts, and in a well-considered opinion[2] asserts that,—

"The construction urged and supported by the Equator
"and subsequent Colorado decisions, violates the language

[1] 8th ed., p. 102.

[2] Watervale M. Co. v. Leach, 33 Pac. 418.

" of the statute, injects into it things not there, results in " conflict in the statute among its parts, and makes infi- " nitely more complex the old system of lode claims."

With reference to cases arising under the act of 1872, the rule announced in Arizona recognizes the controlling force of surface boundaries, and denies the right to the junior locator of a so-called cross lode to invade the domain of the senior claimant for any purpose. Says the court:—

" Section twenty-three hundred and twenty-two gives, " not the lode alone, but all lodes, veins, and ledges, " throughout their entire depth, the top, or apex, of which " lies inside of the surface lines of the claim extended " downward vertically; and as lodes may dip, so that, " when followed, they may be found to extend beyond the " boundaries of the claim, congress further provides that " they may nevertheless be followed. In other words, con- " gress has said to the miners, 'Comply with the require- " 'ments that we impose, and the government of the " 'United States will grant absolutely to you a piece of " 'the earth bounded at the surface by straight lines, dis- " 'tinctly marked, and by planes extending through those " 'lines to the center of the earth; and you shall have all " 'lodes of mineral-bearing rock whose apex is within " 'these boundaries.' This is simple, plain, and the miners' " rights are thereunder easy of ascertainment."

The opinion of the court is elaborate, and a clear exposition of the law from its standpoint. The court fails to see any conflict between the different sections of the law, and thus denies the necessity for invoking the rule of statutory construction applied by Judge Hallett.

The position assumed in this decision compels the owners of lodes located under the act of 1866 to adverse the application for patent filed by one asserting rights to an overlapping surface location. The right of the first locator to pursue his so-called cross lode into the overlapping claim is lost by failure to adverse. This is in harmony with the rule in Colorado[1] only so far as it affected the right to the ore at the space of intersection.

[1] Lee *v.* Stahl, 13 Colo. 174, 9 Colo. 208.

In California it has been held, that as to ledges, rights to which accrued prior to the act of May 10, 1872, the act itself reserves them without the necessity of adversing,[1] and the supreme court of Utah, by a divided court, coincides with the views announced in California;[2] but as to locations made subsequent to 1866, the supreme court of California agrees with the supreme court of Arizona.

The question presented to the California court[3] arose out of an attempt to locate a so-called cross lode over the surface of a prior location. The conflict between the two is illustrated in figure 29, the New Idea being prior in point of time.

In an elaborate opinion, written before the Arizona decision was published, the California court reached the same conclusion as that enunciated by the supreme court of Arizona.

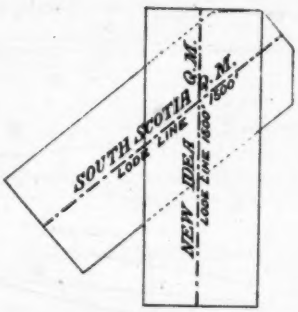



FIGURE 29.

Commenting on the Colorado rule, the supreme court of California asserts,—

"That it would leave the "rights of prior locators in "the greatest confusion: their "property interests in their claims would be undefined, "and the result would be ruinous litigation and perhaps "personal conflicts."

Chief Justice Beatty, whose great judicial experience in mining litigation in Nevada and California, in both trial and appellate courts, is a matter of current history, writes a concurring opinion, embodying additional reasons for the rule announced by the court.

The practical application of the Arizona-California rule is shown in the accompanying figure 30, which represents

[1] Eclipse G. & S. M. Co. *v.* Spring, 59 Cal. 304.
[2] Blake *v.* Butte Silver M. Co., 2 Utah, 54.
[3] Wilhelm *v.* Silvester, 101 Cal. 358.

a quarter section of land covered by official mining surveys in the Grass Valley region of the latter state, in which locality the California case arose.

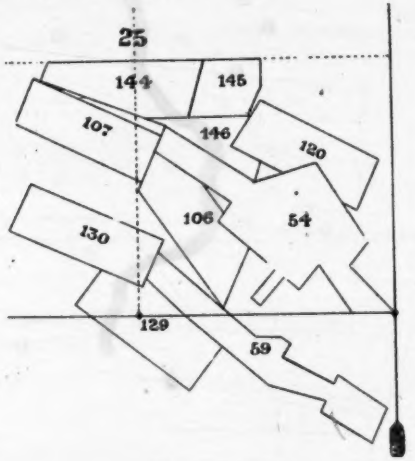



FIGURE 30.

A comparison of this figure with the one illustrative of the Colorado rule, shown on page 664, illustrates the radical difference between the two doctrines. The irregularly shaped surfaces shown in the California illustration are accounted for by patenting a number of claims in one group, showing only the exterior lines of the composite, a practice at one time followed by the land department. Under the existing rules, group surveys preserve the interior lines of all individual locations embraced therein.

We are convinced that we are justified in adopting the rule as expounded by the courts of Arizona and California in preference to Hall *v.* Equator, Branagan v. Dulaney, and the other Colorado cases. Not because more courts have decided one way than another, but for the reason that we believe that the logic and reasoning of the former cases are in line with the rules of construction applied by the supreme court of the United States to the act of 1872 in

other instances, and that the tendency of modern decisions is to recognize the controlling force of surface boundaries. Ever since the decision in the Flagstaff case, the supreme court of the United States has pursued the central idea of referring all rights in lode claims accruing under the act of 1872 to apex and exterior surface lines.

We are impressed with the belief that there is no middle ground between the Colorado and Arizona-California doctrines.

We therefore conclude that a subsequent locator has no right to invade the territory covered by a senior valid subsisting location, or to penetrate within vertical bounding planes drawn through its surface boundaries, except for the single purpose specified in the mining laws, and that is, in the lawful pursuit of a vein on its downward course, the apex of which is properly embraced within the junior location.

The practice of the land department in issuing conflicting junior patents with clauses of exemption and reservation, will be discussed when we consider the subject of patents and the proceedings by which they are obtained.

# A TREATISE

ON THE

# AMERICAN LAW RELATING TO MINES AND MINERAL LANDS

WITHIN THE

## PUBLIC LAND STATES AND TERRITORIES

AND

## GOVERNING THE ACQUISITION AND ENJOYMENT OF MINING RIGHTS IN LANDS OF THE PUBLIC DOMAIN

BY

CURTIS H. LINDLEY

OF THE SAN FRANCISCO BAR

IN TWO VOLUMES

VOLUME II

*"I hold every man a debtor to his profession; from the which, as men of course do seek to receive countenance and profit, so ought they of duty to endeavor themselves, by way of amends, to be a help and ornament thereto."*

*"Et opus desperatum, quasi per medium profundum euntes, cœlesti favore jam adimplevimus."*

*— From Dedication of Justinian's Institutes.*

SAN FRANCISCO

BANCROFT-WHITNEY COMPANY

LAW PUBLISHERS AND LAW BOOKSELLERS

1897

1897 Nov 19 ×
From Bisel

THE LAW ASSOCIATION
PHILADELPHIA.

COPYRIGHT, 1897,
BY
CURTIS H. LINDLEY.

# CHAPTER III.

## THE EXTRALATERAL RIGHT.


ARTICLE I. INTRODUCTORY.

II. EXTRALATERAL RIGHTS ON THE ORIGINAL LODE UNDER PATENTS ISSUED PRIOR TO MAY 10, 1872.

III. EXTRALATERAL RIGHTS FLOWING FROM LOCATIONS MADE UNDER THE ACT OF MAY 10, 1872, AND THE REVISED STATUTES.

IV. EXTRALATERAL RIGHTS ON OTHER LODES, CONFERRED BY THE ACT OF 1872 ON OWNERS OF CLAIMS PREVIOUSLY LOCATED.

V. CONSTRUCTION OF PATENTS APPLIED FOR PRIOR, BUT ISSUED SUBSEQUENT, TO THE ACT OF 1872.

VI. LEGAL OBSTACLES INTERRUPTING THE EXTRALATERAL RIGHT.


### ARTICLE I. INTRODUCTORY.


§ 564. Introductory.

§ 565. Origin and use of the term extralateral.

§ 566. The "dip right" under local rules.

§ 567. The right to pursue the vein in depth, prior to patent, under the act of July 26, 1866.

§ 568. Nature of estate in the vein, created by grant of the dip or extralateral right.


**§ 564. Introductory.**—The extralimital rights of a lode locator, other than the right to pursue the vein on its downward course out of and beyond his vertical bounding planes, are few and comparatively unimportant. The right to locate and hold a millsite in connection with a located lode under the first clause of section twenty-three hundred and thirty-seven of the Revised Statutes, may be said

to be extralimital. It is wholly dependent upon lode ownership. A loss of the lode location by forfeiture or abandonment would undoubtedly destroy the right to the associated millsite, unless it had thereon a quartz mill or reduction works, when an entry might be made thereof under the second clause of that section.

But the selection of a millsite is an independent act.[1] It is a *privilege* which may or may not be exercised. The same may be said of the permission granted by the act of June 3, 1878,[2] to cut timber for mining purposes upon public lands, which is a mere transitory privilege, not to be classified distinctively as a *right*.

The principal right which may be exercised beyond the boundaries of a lode location is that which is now commonly designated by the term "extralateral."

In determining the nature and extent of this right, it will be necessary to consider not only the provisions of the Revised Statutes, but also the act of July 26, 1866. As we have heretofore observed,[3] to a considerable extent this act and the titles issued under it are brought into connection, and are at least partly blended with the later, or present, legislative system and the titles held thereunder.

**§ 565. Origin and use of the term "extralateral."**— The word extralateral does not appear in any of the standard dictionaries. We are indebted to Dr. Raymond for its introduction into the mining literature of the period.[4] Its etymological signification is obvious. Its application, to denote the right to pursue a vein on its downward course, outside of and beyond vertical planes drawn through the side lines of a lode location, into and underneath the surface of adjoining or contiguous land, affords us a simple and comprehensive term with which to express a somewhat

[1] See, *ante*, § 521.

[2] 20 Stats. at Large, 88. Amended, Aug. 4, 1892, so as to apply to all public land states and territories.

[3] See, *ante*, § 60, p. 71.

[4] Law of the Apex, Trans. Am. Inst. Min. Eng., vol. xii., p. 387.

complex idea. The phrase "right of lateral pursuit," employed by Mr. Willard Parker Butler,[1] is an equivalent. Either expression, when used in connection with the federal mining laws, is free from ambiguity and sufficiently explicit.

**§ 566. The "dip right" under local rules.**—The "dip "right" of the early miner was the parent of the modern extralateral right. Whether, in framing their local regulations on this subject, the pioneers of the west drew their inspiration from the traditions of early German customs, which sanctioned the inclined location,[2] received their suggestions from mining on "rake veins" in Derbyshire,[3] or were induced to provide for following their vein on its dip indefinitely, on the consideration that the miner might obtain more that was valuable by this method than any other, is not at this late day necessary to inquire.

The fact remains, that ever since the discovery of the auriferous quartz veins of California, the "dip right" in some form has been an all-important attribute of the ownership of lodes and lode locations. The local regulations which established and governed this right, as well as all others during that period, were not framed with serious regard to precision of expression. The locator was entitled to so many linear feet on the lode, in whatever direction it might be found to run, "together with all the dips, spurs, "angles, and variations of the vein."

Sometimes additions were made to this vocabulary. For example: The miners of Reese River, Nevada, provided that,—

"Each claimant shall be entitled to hold by location "two hundred feet on any lead in the district, with all "dips, spurs, and angles, offshoots, depths, widths, varia- "tions, and all mineral and other valuables therein con- "tained."[4]

[1] School of Mines Quarterly, July, 1886.
[2] See, *ante*, § 43.
[3] See, *ante*, § 8.
[4] J. Ross Browne's Mineral Resources, 1867, p. 247.

These terms were supposed to be comprehensive enough to take laterally what the miner failed to obtain longitudinally. Much controversy arose in the early days over rights asserted under the claim to "spurs"; but generally speaking, the extent and character of the "dip right" was well understood and recognized. The exercise of the right was not hampered by bounding planes. As a rule, no surface lines were marked, and no surface occupant ever dreamed of contesting the privilege of a lode claimant of following his vein underneath such surface. Such privilege was sanctioned by the "American common law of "mining for the precious metals."[1]

Where surface boundaries were established, as they sometimes were, they were not looked upon as controlling any rights upon the located lode, either in length or depth.[2]

If there were disputes as to the common bounding plane between two claimants on a lode, they were usually adjusted by common consent, or resulted in consolidation of interests and the establishment of a common system of development. The law reports covering this period are barren of cases touching this subject.

To assert that end lines were inferred, and that these should be drawn across the lode at a right angle, or at any other angle, to the general course of the lode, is a matter of speculative theory. Lodes did not then, any more than now, pursue a uniform course. The first locator on a continuous vein might comply with this supposed theory, but a claimant locating a part of the same vein some distance removed from the original locator, at a point where the vein had changed its course, would be compelled to accommodate himself to local conditions, leaving intermediate locators with end lines either converging towards or diverging from those established by one or the other of the previous locators.

Whatever may be said of the rule of implied end lines of locations made under the act of July 26, 1866, and their direction with reference to the course of the vein, it cannot

[1] King v. Edwards, 1 Mont. 235. [2] See, *ante*, § 59.

be demonstrated that any definite rule ever actually prevailed during the period when local rules and customs held unquestioned sway.

The nature and extent of the dip right, as established and recognized by the local customs and rules of miners during the period antedating legislation by congress, were substantially as above indicated.

**§ 567. The right to pursue the vein in depth, prior to patent, under the act of July 26, 1866.**— Section four of the act of July 26, 1866, contained the following provision:—

"No location hereafter made shall exceed two hundred "feet in length along the vein for each locator, with an "additional claim for discovery to the discoverer of the "lode, with the right to follow such vein to any depth, "with all its dips, variations, and angles, together with "a reasonable quantity of surface for the convenient work-"ing of the same, as fixed by local rules. . . ."

This act was but the crystallization of the miners' rules and customs.[1] It in no respect enlarged the right of the claimant beyond that which the rules of the mining district gave him.[2] It restricted the locator to one lode,[3] but made no provision for the establishment of surface boundaries as *an act of location*.

We are instructed by Judge Field, that although not in terms mentioning end lines, such were necessarily implied.[4]

Where surface land was appropriated in connection with a linear location on the ledge, it was intended solely for the convenient working of the mine, and did not measure the miner's right, either to the linear feet upon its course, or to follow the dips, angles, and variations of the vein.[5]

[1] Jennison v. Kirk, 98 U. S. 453; Broder v. Natoma Water Co., 101 U. S. 275; Blake v. Butte S. M. Co., 2 Utah, 355.

[2] Eureka Case, 4 Saw. 323.

[3] *Id.*; Eclipse G. & S. M. Co. v. Spring, 59 Cal. 304; Walrath v. Champion M. Co., 63 Fed. 552.

[4] Eureka Case, 4 Saw. 323.

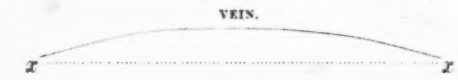
[5] See, *ante*, § 58.

The line of the location, the number of linear feet claimed along the course of the vein, measured his right as to length.

While the act clearly granted the privilege of pursuing the vein in its downward course, there was no attempt at defining the bounding planes which limited the right.

While, as heretofore observed, end lines may have been inferred, for the simple reason that the miner's pursuit of the vein on its strike must cease at some point, the direction to be given to the lines and the angle at which they were to be drawn with reference to the course of the vein were not necessarily inferred. We have the highest authority for the statement that these end lines were not required to be parallel.[1]

Judge Field has said in the Eureka case, that lines drawn vertically down through the ledge, or lode, *at right angles* with a line representing its general course at the ends of the claimant's line of location, will carve out, so to speak, a section of the ledge, or lode, within which he is permitted to work, and out of which he cannot pass. If the general course is to be considered as a straight line connecting the linear extremities of the location indicated thus,—




by the dotted line, *x x*, the application of Judge Field's rule would necessarily result in a parallelism of end lines, which he says is not required. If each end line is to be drawn at right angles to the local trend, as indicated at the respective points where the linear measurement on the vein begins and ends, they never could be parallel, except in the case of ideal veins pursuing a uniform course.

While we may concede, for the purpose of argument, that the theory of the law of 1866 was to give to the miner only

[1] Eureka Case, 4 Saw. 323; Iron S. M. Co. v. Elgin M. Co., 118 U. S. 196–208.

so much of the vein underneath as he had appropriated upon the surface, the act did not define in what manner the bounding planes were to be established. The method suggested by Judge Field, applied to the ideal lode, would accomplish this result, the lines being parallel. The same object would be gained by drawing parallel lines across the vein at any angle. The truth is manifest. The act is crude and imperfect. Congress never anticipated the numerous intricate questions which might possibly arise under it, and the courts were compelled to exhaust their ingenuity in construing it so as to prevent the destruction of the large property interests which had grown up under the system of local rules which congress intended to perpetuate through the medium of congressional law.

What we have thus far said with regard to dip rights under the act of 1866 applies only to unpatented claims located under the act. The proceedings culminating in a patent gave greater precision to the location, and as a rule, definitely fixed that which theretofore was more or less uncertain.

There are but few instances, at the present time, of mining claims originating under this act which have been continuously perpetuated without applying for a patent.

Our object in presenting a review of the law was simply to show the historical evolution of the present extralateral right.

§ 568. **Nature of estate in the vein, created by grant of the dip or extralateral right.**—Before proceeding to a detailed discussion of the nature and extent of the dip or extralateral right as sanctioned by the legislation of congress, it is of considerable importance that we understand the underlying theory upon which the right is based. A proper conception of this theory will, in our judgment, materially aid us in reaching a correct solution of some of the complicated questions arising out of this element of the federal law.

In discussing some of the incidents of the ownership of

veins, or of land containing them, the courts frequently refer to the common law rule of property, and in commenting upon that feature of the American mining law which awards under certain conditions the right to the pursuit of a vein outside of and beyond vertical planes drawn through the surface boundaries, draw the conclusion that this so-called dip or extralateral right is in contravention of the common law. Strictly speaking, this is inaccurate. The grant of the right of lateral pursuit is, in legal effect, a severance of the estate in the vein from the ownership of the soil into which it penetrates after passing beyond the vertical planes drawn through the surface boundaries of the location or patent.

The government being the owner of the fee may carve from it the ownership of the vein. It may grant the surface to one and the vein to another.

There was nothing in the common law which prohibited this severance. In fact, it was expressly sanctioned, as we have heretofore shown.

"Nothing was more common than to sell or demise a "piece of land, excepting the mines, and when the surface "and underlying mines or the different strata of the sub-"soil were differently owned, they were separate tenements, "with all the incidents of separate ownership—a distinct "possession and distinct inheritance."[1]

Therefore, when the government grants a vein with the right to pursue it in depth indefinitely, the title to the vein is severed out of the adjoining land into which it penetrates, and the estate in the land overlying the dip is to that extent lessened. Instead of being in derogation of the common law, this class of grants is in absolute harmony with it. It is not true, therefore, that the statute should be strictly construed because it contravenes the common law. This dip or extralateral right is not a mere easement. The estate thus granted in the vein is of the same dignity as that of a title in fee. It *is* a title in fee as to the vein granted. This grant of the fee in the vein may

[1] See, *ante*, § 9, and authorities cited in notes.

be accompanied by certain easements. To illustrate: The right to follow the vein into adjoining lands frequently cannot be exercised without disturbing some portion of the inclosing rocks. The grant of the vein necessarily carries with it whatever is reasonably required for its enjoyment and without which the grant would be ineffectual. But the estate in the vein is a fee simple estate.

It may be said that these are elementary rules. This is quite true, but they are frequently either overlooked or ignored.

The act of 1866 was, in effect, a proclamation severing veins and lodes of the character specified from the body of the public domain. It was the announcement of a governmental policy, whereby ledges within the earth were to be considered as distinct entities, and to be dealt with as such in administering the public land system.

This policy has never been changed. It is as much a part of the existing system as it was of the one which it succeeded.

## Article II. Extralateral Rights on the Original Lode under Patents Issued Prior to May 10, 1872.

§ 572. The right to patent under the act of 1866, and its restriction to one lode.
§ 573. The functions of the diagram and the surface lines described in the patent as controlling rights on the patented lode.
§ 574. Rights of patentee under the act of 1866, where the end lines converge in the direction of the dip.
§ 575. Rights where the end lines diverge in the direction of the dip.
§ 576. Under the act of 1866, parallelism of end lines not required — Doctrine of the Eureka case.
§ 577. Conclusions.

**§ 572. The right to patent under the act of 1866, and its restriction to one lode.**—The act of July 26, 1866, contained the following provision:—

"Whenever any person or association of persons claim "a vein, or lode, of quartz, or other rock in place, bearing "gold, silver, cinnabar, or copper, having previously occu- "pied and improved the same according to the local cus- "toms or rules of miners in the district where the same is "situated, and having expended in actual labor and im- "provements thereon an amount of not less than one thou- "sand dollars, and in regard to whose possession there is "no controversy or opposing claim, it shall and may be "lawful for said claimant or association of claimants to file "in the local land office a diagram of the same, so ex- "tended laterally or otherwise as to conform to the local "laws, customs, and rules of miners, and to enter such "tract and receive a patent therefor, granting such mine, "together with the right to follow such vein, or lode, with "its dips, angles, and variations, to any depth, although it "may enter the land adjoining, which land adjoining shall "be sold subject to this condition."

In another portion of this work we have commented upon the construction given to this section by the land department, and have there illustrated some of the results flowing from the earlier attempts to administer the law.[1]

While the method of location sanctioned by this act has long since passed into history, and we are not necessarily called upon to speculate upon the subject of dip rights as applied to individual claims prior to patent, beyond the historical summary outlined in a preceding section, there is left us a legacy of numerous patents issued under the provisions of the repealed law, which, to some extent at least, demands serious attention. We shall always have these patents with us. While for many years they have existed unobtrusively, in recent times, particularly in the older quartz camps of California, a revival of the mining industry has brought them to light, and the attention of the courts is directed to the adjustment of controversies arising out of rights asserted under them. They are entitled to more than a passing consideration. It is not to be expected that we should anticipate every possible question that may arise out of the peculiar form of some of

[1] See, *ante*, § 59, figs. 1 and 2.

these early patents. Our purpose is to establish, if possible, the general rules of construction, to be applied to them as affecting the dip or extralateral right, but not to suggest grounds of attack or defense in individual cases, unless the points involved have heretofore forced themselves upon the notice of the courts.

With the exception of the hypothetical case discussed in a succeeding section,[1] we are to construe these patents, at present, solely in the light of the act under which they were issued, without regard to any supplemental or additional rights conferred upon their owners by virtue of the act of May 10, 1872. They granted but one lode, which we call the original, to distinguish it from other lodes which might be ultimately discovered within the surface limits. These patents uniformly contained the following restrictive clause:—

"The grant hereby made is restricted to one vein, or "lode, with the surface ground; to wit, the ——— ledge, "upon which the required improvements are found; and "that any other vein, or lode, should such be discovered "within the above described lot of land, shall be, and "hereby is, expressly excepted and excluded from these "presents."

**§ 573. The function of the diagram and the surface lines described in the patent as controlling rights on the patented lode.**— It is unnecessary to elaborate what we have heretofore noted in the historical portion of this work, with reference to the effect of a patent issued under the act of 1866, upon the right to pursue the vein on its course.[2] We are now dealing with the pursuit of the vein in depth. The diagram required to be filed defined with certainty the extent of the miner's claim upon the lode. It also gave precision to the extent of surface which he was permitted to take in connection with the lode, under the local rules in force in the district. Where these rules fixed a uniform width of so many feet on each side of the vein, the

[1] See, *post*, § 576. [2] See, *ante*, § 59.

diagram as prepared, and the patent as subsequently issued, presented upon the surface a symmetrical figure in the form of a parallelogram. In many districts, however, no definite area was fixed. In such cases, the claimant was authorized to select, adjoining his lode or some portion of it, such a quantity of surface as was reasonably necessary for his use in connection with the proper working of his vein. This was construed to mean ground for dumpage purposes, the erection of mills, the deposit of tailings, and other purposes connected with the conduct of mining operations, and resulted in passing to patent surface areas of all conceivable forms. The boundaries were fixed without regard to the course of the vein, nor was it originally contemplated that in fixing them they would control the miner's rights upon his discovered vein. This came to him as a revelation after patents were issued and the courts commenced to construe them. Frequently, during the pendency of patent proceedings, adverse claims intervened, causing diminution of the area as shown upon the posted diagram, producing irregularity of form where, as originally applied for, it was regular. In many instances, no regard was paid to the direction given to the lines which we call end lines, marking the linear limits on the located lode. There was nothing in the letter of the law requiring the locator to treat this as an essential requirement.

These circumstances produced four classes of patents:—

*First*—Those which defined a small surface area upon which the improvements were situated, the length of the lode claimed being represented by a line produced as shown in the case of the Idaho mine, in figure 1 on page 67;

*Second*—Those whose end lines were substantially parallel, crossing the lode as shown in the case of the Providence mine, a diagram of which is shown in a succeeding section;

*Third*—Those whose end lines crossed the lode, but converged in the direction of the dip;

*Fourth.*—Those wherein such lines crossed the lode, but diverged in the direction of the dip.

Those of the first class are few in number. We are not aware that they have been involved in any controversy beyond that suggested in the Idaho-Maryland case in a preceding section.[1] They are relatively unimportant. This fact, together with motives of professional delicacy, excuse the author from discussing them.

Patents of the second class conform to the ideal standard, and present no possible ground for discussion.

The third and fourth classes, particularly the latter, require serious consideration.

As preliminary to the treatment of these two classes, we announce the view, that the *direction of the end lines as defined in the patent, whether converging or diverging in the direction of the dip, control, define, and limit the extralateral right.* That is to say, *the extent of the extralateral right is to be determined by reference to these end line boundaries, and not by imaginary or hypothetical planes, regardless of the direction of the patented end lines.* Our reasons for this will be noted when dealing with the respective classes under consideration.

**§ 574. Rights of patentee under the act of 1866, where the end lines converge in the direction of the dip.**—It requires no argument to determine the extent of the extralateral right accorded to a patentee under the act of 1866, where the patented end lines converge in the direction of the dip. Our attention has not been called to the precise case where a patent of this character was issued prior to the passage of the act of May 10, 1872, but there are several instances where patents were issued upon proceedings instituted while the act of July 26, 1866, was still in force. The patent issued to the Wyoming mine, in Nevada county, California, which was involved in the case of Consolidated Wyoming Mining Co. *v.* Champion Mining Co.,[2]

[1] See, *ante*, § 59.

[2] 63 Fed. 540.

was of this class. While the problem is so simple that illustration is almost superfluous, we present, in figure 31, a diagram showing the surface boundaries of the Wyoming mine and the course of the lode, which crossed both end lines.

Vertical planes drawn through these end lines, produced in the direction of the dip, indicated by the arrow, gave to the patentee the segment of the vein indicated in horizontal projection on the diagram by the triangle *a b g*.

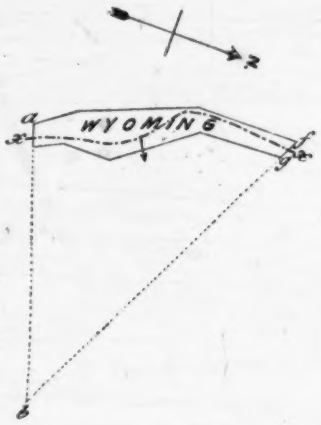



FIGURE 31.

It was conceded in this case, that whatever rights the Wyoming Company might have had prior to its application for patent, when it had its claim surveyed by the United States surveyor, and permitted him to give the end lines the direction indicated, it was estopped under its patent from any further claim outside of the lines which were fixed by the surveyor; that as vertical planes drawn downward through these end lines, produced in their own direction, intersected along a perpendicular line represented by the point *b*, the extralateral right ceased at this line of intersection.

A similar instance is illustrated in figure 15, page 417, which represents the patented surface area of the North Star mine, with converging end lines. In this case,[1] Judge J. H. Beatty, commenting upon this convergence, said,—

"That the end lines are not parallel, cannot be the basis "of an objection, because their convergence, when extended "in the direction of the dip of the vein, would give defend-"ant less, instead of more, than the law provides for."

[1] Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. 597.

It would be absurd to say that the courts can readjust the patented lines so as to perfect the grant to a uniform length throughout the depth. Courts cannot grant anything; their function is limited to the interpretation of the instrument of conveyance.

It is unnecessary to here discuss the force and effect of a patent issued upon proceedings pending and undetermined at the time the act of May 10, 1872, was passed. We shall have occasion to consider this question in a subsequent article. The rule announced by Judge Beatty, which had been conceded in the Wyoming-Champion case, is undoubtedly the correct one to be applied to patents issued under either act.

**§ 575. Rights of patentee under the act of 1866, where the end lines diverge in the direction of the dip.** —For the purpose of illustrating a case where the end lines diverge in the direction of the dip, we may take the patented surface area of the Wyoming mine, shown in figure 31, simply reversing the direction of the dip, as indicated by the arrow. Producing these end lines indefinitely in their own direction, as shown on the accompanying diagram, figure 32, it is manifest, that the farther these lines are produced, the greater the length of the lode included between them, so that, if vertical planes drawn through these extended end lines define the extralateral right, the patentee receives more of the vein in length beyond his side lines than he has within his surface boundaries. As the courts cannot convey to a patentee more than his patent lawfully covers, they cannot deprive him

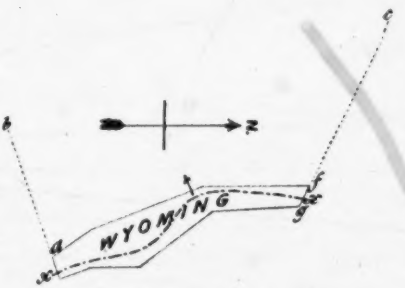



FIGURE 32.

of anything legally embraced within it. The sole question involved is, What passes by such an instrument? We are not particularly concerned with the phraseology of the patent. The land department is but an agent of the government, and its powers can only be exercised within the limits fixed by the act. The patent cannot be broader than the law.

It may be assumed, that the instrument of conveyance describes the surface boundaries, and grants the tract thus described, together with the right to follow the vein, or lode, to the distance expressed in linear feet, which may be assumed to represent the length between the two end lines, "with its dips, angles, and variations to any depth," as specified in the statute.

The question presented by the hypothetical case under consideration suggests several methods of solution, out of which the true one is to be selected.

(1) As by the direction given to the end lines the claimant has asserted a right to more linear feet of the vein in depth than he has included within the surface boundaries, therefore he shall have none of the vein beyond the vertical planes drawn through the surface boundaries. In other words, the patentee's rights are exclusively intralimital, as in the case of irregular locations under the act of 1872.[1]

(2) As the theory of the act was, that the patentee should only have so much of the length of the vein throughout its entire depth as he has linear feet within his surface boundaries, the courts must whet the judicial carving-knife and lop off, at one end or the other, such a segment of the vein as will rectify the inequalities of length.

(3) The patentee is entitled to so much of the vein throughout its entire depth as is found within vertical planes drawn through the end lines, extended in their own direction, regardless of their divergence or non-divergence in the direction of the dip.

[1] See, *ante*, § 552.

However plausible may be the reasoning in support of one or the other of these suggested methods, no solution will be accepted which is not in consonance with principles which have received the highest judicial sanction, nor which does violence to the rules of interpretation which, by reason of their frequent reiteration, have become axiomatic. What are these principles and rules which may be fairly invoked in aid of a correct solution, and which may be stated without begging the question? There are at least two, which, in our judgment, cannot be challenged. They may be thus enunciated:—

*First—Under the act of 1866, parallelism of end lines was not required:*

*Second—The extent of the rights conferred by the patent must be measured with reference to the direction of the surface lines as described in that instrument. There can be no arbitrary or conventional readjustment of such lines after patent, for any purpose.*

If these propositions are correctly stated, and their binding force is unequivocally established, they may afford, in connection with their corollaries, the key to the situation. We will consider them in the order named.

§ 576. **Under the act of 1866, parallelism of end lines not required—Doctrine of the Eureka case.**—There is probably no single case found in the books which is more familiar to the mining practitioner than the one generally known as the "Eureka case," tried before Justice Field and Judges Sawyer and Hillyer, three of the most eminent mining judges of the west. The opinion written by Justice Field has always been regarded as a judicial classic. Therein was announced the first judicial definition of the words "lode" and "vein," subsequently adopted by the supreme court of the United States, and reannounced by the courts of last resort in all the mining states and territories. We are presently concerned with so much of the opinion only as affects the subject of the dip or extra-

lateral right as applied to mining claims acquired under the act of July 26, 1866.

In order to apply the doctrine of that case to the hypothetical one under consideration, as well as for purposes of convenience, we herewith reproduce the diagram accompanying the opinion.[1]

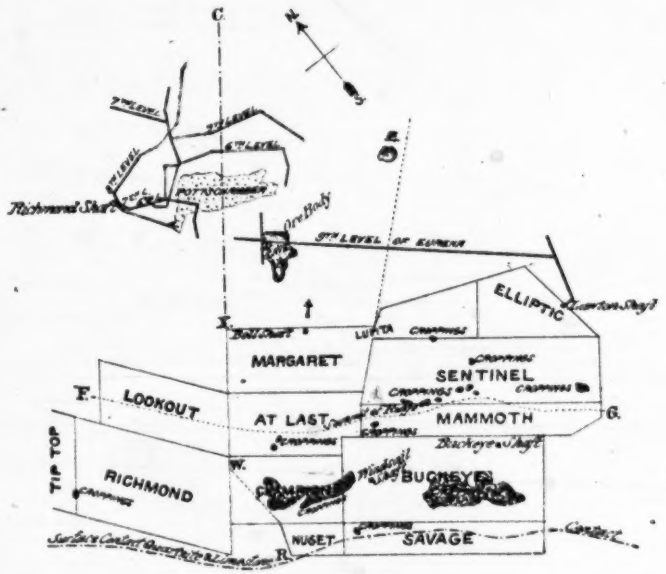



FIGURE 33.

For illustrative purposes, we have produced the east end lines of the At Last and Margaret claims in the direction of the dip, as indicated by the dotted line, thus showing a state of facts similar to that now under consideration and exhibited in figure 32.

The Eureka Company, plaintiff in the case, asserted the right to so much of the "Potts Chamber" as lay to the east of a vertical plane drawn through the west end lines

[1] 4 Saw. 302; 9 Morr. Min. Rep. 578; 8 Fed. Cases, 819.

of the Champion, At Last, and Margaret claims, produced, that is, the line W X C.

Objection was taken by defendant to the validity of the patents to these two claims, because the end lines of the surface locations as patented are not parallel, as required by the act of 1872, both patents having been issued subsequent to the passage of the act. When the locations were made upon which the patents were based does not appear. It must be noted that the Eureka Company as plaintiff in the case was compelled to affirmatively establish its right to the ore bodies in dispute. Therefore, the extent of its extralateral right was necessarily involved. We quote so much of the opinion of the court as deals with this particular branch of the case.

"Within the end lines of the locations, as patented in "all these cases, when drawn down vertically through the "lode, the property in controversy falls. Objection is taken "to the validity of the last two patents, because the end "lines of the surface locations patented are not parallel, as "required by the act of 1872; but to this objection there "are several obvious answers.

"In the first place, it does not appear upon what loca- "tions the patents were issued. They may have been, and "probably were, issued upon locations made under the act "of 1866, *where such parallelism in the end lines of surface loca- "tions was not required.* The presumption of the law is, "that the officers of the executive department specially "charged with the supervision of applications for mining "patents and the issue of such patents, did their duty; and "in an action of ejectment, mere surmises to the contrary "will not be listened to. If, under any possible circum- "stances, a patent for a location without such parallelism "may be valid, the law will presume that such circum- "stances existed. . . .

"In the second place, the provision of the statute of "1872 requiring the lines of each claim to be parallel to "each other, is merely directory, and no consequence is "attached to the deviation from its direction. Its object is "to secure parallel end lines drawn vertically down, and "that was effected in these cases by taking the extreme "points of the respective locations on the length of the "lode.

"In the third place, the defect alleged does not concern "the defendant, and no one but the government has the "right to complain."

When the case reached the supreme court of the United States on writ of error, that court, speaking through Chief Justice Waite, said:—

"Upon the face of the patents, the United States has "granted to the Eureka the right to all veins, lodes, and "deposits, the tops, or apices, of which lie on the inside of "its surveys as patented, throughout their entire depth and "wherever they may go, provided it keeps itself within the "end lines of the surveys. The findings, that the ground "in dispute is within the end lines, and that the apex is "within the surface, settles the rights of the parties be-"tween themselves, as well under their patents as under "their compromise agreement."[1]

In the Elgin case, the same court, speaking through Justice Field, modified the views of the trial court expressed in the Eureka case (without referring to it), with respect to the effect of non-parallelism of end lines, under the act of 1872, but re-announced the rule, that such parallelism was not required under the act of 1866.[2]

The rule has ever since been fully recognized and followed in the circuit courts.[3]

What are the logical results flowing from this doctrine as applied to the exercise of the extralateral right in cases of diverging end lines, as illustrated in the hypothetical case under consideration? The statement of the rule, that parallelism of end lines was not required under the act of 1866, is the announcement of something more than a mere abstraction. The necessity for parallelism was not urged in any of the cases heretofore cited, for the purpose of assailing any intralimital rights. Even under the act of 1872, which requires parallelism, a disregard of this requirement does not affect this class of rights.[4]

[1] Richmond M. Co. *v.* Eureka M. Co., 103 U. S. 839, 847.

[2] Iron S. M. Co. *v.* Elgin M. Co., 118 U. S. 196, 208.

[3] Walrath *v.* Champion M. Co., 63 Fed. 552, 556; Cons. Wyoming G. M. Co., *Id.* 540, 550; Carson City G. & S. M. Co. *v.* North Star M. Co., 73 Fed. 597, 599.

[4] See, *ante*, § 552.

The conclusion drawn from the adjudicated cases is irresistible, that a patentee under the act of 1866, with diverging end lines, is entitled to pursue his vein on its downward course, outside of and beyond a vertical plane drawn through his side boundaries. The only remaining question to be determined is, Within what limits may the right be exercised?

Judge Field, speaking of the local rules before the court in the Eureka case, said: —

"What the miners meant by allowing a certain number "of feet on a ledge was, that each locator might follow his "vein for that distance on the course of the ledge, and to "any depth within that distance. So much of the ledge he "was permitted to hold as lay within vertical planes, drawn "downward through the end lines of the location, and "could be measured anywhere by the feet on the surface. "If this were not so, he might, by the bend of his vein, "hold under the surface along the course of the ledge dou- "ble and treble the amount he could take on the surface. "Indeed, instead of being limited by the number of feet "prescribed by the rules, he might, in some cases, oust all "his neighbors and take the whole ledge. No construction "is permissible which would substantially defeat the limi- "tation of quantity on a ledge, which was the most impor- "tant provision in the whole system of rules."[1]

And yet he sustained the Eureka's right, under its patent, to an ore body lying outside of the surface boundaries, within diverging end line planes, and the appellate court assigned as one of its reasons for affirming the judgment, that the ore body in dispute was so situated between such planes.

Suppose the ore body in dispute had been found to the west of and immediately adjoining the extended easterly end line of the Margaret and Last Chance at the point z, on figure 33, and the Eureka had been called upon to affirmatively prove its right to it, would not the same rule be equally applicable? Would not the doctrine apply to any ore body, part of the continuous vein,

[1] Eureka Case, 4 Saw. 302.

encountered at any intermediate point between the extended end line planes? It seems to us that the doctrine of this case gives to the patentee all portions of the vein embraced between the two planes; and the fact, that it gave him more in depth than he had on the surface, cannot be invoked to control or qualify the plain proposition of law announced by the court. The fact, that the courts upheld the contention of the Eureka Company as to the effect of the compromise agreement, which was also involved in the case, does not militate against the force of its ruling as to that company's rights under the patent. Both questions were involved, were separately discussed, separately considered and decided.

We do not conceive that Judge Field intended to convey the idea, that while the extralateral right might be exercised to some extent in the case of diverging end lines, the courts could define that extent in an action between private parties by constructing an end line plane and cutting off an underground segment of the vein at one end or the other, so as to equalize the length throughout. There can be no arbitrary or conventional readjustment of lines after patent. The courts cannot make locations for mining claimants. They cannot relocate the claim and make new side lines or end lines.[1] This rule is just as applicable to patents issued under the act of 1866 as it is to those acquired under the existing system. This follows as a logical deduction from all the decisions promulgated since the Flagstaff-Tarbet case.

It seems to us, that the patentee of a lode claim issued in the form and under the conditions illustrated by figure 32, is entitled to all the vein betweeen the end line planes extended in their own direction. Congress contemplated that such results might legally flow from patents issued under the act of 1866, and to prevent the future possibility of such inequalities arising, inserted in the act of 1872 a mandatory provision requiring all end lines thereafter to

[1] King v. Amy & Silversmith M. Co., 152 U. S. 222, 228.

be parallel. If the courts were permitted to readjust lines under the prior law, so as to avoid such results, there would have been no necessity for this provision of the later act. The mischief under the old law was, the possibility of a patentee obtaining more of the vein in depth than he had on the surface. The remedy was found in the provision requiring end lines to be parallel.

It may be said, that patents issued under the act of 1866 did not contain any granting clause giving to the patentee all parts of the vein lying between vertical planes drawn through the end lines, extended in their own direction. This is quite true. If such were not the legal effect of the patent, the act of May 10, 1872, supplied this clause.

Section three of this act[1] provided that,—

"The locators of all mining claims *heretofore made* . . . "shall have the exclusive right of possession and enjoy- "ment of all the surface included within the lines of their "locations, and of all veins, lodes, and ledges throughout "their entire depth, the top, or apex, of which lies in- "side of such surface lines extended downward vertically, "although such veins, lodes, or ledges may so far depart "from a perpendicular in their course downward as to "extend outside of the vertical side lines of such surface "locations; but their right to possession to such outside "parts of such veins, or ledges, shall be confined to such "portions thereof as lie between vertical planes drawn "downward through the end lines of their locations, so "continued in their own direction that such planes will "intersect such exterior parts of such veins, or ledges."

The grant is not confined to locations theretofore made, the end lines of which were parallel, but included all mining locations theretofore made.

The provision for parallelism of end lines is found in section two of the act,[2] and of course applies only to claims located subsequent to its passage.

§ 577. **Conclusions.**—We think we have shown abundant justification for the conclusion, that whatever may be the form of a surface area described in a patent issued

[1] Rev. Stats., § 2322. [2] Rev. Stats., § 2320.

under the act of 1866, the extralateral right of the patentee is to be defined by drawing vertical planes through the end lines, produced in their own direction indefinitely. The end lines are such as cross the originally located lode. Whatever segment of the lode may be found between these end line planes belongs to the patentee.

If by any process of reasoning this doctrine may be qualified, no one but the government and the patentee can complain. Neither subsequent appropriators of the surface overlying the dip beyond the patentee's side lines nor adjoining locators have any cause of complaint.[1]

## ARTICLE III. EXTRALATERAL RIGHTS FLOWING FROM LOCATIONS MADE UNDER THE ACT OF MAY 10, 1872, AND THE REVISED STATUTES.

§ 581. Introductory.
§ 582. Parallelism of end lines a condition precedent to the exercise of the extralateral right.
§ 583. Entire width of apex to be included in the location — "Broad lodes."
§ 584. Vein entering and departing through the same side line.
§ 585. The extralateral right applied to the ideal lode.
§ 586. Vein crossing two parallel side lines — The Flagstaff case.
§ 587. Same — The Argentine-Terrible case.
§ 588. Same — The King-Amy case.
§ 589. Deductions from side-end line cases — Extralateral right in such cases defined by vertical planes drawn through the side-end lines produced.
§ 590. Vein crossing two opposite non-parallel side lines.
§ 591. Vein crossing one end line and a side line.
§ 592. Vein with apex wholly within the location, but crossing none of its boundaries, or entering at one end line and not reaching any other boundary.
§ 593. Extralateral right as to veins other than the one upon which the location is based.
§ 594. Conclusions.

**§ 581. Introductory.**—We are now to consider the subject of extralateral rights flowing from locations initiated

[1] Eureka Case, 4 Saw. 302.

subsequent to the passage of the act of May 10, 1872, and to note the conditions and limitations under which they may be exercised. No branch of the mining law presents so many intricate and varied questions, and there is none more difficult to treat comprehensively and concisely. Certain important principles governing it have been established, and are beyond the domain of speculation. Others await the decision of the supreme court of the United States, the final arbiter upon all questions arising under the federal laws.

Manifestly, the application of the law to individual cases requires the consideration of physical conditions existing in each. Where a patented surface area is invaded, the patentee need but produce the instrument under which he deraigns title from the paramount proprietor, to put the invader upon proof of justification; but where, in pursuit of his vein on its downward course, out of and beyond vertical planes drawn downward through his surface boundaries, his right is challenged, he is called upon to show something more than appears upon the face of the patent, and establish facts, the existence of which are not even, *prima facie*, presumed from that instrument.

Naturally, therefore, the discussion leads us into geological questions, sometimes simple, at others complex. The peculiar facts found in one case may never have their precise parallel. For that reason, each case presented must be analyzed in the light of the facts established, or as they appeared to the court deciding it. We may have to reach the ultimate goal by circuitous routes and easy stages, but we do not anticipate meeting with insurmountable obstacles.

Let us first consider the circumstances under which there is a total denial of all extralateral rights, thus eliminating this class of cases from the necessity of future consideration.

**§ 582. Parallelism of end lines a condition precedent to the exercise of the extralateral right.**— It is needless to quote the language of sections twenty-three hundred

and twenty, and twenty-three hundred and twenty-two of the Revised Statutes. The former prescribes the nature and extent of the location, and the latter defines the extent of the extralateral right. The law does not in terms impose as the penalty for failure to parallel the end lines, the deprivation of all extralateral right, but the courts construing the two sections together have announced the conclusion, that such parallelism is essential to the exercise of the right. When we speak of end lines, we mean such lines as are crossed by the lode on its course. As we have heretofore noted, side lines may become end lines, or as we have called them, side-end lines,[1] for descriptive purposes.

The leading case upon the subject of non-parallelism, and the consequences flowing from it, is that of the Iron Silver Mining Company *v.* Elgin Mining Company, decided by the supreme court of the United States,[2] familiarly known as the "Horseshoe case," the illustration of which is photographed upon the brain of every mining practitioner.

The doctrine there announced is as follows:—

"Under the act of 1866 parallelism in the end lines of "a surface location was not required, but where a location "has been made since the act of 1872, such parallelism is "essential to the existence of any right in the locator or "patentee to follow his vein outside of the vertical planes "drawn through the side lines. His lateral right by the "statute is confined to such portion of the vein as lies "between such planes drawn through the end lines and "extended in their own direction; that is, between parallel "vertical planes. It can embrace no other."

We reproduce the diagram for illustrative purposes.

The case arose, as did all others in which the Iron Silver Mining Company was involved, out of conflicting rights to certain portions of the blanket deposits of Leadville. Dr. Raymond discusses the case fully in his monograph, "Lode Locations."[3]

[1] See, *ante*, § 367.
[2] 118 U. S., 196.
[3] Trans. Am. Inst. Min. Eng., vol. xv., p. 272.

It appears that the line marked "apex" in figure 34 represents a vein exposure caused by the erosion of California gulch, the only exposure found in that neigborhood. The

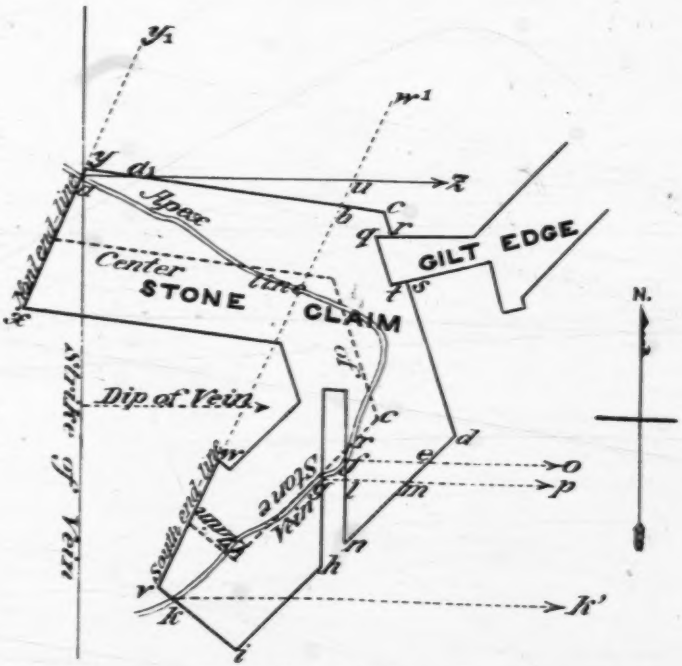



FIGURE 34.

vein on its downward course had a slight inclination from the horizon in the direction of the Gilt Edge. The form assumed by the line of vein exposure may be illustrated in a homely way by a bite taken out of a sandwich.

In another portion of this treatise,[1] we have presented geological cross sections illustrating the position in the earth of this form of deposit, showing the difficulties of determining which is the strike and which is the dip of

[1] See, *ante*, pp. 404, 405.

the vein. Assuming the vein exposure to be an apex, the predecessor in title of the Iron Silver Mining Company laid his location along what he supposed to be the course of the vein, producing the fantastic results shown in the figure, being unable to draw a line at the southwestern terminus of the so-called apex, which would be across the apex and at the same time be parallel to the northwest end line, *x y*. The so-called apex crossed the line, *v i*, which was not parallel to *x y*, the two lines diverging at an obtuse angle in the direction of the dip. Therefore, the right to pursue the vein underneath the Gilt Edge claim was denied. A strenuous plea was made in the case for the judicial readjustment of the boundaries, so as to give to the Iron Company a segment of the vein in depth, but the court held, as we have heretofore observed, that it had no power to make locations, but that the miner must stand or fall upon the one he makes himself.

While the local conditions out of which this case arose were peculiar, there is no reasonable expectation that the doctrine of the case, as hereinbefore quoted, will be disturbed where the lines crossing the lode diverge in the direction of the dip.

It has been applied by Judge Knowles to a location having the form of a triangle,[1] and will undoubtedly control all forms of locations, varying from a square to a crescent, where the production of the end lines would create exaggerated inequalities in length as the vein is followed in depth.

Where, however, the two lines crossing the lode converge in the direction of the dip, intersecting as they are produced, at some point beyond the side lines, we cannot see upon what principle the doctrine can be maintained. Where the reason of the rule ceases, the rule itself should cease. It is absurd for the courts to say to a claimant with converging end lines: "The law permits you to take as "much of the vein in its downward course, beyond the

[1] Montana Co., Limited, *v.* Clark, 42 Fed. 626.

"side lines, as you may include within parallel surface end "lines. You have taken less than you might have acquired, "therefore you shall have nothing."

What we have heretofore said upon this subject of converging end lines under the act of 1866,[1] applies with equal force to locations made under the later laws.

With this qualification, there can be no question as to the scope and meaning of the rule announced in the Elgin case.

We have heretofore noted,[2] that the supreme court of California, following the *dictum* of Judge Field in the Eureka case, has stated that the provisions of the act of 1872, requiring the end lines of each claim to be parallel, is merely directory, and no consequence is attached to a deviation from its direction.[3]

In the case wherein this was announced, the controversy was over the possession of the surface. It involved only intralimital rights, and as fully explained in preceding sections,[4] this class of rights is not affected by the form of the location, so long as the area included is within the statutory limit.

The requirement of the statute as to parallelism does not necessarily imply that the lines should be drawn on the surface with absolute mathematical precision. A reasonable compliance with the law is all that is required. A *substantial* parallelism should satisfy the law.

The statute,[5] in defining the extent of the extralateral right, refers to *locations* only, and does not in terms mention patents; but, of course, a patent is but the evidence of a perfected location. A right conferred by patent cannot be defeated by showing a want of parallelism of the end lines of the claim as originally located. The location will be conclusively presumed to have been made in the form described in the patent.[6]

[1] See, *ante*, § 574.
[2] See, *ante*, § 365, p. 472.
[3] Horswell v. Ruiz, 67 Cal. 111.
[4] See, *ante*, §§ 365, 552.
[5] Rev. Stats., § 2322.
[6] Doe v. Waterloo M. Co., 54 Fed. 935, 940.

Conversely, if the form of the surface boundaries as described in that instrument, taken in connection with the physical facts shown, is of such a character as to prevent the exercise of the extralateral right, the patentee cannot be permitted to appeal to his location as originally marked to control, vary, or modify the terms of the patent.

The term "location," therefore, as found in this section of the statutes, is intended to apply to the *status* of the location as to form as it appears at the time rights asserted under it are brought into question. The production of the patent simply dispenses with the necessity of proving the antecedent facts culminating in its issuance—facts that, in the absence of such an instrument, would have to be proved independently, such as discovery, marking of the boundaries, and performance of such other acts as may be required under local or state regulations as conditions precedent to the completion of a valid location. The term "survey" is sometimes found in the decisions when referring to the exterior form of a location. This refers, of course, to the patent survey, the field notes of which are embodied in the patent as ultimately issued.

It may not be out of place to call attention to the fact, that in the absence of a patent, the extent of the extralateral right is not necessarily to be determined by the lines of the location as they were originally established in the field. If a locator has any apprehension as to the sufficiency of his original location, there is no reason why he should not be permitted to modify or amend it, if it can be accomplished without prejudice to the rights of others.[1] For the purpose of obtaining parallelism, the lines may be at least drawn in, so that, as finally surveyed for patent, the location will be perfected in strict compliance with the law.[2] We have fully discussed the circumstances justifying

[1] See, *ante*, § 397.

[2] Doe v. Sanger, 83 Cal. 203, 214; Doe v. Waterloo M. Co., 54 Fed. 935, 940; Tyler v. Sweeney, *Id.* 284; Last Chance M. Co. v. Tyler, 61 Fed. 557; Philadelphia M. Claim v. Pride of the West, 3 Copp's L. O. 82.

a change of boundaries, in a preceding article,[1] and the manner in which such changes may be effected.

**§ 583. Entire width of apex to be included in the location — "Broad lodes."** — A location may be regular in form, with its side lines constructed along the course of the vein, and the end lines crossing it, and yet physical conditions may exist which will prevent the exercise of the extralateral right. We refer to a case where the apex of the lode is either broader than the location, or where the locator mistakes the position of his vein, and instead of drawing his lateral boundaries with regard to its center, it is bisected by one of the side lines.

We have already observed, that if any portion of the apex is included within the lines of a location, such location is valid.[2] The failure of the first discoverer and locator to include the entire width of the apex would not impair any of the intralimital rights. But the extralateral right may be affected by the absence of such physical conditions as the law contemplates must exist in connection with the location, such as the course of the vein through the ground, and the extent of apex in both length and width, which may be found therein. The extent of the rights of the junior locator, who appropriates that portion of the apex excluded from the senior location, depends altogether on the nature and extent of the right flowing from the senior appropriation.

We have heretofore defined an apex to be necessarily and always a surface.[3] Owing to the liberal definitions applied by the courts to the terms vein, or lode,[4] this apex surface may be wider than the maximum lateral limits of a claim allowed under the law. Cases of this character are not likely to occur, except in those localities where local legislation only permits narrow surfaces. Instances of this class are found in the books, and the extent of the

[1] Tit. v., ch. ii., art. x., §§ 396–398.
[2] See, *ante*, § 364.
[3] See, *ante*, § 309.
[4] See, *ante*, §§ 291–294.

lateral rights permitted under such conditions has been the subject of serious discussion.

Dr. Raymond, in his "Law of the Apex," assumes a case for illustrative purposes, where the apex was bisected by a side line, and as the principle involved in such a case is the same as in the instance of a lode wider than the lateral surface limits, we take the liberty of utilizing the diagrams employed by him as an aid to discussion.

Let figure 35 represent two contiguous locations, A. and B., with a common side line, 2-5, bisecting the apex of the vein, the dip being in the direction of the arrow. Without intimating that the rights upon the located vein are to be determined by priority of appropriation, we may assume such priority in favor of A., the footwall claimant. Both locations are regular in form. Both have included within their respective boundaries some portion of the apex. Unquestionably, A.'s intralimital rights are not affected by the subsequent location of B.

FIGURE 35.

What, if any, are the extralateral rights of the respective parties? For the purpose of discussion, we assume both locations to have been made under the act of 1872.

When we consider the reported cases upon the subject, we find that two opposite views have received judicial sanction—one denying the extralateral right to either claimant, the other awarding it to the location senior in point of time.

We have heretofore called attention to the case of Hall *v.* Equator Mining Company in connection with the subject of cross lodes,[1] presenting a diagram of the property in controversy,[2] and noted, that on the trial of the case upon its merits,[3] it presented an instance of one lode with part of its width in one location and part in the other.

[1] See, *ante*, § 558. [2] Fig. 25, p. 660. [3] See, *ante*, p. 663.

In addition to the decision of Judge Hallett, upon the motion for a preliminary injunction, which suggested, but did not deal with the aspect of the case now under consideration, the case was tried three times — the first time before that judge, whose decision is not found in any of the reports.

Carpenter's "Mining Code"[1] contains some excerpts from it, and Dr. Raymond gives us full quotations in his "Law of the Apex," from which we quote so much as will illustrate Judge Hallett's views: —

"As to all the disputed ground, the principal question "affecting the whole lode is, whether by locating a part of "the width of outcrop the whole may be taken. Of several "collateral locations on the course of a lode, where the top "or outcrop is of sufficient breadth to admit of more than "one, are not all of equal dignity? This question will "admit of but one answer, with such modifications as "may be hereafter suggested. The act of 1872 certainly "requires a location to be along the course of the vein and "to include the top of it, and it is believed that the act of "1866 is of the same effect. Defendants' location was "made under the act of 1866, and probably some discus-"sion of that view of the act would be appropriate in this "connection. But it may be enough to say, that defend-"ants assumed to take the whole lode into their location, "and if they failed to get the whole, either by their own "omission or because of some restrictive provision of the "local law, the result is the same. In either case they can-"not now claim more than was taken by the location. "The same rule is applicable to plaintiffs' location, and as "to both of them, it is no answer to say, that the law "would not admit a location of sufficient width to take "the whole lode. If the law is illiberal, it is not for that "reason the less controlling. If, however, a right to the "entire lode cannot be asserted under a location covering "a part only of its width, as seems to be obvious, the loca-"tion may be valid for the part described in it. If it is "on the top of the lode, it is within the act, and so it ought "to be good for the part within the lines extended down-"ward vertically, if for no more. . . . And thus it may "be true, that each of several locators on the same vein,

[1] 3d ed., p. 65.

"or lode, will own all within his lines without being able "to go beyond them. For, as to his right to go into other "territory, he can only do so in pursuit of a lode, or vein, "that has its top and apex wholly in his own ground, and "having but a part of the lode in his territory he cannot "comply with that condition. This appears to be a clear "inference from the language of the act. The right given "relates to veins, lodes, and ledges, the tops of which are "inside the surface lines, which obviously means the whole, "and not a part. If, then, two or more collateral locations "be made on one and the same vein, and the vein appear "to be homogeneous throughout its width, we are author-"ized to say, that each shall be confined within his own "lines drawn down vertically. . . ."

Dr. Raymond illustrates the effect of this rule by a simple geological cross-section, as shown in figure 36, drawn through the end lines, *1 2* and *2 3*. Dropping a vertical plane through the common side line, *2 5*, leaves but a small triangular segment of the vein to A., and a similar plane drawn through the side line, *3 4*, shows the extent of B.'s rights between the two planes.

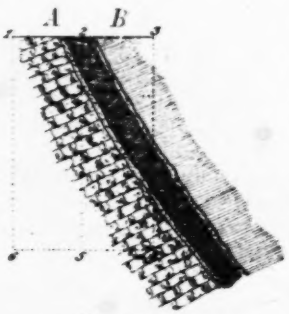


FIGURE 36.

At the next trial of the case, Justice Miller charged the jury as follows:—

"There is introduced, both "by plaintiffs and defendants, evidence tending to prove "that the claims of both parties are located on the "same vein, or lode, of mineral-bearing rock in place, "the general apex, or upper surface, of which is about "one hundred feet wide.[1] If the jury believe this to "be true, then I instruct you, as the law of this case, that "plaintiffs, having the prior title from the United States "to that portion of this lode within the lines of their "patent, extended vertically downward to the earth's cen-"ter, and the defendant having contested plaintiffs' right "to receive a patent for the parts of the lode in controversy,

[1] The claims were each fifty feet wide.

"in the court of the territory, according to the act of con-
"gress on that subject, and failed in that contest, and hav-
"ing accepted and read in evidence a patent for their
"own claim, which expressly excepts out of its granting
"clause the interfering parts in plaintiffs' said patent,
"the law of the case is for the plaintiffs, and they are
"entitled to all the mineral found within the side lines of
"their patent, extended downward vertically."[1]

When we consider that the defendants' location of the Equator was prior in point of time to the plaintiffs' Grand Central, if the defendants could lawfully base an extralateral right upon the part of the apex within the Equator, they could not be deprived of it by patenting to another the surface overlying the dip. Asserted underground rights are not the subject of adverse claims.[2] Such controversies are confined to surface conflicts. Justice Miller's views are in practical accord with Judge Hallett's.

A case somewhat similar to the Grand Central-Equator controversy came before the supreme court of Utah territory.[3] The facts found by the trial court, which finding was accepted by the appellate tribunal, presented a case where the first locator had the apex of a vein entirely within the surface lines of his claim for a portion of its length, and the remaining portion partly within and partly without, the excluded portion being embraced within the boundaries of a coterminous junior location.

The majority of the appellate court held, that under the act of 1872,—

"The discoverer of any part of the apex gets the right
"to its entire width, despite the fact that a portion of the
"width may be outside of the surface side lines of his
"claim, extended downwards vertically. While he has no
"right to the extralateral surface, he has a right to the
"extralateral lode beneath the surface."

Judge Boreman dissented, practically accepting the doctrine of Judge Hallett in the Equator case.

[1] See note, 11 Fed. cases, No. 5931, p. 225.
[2] Champion M. Co. v. Cons. Wyoming M. Co., 75 Cal. 78, 82.
[3] Bullion, Beck & Champion M. Co. v. Eureka Hill M. Co., 5 Utah, 3.

The case of Rose *v.* Richmond Mining Company[1] was decided by the supreme court of Nevada upon the assumption that the first locator took the whole lode to its entire width. No issue was raised as to this point. It was conceded by both parties to the litigation. The supreme court of the United States, in its opinion affirming the judgment, gave no consideration whatever to the subject.[2]

Mr. Morrison, in his "Mining Rights,"[3] says, that in Colorado the rule announced by Judge Hallett in the Equator case is uniformly followed by the trial courts in that state. Dr. Raymond refers to the rulings by Judges Rising and Rives, district judges in Nevada, as supporting the broad lode theory. He undoubtedly had in mind the Rose-Richmond case, heretofore referred to.

Without doubt, in Nevada, prior to the act of 1866, and in fact after that act had been passed, locations were made of the vein without any attempt to draw side lines. The entire Comstock lode was located in this way, it being popularly conceded that the *locus* of the east wall of that remarkable zone could not be determined.

But the act of 1872 revolutionized this method, and ever since, the supreme court of the United States has uniformly emphasized the necessity for regarding surface boundaries as the prime factors in determining controverted questions arising out of the mining laws. In our judgment, the reasoning of Judge Hallett and the doctrine announced by him is in full accord with the spirit of the decisions since rendered by the supreme court of the United States, particularly in the Elgin and Amy-Silversmith cases. While the application of the rule may seem inequitable in individual instances, "the rule, whatever "hardship it may work, should be settled, and thus pre-"vent, as far as practicable, such uncertainty."[4]

If the law possessed elastic properties, and the courts

[1] 17 Nev. 25.
[2] Richmond M. Co. *v.* Rose, 114 U. S. 576.
[3] 8 ed., p. 112.
[4] Iron S. M. Co. *v.* Elgin M. & S. Co., 118 U. S. 196, 207.

were permitted to act as a board of equitable arbitration, there are several methods suggested by Dr. Raymond by which individual hardships might be relieved; but considering the law and its interpretation by the highest tribunal in the land upon questions of a kindred nature, we can look for no other ultimate result than that announced by Judge Hallett.

Where there are two veins within a lode, a condition which frequently arises,[1] each vein is the subject of an independent appropriation, and the broad lode question cannot arise. It is only involved where, as suggested by Judge Hallett, the lode is homogeneous throughout its width. The "broad lode" theory is the legitimate offspring of the "zone" theory, which had its genesis in the Eureka case.

**§ 584. Vein entering and departing through the same side line.**—It seems hardly necessary to discuss the question of extralateral rights as applied to a case where the vein enters and departs through the same side line, as illustrated in figure 37.

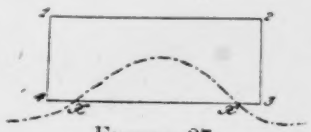


FIGURE 37.

Even invoking the theory, that under certain circumstances the courts may apply the plane drawn through the line crossed by the lode on its course as it enters the location, to a line drawn parallel to it through the point on a boundary line crossed on its departure, we can find no room for such a plane in the illustrated case. The two planes in the case assumed would be coincident. Such plane would necessarily cut off the extralateral right.

Planes parallel to those drawn through *1 4* and *2 3* could not be applied at the points *x x*, for the simple reason, that neither of them are crossed by the vein, and neither of such lines perform the functions of end lines. They are simply side lines, performing no office, except with

[1] United States v. Iron S. M. Co., 128 U. S. 673, 680. See, *ante*, § 367.

reference to the intralimital rights. Under the conditions assumed in figure 37, there can be no extralateral right.

A case somewhat analagous in principle to that shown in figure 37 was recently presented to the supreme court of Colorado, for its consideration.[1]

The controversy arose out of the following state of facts, which may be readily understood by reference to figure 38, a reproduction of the diagram accompanying the opinion of the court.

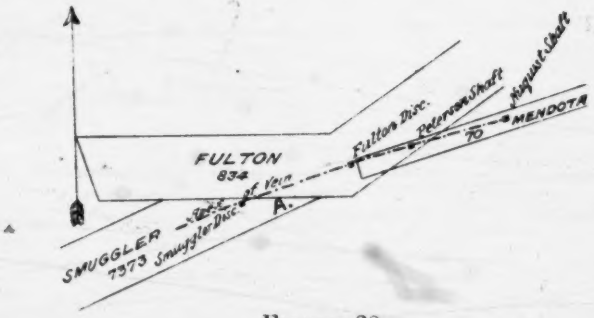



FIGURE 38.

Plaintiff owned the Smuggler, defendants the Fulton and Mendota claims. The dotted line shows the apex through the claims. The dip is to the south. All the properties were patented, and there was no surface conflict involved. Defendants, in following the vein on its course downward, penetrated underneath the Smuggler surface and had extracted ore from the vein, the point of the alleged trespass being designated on the diagram by the letter A. The defendants justified their presence underneath the Smuggler surface by asserting ownership of the apex in the Fulton ground and the right to pursue the vein in depth by reason of such apex ownership. The court below sustained the contention of the defendant. Hence the appeal.

[1] Catron v. Old, decided Feb. 3, 1897, not yet reported.

The appellate court, after reviewing most of the end line cases to be hereafter noted, reversed the judgment, thus expressing its views:—

"In the case at bar, no part of the Fulton vein runs "parallel or nearly parallel with the side lines of that "claim, as staked upon the surface. The United States "supreme court has said, that if the locator of a mining "claim mistakes the direction of his vein, and locates "accordingly, the courts have no power to make a new "location for him, but must determine his rights with "reference to the location actually made. Developments "subsequent to the location of the Fulton disclose that the "claim as located contains very little of the apex of the "vein, and such as it does contain does not cross either end "line, and does not run parallel or nearly parallel to the "side lines; so that in no aspect of the law can the Fulton "be allowed extralateral rights by reason of the apex of "the vein."

We shall have occasion to recur to the decision of the supreme court of Colorado in this case when dealing with instances where the vein crosses an end line and a side line.

We are not prepared to say, that in all cases, save those outlined in this and the preceding sections of this article, there is necessarily some extralateral right. This would be too broad an assertion. Geological nature is too infinite in its variety to permit us to anticipate all possible conditions, natural and artificial, which may exist. At best, we may outline the general principles as we understand them in the light of adjudicated cases, utilizing for this purpose pronounced types, from which others may be differentiated. If we can determine precisely what is certain in the exposition of the law as applied to these types, the uncertainties which may arise in other cases may be reduced to the minimum. We are quite certain that in cases of the character heretofore presented there can be no extralateral right. We are equally convinced that in those which we are about to present the right exists to a greater or less extent.

**§ 585. The extralateral right applied to the ideal lode.**—We have, in preceding sections, given our conception of the ideal lode,[1] and have illustrated what we understand to be the highest type of a location embracing it,[2] one which confers upon the possessor the greatest property right which may be acquired under the mining laws. With this ideal lode in position within the boundaries of such a location, if we may assume that the vein in its descent into the earth to an indefinite depth is continuous, that its identity is unquestioned, and that there are no natural or legal obstacles intervening, we have presented a standard with which all cases of all classes may be compared and analyzed. It is upon the existence of such a theoretical lode and hypothetical location that the existing laws were framed.

As Dr. Raymond facetiously remarked,—

"If all mining properties presented this beautiful sim-
"plicity of structure, and all mining locators exhibited a
"corresponding simplicity of purpose, the application of
"the law would be easy. But the *naïveté* of the statute
"fares badly between the freaks of nature and the tricks of
"man."[3]

We need devote no time to the consideration of extralateral rights flowing from ideal locations embracing ideal lodes. This right may be curtailed, interrupted, and perhaps completely cut off by underground conflicts with prior appropriators of other segments of the same vein, or by encountering a vertical bounding plane of some prior grant, out of which the underlying vein was not reserved, or its continuity may be broken and its identity lost. But with these subjects we shall deal later. Eliminating these elements from present consideration, the possessor of the ideal lode, ideally located, has the same length on the vein throughout its entire depth as he has included within his boundaries at the surface, and this was the unquestionable intent of the law, in providing that the end lines should

[1] See, *ante*, § 309.
[2] See, *ante*, § 360.
[3] Law of the Apex.

be parallel. To this extent the locator becomes the owner of the vein. His estate therein is that of a fee.

**§ 586. Vein crossing two parallel side lines — The Flagstaff case.**— One of the most frequent disappointments which falls to the lot of the lode locator, arises from his mistaking the course of his vein, and constructing his location across, instead of along it. The first instance of this which was brought to the attention of the supreme court of the United States arose in the Flagstaff case, in Utah, and involved the construction of a patent issued under the act of 1866. For the first time the miner was brought to a realizing sense that a United States patent issued under that act was not, according to his preconceived notions, a "thing of beauty and a joy forever." Its "ironclad potency" shattered his early idols, and there was a rude awakening to a new order of things. After having fixed his location on the surface, filed his diagram, and received his patent, he learned that his rights to the lode were to be determined and measured by the boundaries defined therein. He could no longer follow his lode on its course whithersoever it might run, regardless of lines, stakes, and monuments. He could only take so much on the strike of the vein as was included within his patented lines. What was excluded became the subject of appropriation by the next comer.

In a preceding section,[1] we have presented in outline a diagram of the property involved in this case, for the purpose of illustrating this principle. As this case was the forerunner of several others — a mold into which others were ultimately cast,— it will not be out of place to present a diagram, somewhat more elaborate in design than that appearing in the historical portion of this treatise.

Figure 39 shows the surface lines, the course of the outcrop, or apex, through the Titus and Flagstaff, and in horizontal projection, the nature and extent of the latter's underground workings. The alleged trespass occurred in

[1] See, *ante*, § 60, p. 70.

the underground workings in the vicinity of the triangle, K J H, but the controversy necessarily involved all excavations of the vein lying easterly of the east side line of the Flagstaff and south of the Titus south boundary. Neither party claimed the surface overlying this segment of the vein.

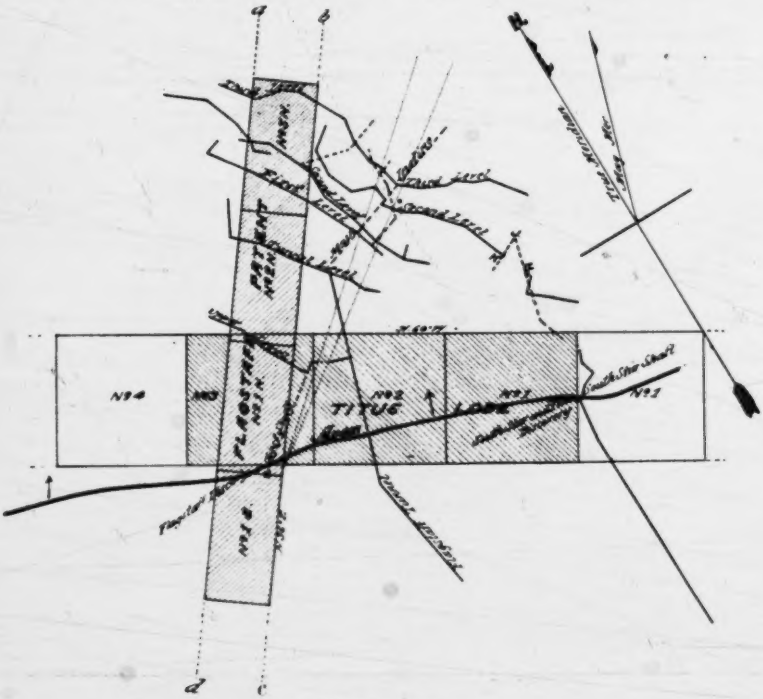



FIGURE 39.

The decision of the supreme court of the United States established two important basic principles:—

(1) A vein cannot be pursued on its course beyond the lines which it actually crosses. The patentee takes only so much of the vein as his location actually covers. Where such vein crosses two opposite side lines, these lines become, in law, the true end lines of the location;

(2) The right to follow the dip of the vein is bounded by the end lines, properly so called, which lines are those which are crosswise of the general course of the vein on the surface.[1]

The segment of the vein in dispute was not within planes drawn through these side-end lines. It pertained to the overlying apex within the Titus ground. The judgment against the Flagstaff was affirmed.

The same doctrine had been previously announced by the supreme court of Colorado,[2] and by the supreme court of Utah, in the Flagstaff case,[3] and in another case involving the Flagstaff patent.[4]

**§ 587. Same—The Argentine-Terrible case.**—The case of the Argentine Mining Company *v.* Terrible Mining Company[5] seems to present a case on parallel lines with that of the Flagstaff case, so far as the physical facts are concerned. We herewith present a diagram (figure 40) of the properties involved, reduced from the atlas of Mr. Emmons, accompanying his great monograph, "Geology and Mining Industry of Leadville."

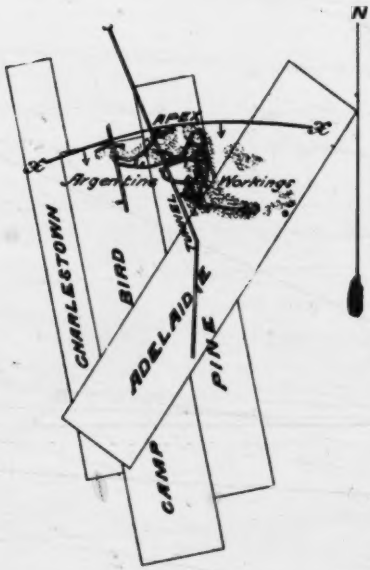



FIGURE 40.

Reading the opinion of the supreme court of the United States in the Argentine-Terrible case, in connection with this figure, justifies the con-

[1] Flagstaff M. Co. *v.* Tarbet, 98 U. S. 463.
[2] Wolfley *v.* Lebanon M. Co., 4 Colo. 112, April, 1878.
[3] June, 1878, unreported.
[4] McCormick *v.* Varnes, 2 Utah, 355, Feb. 1879.
[5] 122 U. S. 478.

clusion that the conditions shown upon Mr. Emmons' maps existed at the time of the trial of the case, and upon the state of facts thus illustrated the decision was based. Assuming that the course of the apex is correctly delineated by the line *x x*, we have, as in the Flagstaff case, the lode crossing parallel lines, which the locator supposed were side lines, but which in law were end lines. The locations were all made under the act of 1872. The Adelaide was the prior location. The Argentine Company, owning the Pine and Camp Bird claims, extended its workings beyond its side-end-line planes, underneath the surface of the Adelaide, asserting its right to do so by reason of ownership of the apex within the boundaries of the Pine. A patent had been issued to the Pine, out of which there was excepted so much of the surface as conflicted with the Adelaide boundaries.

At the trial of the case, Judge Hallett, in his charge to the jury,[1] does not seem to have presented the questions upon which the appellate tribunal based its decision affirming the judgment. The trial judge took the position, that a prior location on the dip cut off the extralateral right of the junior apex locator, and the priority being with the Adelaide, the validity of its location having been established, verdict and judgment passed in favor of the owners of that claim.[2]

The Supreme Court of the United States, after quoting the doctrine of the Flagstaff case, said:—

"Such being the law, the lines which separate the loca-
"tion of the plaintiff below from the locations of the
"defendant are end lines, across which, as they are
"extended downward vertically, the defendant cannot
"follow a vein, even if its apex or outcropping is within
"its surface boundaries, and as a consequence, could not

[1] Van Zandt v. Argentine M. Co., 8 Fed. 725.

[2] We have discussed this charge of Judge Hallett in a previous section (§ 364) when dealing with the necessity for including the apex within the boundaries of a location. With regard to the junior apex locator's right to pursue his vein underneath a senior's, see, *post*, art. vi., of this chapter.

"touch the premises in dispute, which are conceded to be "outside of those lines and outside of vertical planes "drawn downward through them."

Manifestly, the Flagstaff and Argentine cases were identical as to the facts. The supreme court of the United States having in the former case emphasized the controlling force of surface lines as fixed by the patent, and established the rule, that when the lode crossed a line which the locator called a side line, such line became in law an end line, to the extent, at least, that the lode could not be followed beyond it, the application of the same principle to locations made under a law which required, as a condition precedent to a valid appropriation, the defining of a surface and marking of boundaries including the discovered lode, was logical and consistent.

§ 588. **Same — The King-Amy case.** — Three years after the decision in the Argentine-Terrible controversy, what is familiarly know as the King-Amy or Silversmith case, came before the supreme court of Montana. The facts were precisely the same as in the Flagstaff and Argentine

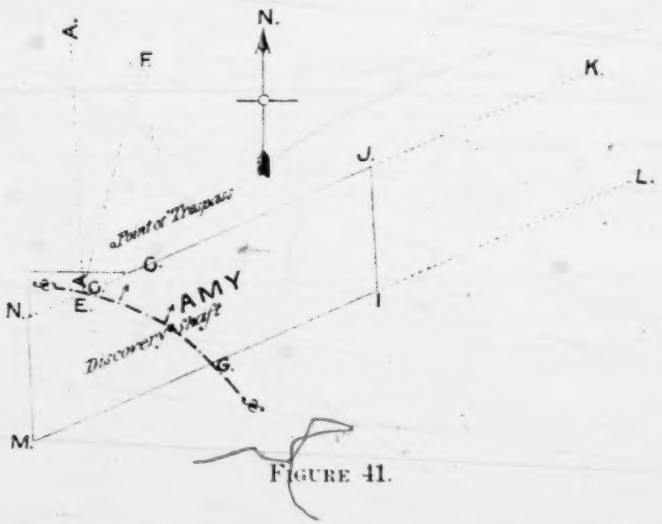



FIGURE 41.

cases; that is to say, the location was regular in form, and instead of being laid along the lode it was placed across it, so that the vein entered through one side line and departed through the other, as shown in figure 41. The only variation observable is, that in the Flagstaff and Argentine cases the lode crossed the two side lines, substantially at right angles, while in the King-Amy case the lode, *x x*, crossed the claim diagonally, the dip being in the direction indicated by the arrow.

There were three contentions presented for the consideration of the court:—

(1) That the Amy could not pass to the north of a vertical bounding plane drawn through the north side line, N J, invoking the doctrine of the Flagstaff and Argentine cases;

(2) That a plane should be drawn at right angles to the course of the vein, through the point E, where the vein crossed the north side line, N J, producing the imaginary bounding plane, E F;

(3) The application, through the same point, of a plane parallel to the located west end line, M N, producing the imaginary plane, A A.

The trial court adopted, on its own motion, the second, or right-angle theory.

The supreme court of Montana, speaking through Judge De Witt,[1] admitted that neither one of the three suggested solutions was absolutely free from possible criticism, but in a very interesting and ingenious opinion adopted the third theory, of applying a plane parallel to the one drawn through the line which the locator called an end line, but which was not, in fact, crossed by the lode. The court saw a marked difference between the facts of this case and the Flagstaff and Argentine cases. This difference is in the angle at which the vein crossed the side lines. The court did not clearly demonstrate where it would draw the east

[1] King v. Amy & Silversmith Cons. M. Co., 9 Mont. 543.

end line, in view of the crossing at G. The decision was an heroic attempt to fulfill what the court conceived to be the spirit of the statute, but it was unavailing. The supreme court of the United States adhered to its previous doctrine, and in reversing the judgment of the supreme court of Montana said:—

"The difficulty in the present case arises from the course "of the vein, or lode, upon which the Amy location was "made. It is evident that what are called side lines of the "location, as shown in the diagram, are not such, in fact, "but are end lines. Side lines properly drawn would run "on each side of the course of the vein, or lode, distant "not more than three hundred feet from the middle of "such vein. In the Amy claim, the lines marked as *side* "lines cross the course of the strike of the vein, and do "not run parallel with it. They therefore constitute end "lines. . . . The most that the court can do, where the "lines are drawn inaccurately and irregularly, is to give "the miner such rights as his imperfect location warrants "under the statute. It cannot relocate his claim, and "make new side lines or end lines. Where it finds, as in "this case, that what are called *side* lines are, in fact, *end* "lines, the court in determining his lateral rights will treat "such side lines as end lines; but the court cannot make a "new location for him, and thereby enlarge his rights. "He must stand upon his own location, and can take only "what it will give him under the law."[1]

Necessarily, the supreme court of the United States considered the facts of this case to be parallel with those in the Flagstaff and Argentine cases, although neither of these cases are cited in the opinion, resting its judgment on its opinion in the Elgin or "Horseshoe" case.

The opinion of Judge De Witt in the King-Amy case, or rather the reasoning upon which it is based, has, however, borne some fruit, as we will observe when dealing with cases where the vein crosses a side and an end line.

It may be considered as absolutely and finally settled, that where a vein on its course crosses two opposite side lines, the vein cannot be followed either on its dip or

[1] King v. Amy & Silversmith Cons. M. Co., 152 U. S. 222.

strike beyond vertical planes drawn through the side-end lines, and that the angle at which it crosses these side lines makes no difference in the application of the principle.

**§ 589. Deductions from side-end-line cases — Extralateral right in such cases defined by vertical planes drawn through the side-end lines produced.** — None of the side-end-line cases heretofore reviewed give countenance to the suggestion, that where a vein crosses two opposite parallel side lines, the locator is denied all extralateral right. On the contrary, the irresistible conclusion to be drawn from each of them is, that vertical planes drawn through the side-end lines, produced in the direction of the dip, will carve out a segment of the ledge throughout its entire depth, which will belong to the locator. So in the Flagstaff case, the side-end lines, *d a* and *c b*, produced northerly indefinitely, bound the extralateral right. In the Argentine case, the original side lines of the Adelaide, extended southwesterly, define its limits. The extralateral right of the Pine, Camp Bird, and Charlestown is obstructed and cut off by a prior valid appropriation of that segment of the vein underlying the Adelaide apex. Were it not for such obstruction, their right of lateral pursuit would be defined by extending *their* side-end lines southerly.

In the King-Amy case, planes drawn through the side-end lines, N J and M I, produced indefinitely in the direction of K and L respectively, will bound the extralateral right.

A simple illustration of this is shown in figure 42, the bounding dip planes in each instance being defined by the produced side-end lines, *a b b'*, *c d d'*. These side-end lines are to be treated as if they were the

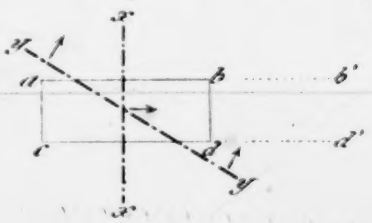



FIGURE 42.

*original end lines.* Being parallel, the right of lateral pursuit cannot be gainsaid. A location in such a form would be valid to the extent, at least, that it enclosed the apex. It is true, that the end-side lines may be more than three hundred feet from the center of the vein, but in any event, this would not render the location wholly void. The excess might be cast off,[1] leaving the extralateral right unaffected.[2] Subsequent locators of the apex on the outside of the crossed side-end lines could not complain.

As to patents issued in such form and under such conditions, we will consider them in a subsequent chapter.

Judge J. H. Beatty, in the last trial of Tyler Mining Company *v.* Last Chance Mining Company,[3] adopted the view herein announced as to bounding planes to be drawn through side-end lines.

In applying the decisions in these end-line cases we are forced to recognize the fact, that all theories based upon the *true course* or the *true dip* of veins are purely speculative. When the law says that end lines are those which are crossed by the lode, it does not imply that they shall be crossed at a right angle. So the downward course of the vein which may be followed in the exercise of the extralateral right is not necessarily at right angles to the true strike or course. It is that direction which the vein takes underneath the surface, on its downward course, between vertical planes drawn through the end lines, or the side-end lines, as the case may be. This gives a segment in length, throughout the depth, within vertical planes drawn through the parallel crossed lines, equal to the length of apex covered by the surface boundaries, measured, of course, on lines parallel to the course of the apex. In dealing with the subject of locations in a preceding chapter,[4] we have shown that end lines may take any direction so long as they cross the vein and are parallel.

[1] See, *ante*, § 362.
[2] See, also, Lakin *v.* Dolly, 53 Fed. 333; *ante*, § 366, p. 478.
[3] 71 Fed. 848.
[4] See, *ante*, § 365.

**§ 590. Vein crossing two opposite non-parallel side lines.**— In a preceding section, when considering the form of a surface location, we have indicated that there is no requirement of the law that side lines should be parallel, but have there said, that the parallelism or non-parallelism of the lines originally located as side lines might become an important factor if the locator makes a mistake as to the course of his vein and locates crosswise, instead of along its course. We had reference to the extralateral right.[1]

If we have correctly stated the law applicable to cases of end lines converging in the direction of the dip, that is, that in such instances the vein may be pursued within vertical planes drawn through such end lines produced in such direction,[2] and are justified in the deductions announced in the previous section, that parallel side-end lines may be produced in the direction of the dip for the purpose of defining the extralateral right, it follows as a corollary, that in case of non-parallelism of side-end lines the extralateral right is granted where such lines converge in the direction of the dip, as shown in figure 43, and denied where they diverge, as illustrated in figure 44.

FIGURE 43.

FIGURE 44.

In our judgment, there can be no possible objection to this rule. It logically flows from the reasoning which supports the decisions making the crossed lines, end lines in law, and harmonizes with the theories invoked in support of all the adjudicated cases. It gives to the miner as

[1] See, *ante*, § 306, p. 478.

[2] See, *ante*, § 582, p. 698. See, also, discussion of this subject as applied to the Wyoming case, *ante*, fig. 31, § 574, p. 684.

much of the vein as the imperfect manner in which his location is made will permit, in the light of established legal principles, and is in consonance with the underlying theories upon which these principles rest.

**§ 591. Vein crossing one end line and a side line.**— We are now called upon to consider the nature and extent of the extralateral right in cases where the vein crosses an end line and a side line, instances of which are quite common. In reaching a satisfactory solution of this important question, we must necessarily keep in mind the principles established and enunciated in the preceding sections, and recognize that a substantial departure from the doctrine of the adjudicated cases will necessarily produce inharmonious and inconsistent results.

As in the nature of the case to be discussed the crossed lines cannot under any circumstances be parallel to each other, there are but two possible solutions:—

(1) Either there is no extralateral right whatever, or

(2) The right is to be determined with reference to one of the lines which is actually crossed by the lode.

There is no possible compromise between these two methods.

For the purpose of presenting the subject in the light of the reported cases, we will avail ourselves of the diagram which illustrated the facts involved in the case commonly known as the Tyler-Last Chance, and is a reproduction of the map accompanying the decision of the supreme court of the United States in the case of Last Chance Mining Co. *v.* Tyler.[1]

For the purpose of illustrating certain other questions which may incidentally arise in another portion of the work, we have added to the diagram a representation of the width of the lode, as shown upon the plat contained in the record upon the writ of error to the circuit court of appeals after the trial, which supervened subsequent to the

[1] 157 U. S. 683.

decision of the supreme court of the United States on *certiorari* proceedings, in the case noted on preceding page.

While the question now under consideration was ultimately eliminated from the case by the decision of that court, the present state of the law, so far as it has been

FIGURE 45.

adjudicated, has been evolved out of this controversy and the reasoning found in the numerous decisions rendered at different stages of its progress through the courts.

In the discussion of other classes of cases which involved no surface conflict, we have, as a rule, avoided injecting into them the question of priority as affecting the extralateral right. We have intended to deal with this subject when treating of the legal obstacles which interrupt the right of lateral pursuit. Where both parties have each a part of the apex of the same vein, conflicts between underground planes frequently occur, which must be

settled by priority of apex appropriation, a subject to be fully discussed in a succeeding article.[1]

To obtain the latitude required for the purpose of properly presenting the question, we will assume priority in favor of the Tyler, placing the Last Chance in the position of a junior appropriator owning the surface overlying the ore bodies in dispute. We shall also deal with the question regardless of the subsequent readjustment of the Tyler end line, *5 6*; in other words, assuming the location to be in the form described by the original boundaries. We have, therefore, a vein, *x x*, entering the claim across the end line, *1 2*, and passing out of the side line, *2 3*.

Has the Tyler, under the assumed state of facts, any extralateral right? If so, how is it to be defined?

The dip, in the illustrated case, is to the south, although it makes no difference in the application of principles in which of the two possible directions, north or south, the vein descends into the earth.

Judge J. H. Beatty, district judge of Idaho, before whom the Tyler case was tried, decided the case on questions of priority in favor of the Last Chance, as established by a former judgment between the same parties.

The circuit court of appeals, ninth circuit, held this to be error, reversed the case, remanded the cause for a new trial, and expressed its views as to the extent of the extralateral right of the Tyler. The opinion was written by Judge Hawley and concurred in by Judges McKenna and Gilbert.[2] The court reviewed the opinions in the Flagstaff, Elgin, and Argentine cases, and reached the conclusion, that the theory adopted by Judge DeWitt, speaking for the supreme court of Montana in the King-Amy case, while not applicable to the facts shown in that case, as the lode crossed neither end line, afforded a clear, logical, and consistent solution of the question under consideration, when applied to a case where the lode in fact crossed one of the lines which the locator had selected as an end line.

[1] See, *post*, art. vi. of this chapter.

[2] Tyler M. Co. v. Sweeney, 54 Fed. 284.

In commenting upon the Elgin-Horseshoe case, Judge Hawley, speaking for the court, said:—

"The learned justice who wrote the opinion in the "Horseshoe case, when he said that the parallelism of the "end lines 'is essential to the existence of any right in "'the locator or patentee to follow his vein outside of the "'vertical planes drawn through the side lines,' did not "mean that it was essential to such a right that the lode "should extend in its length from one end line to the "other of the location. If the lode in question, instead of "extending into the Last Chance location, had abruptly "broken off within the surface lines of the Tyler, near the "point where in fact it crossed the line, there could cer-"tainly be no question as to the right of the Tyler to "follow the lode, or vein, in its downward course for its "entire depth, outside of the vertical planes drawn through "the side lines. The fact that it continued its course and "crossed the side line does not in any manner change this "principle. In either case the locator is entitled to the "same rights. In such cases the end lines are not neces-"sarily those which are marked on the ground as such. "An end line may be drawn at the point where the lode "abruptly terminates within the surface lines, or at the "point where the apex of the lode crosses the side line of "the surface location. This, upon principle, justice, and "authority, it seems to us, is the only reasonable construc-"tion that can be given to the statute."

The court then draws attention to the decision by the supreme court of Montana in the King-Amy case, quoting the following from the opinion of Judge De Witt:—

"The law intends that the plane of the end line shall "operate as a boundary to the dip, and so operate at the "point where the strike is ended. If the strike reached "the original end line, as in a regular location, the bound-"ing plane would there operate upon the dip. If the "strike, by reason of its going out of a side line, falls short "of reaching the original end-line plane, that plane must "take effect where the strike in fact ends, that is, at a point "on the side line, . . . and if it takes effect there, its "parallelism must not be destroyed. We therefore have "the bounding plane operating at the point where the "apex leaves the north side line, and operating parallel "to the east end line, and retaining its parallelism as

"originally marked on the ground. It is not a new line or "plane, or one judicially constructed. It is determined by "the location lines on the surface. There is never any "readjustment according to subsequent developments. "The parallelism of the end-line planes is fixed by loca- "tion, and never varies. The point of departure of the "strike from the surface lines fixes the point where the "end-line plane is to perform its functions, whether that "departure be at an end line, as contemplated by the "statute, or whether accident has fixed it at a point on a "side line."

The manifest distinction between the King-Amy and the Tyler-Last Chance cases is found in the fact, that in the former the end-line plane applied by Judge De Witt was not based upon any line actually crossed by the lode, while in the latter case one of the originally located end lines was so crossed.

The Tyler case was retried by Judge Beatty, resulting in judgment for the Tyler, which was affirmed on writ of error.[1] The case was then presented to the supreme court of the United States upon *certiorari* proceedings, wherein the previous ruling of the circuit court of appeals upon the end line question was fully argued. But the reviewing court did not feel called upon to determine it, as its ruling upon the effect of the former judgment between the parties established a priority which necessarily gave the segment of the vein in dispute to the Last Chance.

Said the court:—

"Our conclusions in this respect obviate the necessity "of considering another very interesting and somewhat "difficult question presented by counsel. It will be seen "from the diagram, that according to the original location "of the Tyler claim, the vein enters through an end and "passes out through a side line, while by the amended "location it passes in and out through end lines. Of "course, if the latter is a valid location, the owner of the "claim would unquestionably have the right to follow the "vein on its dip, beyond the vertical plane of the side line. "But if it were not, and the original location was the only

[1] Last Chance M. Co. v. Tyler M. Co., 61 Fed. 557.

"valid one, has the owner the right to follow the vein out-
"side any boundaries of the claim extended downward?
"It has been held by this court in the cases heretofore
"cited, that where the course of a vein is across, instead of
"lengthwise of the location, the side lines become the end
"lines, and the end the side lines; but there has been no
"decision as to what extraterritorial rights exist if a vein
"enters at an end and passes out of a side line. Is that
"a case for which no provision has been made by statute?
"Are the parties left to the old rule of the common law,
"that the owner of real estate owns all above and below
"the surface, and no more? Or may the court rely upon
"some equitable doctrine and give to the owner of the
"vein the right to pursue it on its dip in whatever direc-
"tion it may go, within the limits of some equitably crea-
"ted end lines?

"If the common law rule as to real estate obtains in
"such a case, then, of course, on the original location the
"owners of the Tyler claim would have no right to follow
"the dip of their vein outside of the vertical planes of any
"of its boundary lines; and even if the amended applica-
"tion was perfectly valid, the question would arise, whether
"the rights acquired under it related back to the date of
"the original location, or arose simply at the time of the
"amendment, in which case there would be no doubt of
"the fact that the owners of the Last Chance had, by years,
"a prior location. However, in the view we have taken
"of the other question, it is unnecessary to consider this."[1]

It may therefore be said, that the important question remains yet to be determined by the court of last resort, with at least a suggestion that its solution does not necessarily depend on the strict application of rules announced by that court in the previous end-line cases. It has unquestionably paved the way to the ultimate adoption of Judge De Witt's and Judge Hawley's views, and the courts in different State and federal jurisdictions have, with practical unanimity, taken advantage of the opportunity thus afforded to emphasize and apply the Tyler-Last Chance doctrine to cases of a kindred nature.

Judge Hallett, a few weeks prior to the announcement of the opinion by the supreme court of the United States

[1] Last Chance M. Co. v. Tyler M. Co., 157 U. S. 683, 694.

in the Last Chance-Tyler controversy, decided the case of the Del Monte Mining and Milling Co. *v.* New York and L. C. Mining Co.,[1] wherein he applied the rules announced by the circuit court of appeals, above commented upon. We reproduce the diagram accompanying Judge Hallett's opinion, for purpose of convenient reference (figure 46).

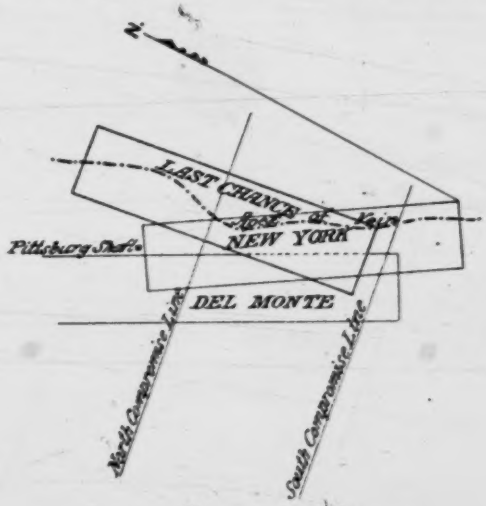



FIGURE 46.

We quote Judge Hallett's views as applied to the facts shown in the diagram, as the importance of the subject requires us to search for and obtain all possible light on the question.

"If the strike of the lode in the New York location "kept its course from end to end of the location, the right "to follow the lode outside the location would not be de- "nied. As, however, it departs on its strike from the loca- "tion on the east side, and not from the north end, it is "said that the claim has no end lines, or at all events, "none that can be recognized as limiting the right to any "part of the vein outside of the exterior lines of the claim.

[1] 66 Fed. 212.

"This is asserted as a proposition of law, deducible from "several decisions of the supreme court, that the lines of a "location crossed by the apex of a vein on its strike shall, "as to such vein, be regarded as end lines, whatever their "position may be; and if this proposition be accepted, the "south end line and east side line intersected by the out-"crop of this lode are not parallel to each other, as de-"manded by section twenty-three hundred and twenty of "the Revised Statutes. This, however, has not been the "interpretation of the law in the supreme court, or in any "court, so far as we are advised. It is true, that in the "Flagstaff case,[1] and recently in the Amy-Silversmith "case,[2] the supreme court declared that the side lines of a "location shall be end lines whenever the lode on its strike "crosses such lines; but these decisions do not affirm that "all lines of a location crossed by a lode on its strike shall "be end lines. The most that can be deduced from them "is, that opposite lines parallel to each other, when crossed "by the lode, shall be end lines. The case presented is not "within the principle of these decisions. We have a lode "extending on its strike on the general course of the loca-"tion and within its side lines a distance of ten hundred "and seventy feet. It is conceded that the south end line "of the location is well placed, and all parts of the lode "covered by the location are within the end lines as fixed "by the locator. The difficulty arises from the circum-"stance, that the location extends in a northerly direction, "two hundred and eighty feet beyond the point where the "lode diverges from the side line. No reason is perceived "for saying, that this mistake in the length of the location "should defeat the right to follow the vein on its dip out-"side of the location. It is said that we cannot make a "new end line at the point of divergence or elsewhere, be-"cause the court cannot make a new location, or in any "way change that made by the parties. This, however, is "not necessary. We can keep within the end lines fixed "by the locator, in respect to any extralateral right that "may be recognized, without drawing any line, and if there "be magic in the word 'line,' it will be better not to use it.

"In this instance, as in most controversies between adja-"cent owners, it is necessary to ascertain what part of the "lode is within the New York location; and this, accord-"ing to the map, appears to be ten hundred and seventy "feet. At all points on the dip of the lode into the

[1] 98 U. S. 463. [2] 152 U. S. 222.

"mountain westwardly, we can ascertain the length of the "lode within the end lines by measuring the same distance "from the south end line produced. In this proceeding, "there is no departure from the end lines of the New York "location as fixed by the locator, and there is no new line "of location drawn for any purpose whatever. We keep "entirely within the end lines of the location as required by "the statute, and the circumstance that we are somewhat "short of the north end line, does not in any way affect "the principle to be followed in construing the statute."

Judge Hawley reannounced his views expressed in the Tyler-Last Chance case in the subsequent controversy between the Wyoming and Champion Mining Companies.[1]

Subsequent to the decision of the supreme court of the United States in the Tyler-Last Chance litigation, the supreme court of Montana was afforded an opportunity of applying the doctrine originally announced by it in the King-Amy case, to a controversy involving extralateral rights on a vein which crossed an end and a side line. The case of Fitzgerald *v.* Clark, which came before that

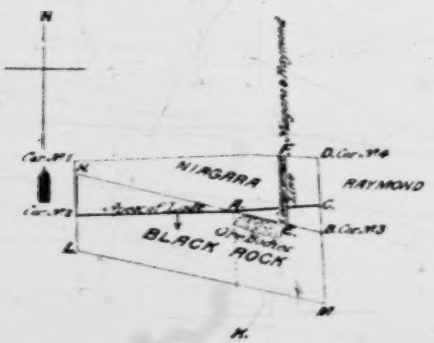



FIGURE 47.

court,[2] involved a contention between two lateral co-terminus lode claims—the Niagara and Black Rock—as shown in the accompanying diagram (figure 47), reproduced from the one accompanying the opinion.

[1] Cons. Wyoming G. M. Co. *v.* Champion M. Co., 63 Fed. 540.
[2] 17 Mont. 100.

The vein entered the west end line of the Black Rock, pursued an easterly trend, crossing through the common side boundary at A, and thence through the east end line of the Niagara, thus presenting a case where the vein on its course crossed an end and side line of each claim. As in King *v.* Amy & Silversmith Mining Co.,[1] Judge De Witt wrote the opinion of the court, and in doing so reviewed all the end-line cases which had been decided subsequent to the ruling in the Amy case. The same reasoning was applied to the solution of the Fitzgerald-Clark controversy as was invoked in the Amy case. The opinion is an earnest and forcible plea for the preservation of the extralateral right, in cases where, through honest mistake, one of the conditions contemplated in the case of ideal locations is not fulfilled to the letter. As we have heretofore observed, there was no denial by the supreme court of the United States of *all* extralateral rights in either the Flagstaff, Argentine, or Amy cases. This right was necessarily preserved by the extension of the side-end lines.[2] The court of last resort simply determined that the privilege of lateral pursuit could not be exercised in the manner claimed in these cases, for the simple reason, that such an application of the law would have carried the claimant outside of and beyond the planes drawn through lines which were crossed by the lode, and would have granted a segment of the vein, practically on its strike, after it had passed out of the located boundaries.

In the Elgin case, it would have been impossible to construct a line at the extremity of the location parallel to either one which actually crossed the lode, for the reason that such a line would, when so applied, be coincident with the local strike, and therefore could not cross the vein.

Another suggestion as to the Elgin case. It arose out of a unique and peculiar geological condition, to which, it may be safely surmised, the law was never intended to apply. We are not convinced that rules announced as

[1] 9 Mont. 543.

[2] See, *ante*, § 589.

governing such an unusual condition should be arbitrarily applied to instances which have nothing in common with it.

Let it be conceded absolutely, that where a vein crosses any line of a location, the crossed line becomes an end line in the sense that it stops the right of pursuit on the *course, or strike*, of the lode. All courts agree upon this.

The doctrine applied by Judge De Witt in the King-Amy and Fitzgerald-Clark cases, by Judge Hawley in the Tyler-Last Chance case, and by Judge Hallett in the Del Monte case, recognizes this fully. The doctrine, as contended for by them, constructs a plane, with reference to a boundary crossed by the lode, lawfully designated by the locator as an end line. It stops the pursuit of the vein on its strike, which result is also accomplished by the crossed line. It gives to the locator as much of the lode in depth as he has within his surface lines. It takes away nothing that could be lawfully appropriated by any one else. A case more forcibly illustrating the inherent equity of the rule than that shown in Fitzgerald *v.* Clark, could hardly be assumed.

If the extreme doctrine is to prevail, that no extra-lateral right is to be allowed where a vein crosses an end and a side line, the Niagara's rights are cut off by a plane drawn through its south side line, H B. This gives to the Black Rock an underground segment of the vein underlying its surface for its full length, with only a small portion of the apex. In other words, it holds more of the vein underneath, within its own boundaries, than it has overlying apex. But its pursuit of the vein on its downward course is cut off by the plane drawn through L M, its south side line. The remainder of the vein lying south of such vertical plane cannot be thereafter appropriated by any one under the mining laws, because there is no apex upon which to predicate such a location. Either the Niagara or the Black Rock, had they been able to obtain sufficient knowledge of the position and course of the vein, might have taken the full length and depth. But as they were mistaken in their surmises as to the course of the vein, and

so made their locations that it crossed the common side boundary, one receives practically nothing, and the other obtains something which the law did not intend he should have, and fails to receive all of the vein underlying his apex, which the law contemplated that he should take.

If, on the contrary, Judge De Witt's theory is adopted, and a bounding plane, A K, parallel to the end line, H L, is applied at A, the point of crossing the side line, each locator receives a segment of the vein throughout its depth equal in length to the apex within his surface boundaries. There is a complete appropriation of the vein for the entire length and depth. Any subsequent location would be necessarily based upon a portion of the apex not included within the boundaries of either the Niagara or Black Rock, and such junior locator would have no just cause of complaint. This seems to fulfill the intent and spirit of the law. It gives to the locator as much of the vein as the irregularity and imperfection of his location will permit, without depriving others of any legal rights. It brings order out of chaos, and certainty out of uncertainty. It does substantial justice to all concerned. Is not this the true end and object of statutory interpretation?

The objection that this is a judicially constructed end line, seems to us to be plausibly met by the reasoning of Judges De Witt, Hawley, and Hallett. The application of such a plane is neither arbitrary nor conventional. The direction of it is fixed by reference to the line properly designated by the locator as an end line. While the rule yet awaits the authoritative sanction of the supreme court of the United States, when we consider the practical unanimity with which both trial and appellate courts in the mining regions have accepted it as the only proper solution of the question, we express the belief that the court of last resort will not withold its approval.

**§ 592. Vein with apex wholly within the location, but crossing none of its boundaries, or entering at one end line and not reaching any other boundary.**—After

reading the opinions of Judges De Witt, Hawley, and Hallett, in the side-end-line cases, reviewed in the previous section, it is hardly necessary to consider under a separate classification the case of a vein having its apex wholly within the location, but crossing none of its boundaries, as illustrated in figure 47, or that of one crossing an end line and failing to reach any other boundary, as illustrated in figure 48.

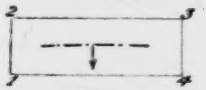


Figure 47.

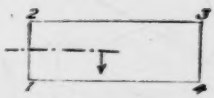


Figure 48.

We are not aware of any adjudicated case such as is illustrated by figure 47. Such an instance was assumed, for the purpose of argument, by Judge Hallett in the Del Monte case,[1] wherein that judge was inclined to ridicule the idea, that any one would deny the right of the locator to follow the lode within his end lines, upon the ground that the lode did not reach either of such lines.

It would be exceedingly difficult to understand upon what theory the extralateral right could be denied in either this case or that illustrated in figure 48.

An instance of the latter class occurred in the suit of the Carson City Gold and Silver Mining Co. *v.* North Star Mining Co., tried before Judge J. H. Beatty, sitting as circuit judge in the ninth circuit.[2]

We have presented, on page 417, a diagram illustrative of this case. It was demonstrated that the course of the vein through the location in the direction of the west end line was interrupted by what was locally termed a "cross-"ing," beyond which the fissure did not extend. No ore bodies were encountered west of this crossing. The court found that the apex of the vein ended at the point C,

[1] Del Monte M. & M. Co. *v.* New York & L. C. M. Co., 66 Fed. 212, 215.
[2] 73 Fed. 597.

under the mill, and applied at this point an end line plane parallel to the east end line, invoking the doctrine of the Tyler-Last Chance case, on the theory that the east end line was crossed by the lode. The practical result, so far as the North Star was concerned, would have been the same if the court had extended the west end line, as there was no segment of the vein lying between a plane drawn through that line and the one applied by the court at the point C.

A similar case was assumed, for illustrative purposes, by Judge Hawley, in his decision in Tyler Mining Co. *v.* Sweeney.[1] It was there said, that there certainly could be no question in such a case as to the right of the locator to follow the lode in its downward course for its entire depth.

**§ 593. Extralateral right as to veins other than the one upon which the location is based.**—The law contemplates that there may be found veins having their tops, or apices, within the boundaries of the location other than the one originally discovered, and upon which the location is predicated. Such instances are by no means rare. Sometimes they are parallel to the located vein, in which case there is but little room for controversy as to the bounding planes which define the extralateral right.

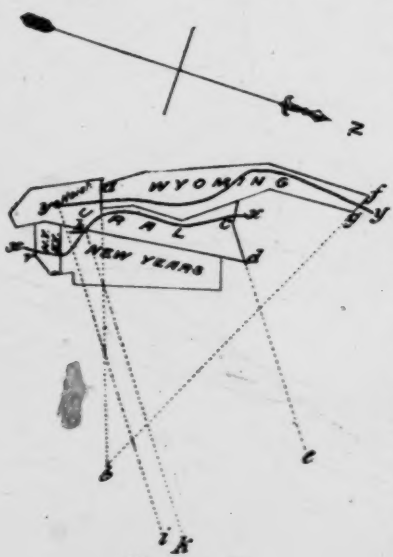


FIGURE 49.

One thing is quite certain, and that is,

[1] 54 Fed. 284, 293.

there can be but one set of end line planes, which must bound the extralateral right as to all lodes. A case involving this question was tried before Judge Hawley, sitting as circuit judge, ninth circuit, the facts of which may be illustrated by the use of a diagram (figure 49).

The Ural was an irregularly shaped surface, the original location of which was based upon the Ural vein, *x x*, called the "contact vein," as it was found between a granite hanging and a slate foot wall. It was shown, that lying west of this, in the slate, was a separate and distinct vein—an extension of the Wyoming—which continued into the Ural ground as far as the point marked "hoist." There was a union in depth between the Wyoming and Ural veins, underneath the surface of the New Years mine, claimed by the Champion Company, which company had a portion of the apex of the contact vein in the New Years; and as the Ural and Wyoming were located prior to the New Years, the court was called upon to define the extralateral right.

The court followed the Tyler-Last Chance rule as to the bounding plane on the Ural, or contact, ledge, by applying a plane, *h k*, parallel to the produced line, *c d e*, at the point *h*, where the vein crossed the side line into the New Years ground, and a similar plane, *y i*, at the point where the Wyoming vein terminated in the Ural ground.

If there is anything illogical in this method of adjusting the difficulty, it is found in the selection of the line *c d* as an end line. It was not such in law, as the contact vein did not cross it. The supreme court of Colorado, in commenting upon this decision, expresses the opinion that it is in irreconcilable conflict with the ruling of the supreme court of the United States in the King-Amy case.[1]

The method pursued by Judge Hawley, however, as to the segment of the Wyoming ledge found within the Ural boundaries, illustrates the principle of bounding the extralateral right upon all lodes found within the location

[1] Catron v. Old, Feb. 3, 1897.

boundaries by planes constructed with reference to the direction of the end lines of the located lode, assuming, for purposes of illustration, that the plane applied to the contact vein at the point *h* was a true end-line bounding plane.

Justice Field, in his opinion in the Elgin case, says:—

"It often happens that the top, or apex, of more than one "vein lies within such surface lines, and the veins may "have different courses and dips, yet his right to follow "them outside of the side lines of the location must be "bounded by planes drawn vertically through the same end "lines."[1]

Another instance of the character under consideration will be noted in the next article, which will more clearly illustrate the views of Judge Hawley, and will enable us to close the discussion of this question.[2]

§ 594. **Conclusions.**—It is quite manifest, from a review of the foregoing sections of this article, that we have not undertaken to present all possible combinations arising from either the forms of location or the erratic course of veins through them. Hypothetical cases without number might be assumed, illustrated, and discussed, without material advantage to either the practitioner or the author. Many of them may be solved by the application of established principles. Others present individual types, which will, should they arise, perplex the courts, even in the absence of controverted questions of fact. It has been our aim to confine our treatment of the subject to the exposition of the law, as found in the adjudicated cases, and applying the principles which seem to be sanctioned by the current of judicial authority to a few hypothetical cases which appear to us to be susceptible of solution by resorting

[1] Iron S. M. Co. *v.* Elgin M. Co., 118 U. S. 196, 207.

[2] The case of Cons. Wyoming *v.* Champion, discussed in this section, was appealed to the circuit court of appeals. Pending the appeal, the Champion Company purchased the entire property of the Wyoming, thus uniting all the claims under one ownership. The appeal was thereupon dismissed.

to such principles. We may admit that as to some of these hypothetical cases the position assumed by us is open to debate and criticism, but in the main we think we have fairly presented the existing state of the law on this important subject, and are justified in deducing therefrom the following rules:—

(1) Under the act of 1866, parallelism of end lines was not essential to the exercise of the extralateral right. The vein might be pursued in depth indefinitely between planes drawn through the end lines and such lines produced, whether they converge or diverge in the direction of the dip;

(2) Under the act of 1872, parallelism of end lines is essential, except where the opposite boundary lines, crossed by the lode, converge in the direction of the dip;

(3) In order to enjoy the extralateral right, the locator must include within his boundaries the apex of a discovered vein throughout its entire width;

(4) Where a vein crosses two opposite parallel side lines, the extralateral right is defined by producing such side-end lines indefinitely in the direction of the dip, and the angle at which the lode crosses these lines is of no moment;

(5) Where a vein, located under the act of 1872, crosses two opposite non-parallel side lines, if such lines diverge in the direction of the dip, there can be no extralateral right. Where, as produced, they converge and intersect beyond the limits of the location, the vein may be pursued in its downward course to the line of intersection of the two planes, at which line the extralateral right ceases;

(6) Where such a vein crosses one of the lines designated by the locator as an end line, and departs through a side line, the extralateral right is defined by reference to the direction of the crossed located end line. A plane parallel to one drawn through such crossed end line, produced indefinitely in the direction of the dip, applied at the point where the lode crosses the side line, will carve out a segment of the vein throughout its entire depth, which will belong to the locator;

(7) Where the apex of the located vein crosses none of the boundaries of the location, but lies wholly within such boundaries, or crosses one end line and fails to reach any other boundary, the extralateral right is defined by reference to planes drawn through the located end lines.

If these principles are fairly deducible from the adjudicated cases, the difficulties surrounding the application of the law are reduced to a minimum. What is most essential is, certainty of the rule and uniformity in its application. It is better that the principle established should be certain and definite, even if it is not based upon incontrovertible logic or the perfection of human reasoning.

## Article IV. Extralateral Rights on Other Lodes Conferred by the Act of 1872 on Owners of Claims Previously Located.

§ 598. Introductory.
§ 599. Extralateral right on other lodes where the end lines of the original location cross the original lode and are parallel.
§ 600. Same — Where the end lines are not parallel.

**§ 598. Introductory.**—We have heretofore observed, that under the act of 1866 the locator was restricted to one lode, and that in all patents issued under that act a restricting clause was inserted in that instrument, limiting the conveyance to such lode.[1]

When the change in the manner of locating claims was inaugurated by the act of May 10, 1872, in order to prevent any question as to the ownership of such other veins as might be found within any surface area of claims previously located, to prevent conflicts from arising as to such other veins, and to bring as far as practicable all classes of locations theretofore or thereafter made under one general system, a clause was inserted in the act, conferring upon all locators of claims theretofore appropriated the same

[1] See, *ante*, § 512.

rights as to all lodes whose tops, or apices, might be found within the surface boundaries as were granted to locators of claims thereafter acquired. We have quoted this clause of the act in a previous section,[1] and it is unnecessary to here repeat it.

The application of this law to locations made under a system which exacted, as a condition precedent to the exercise of any extralateral right, that end lines should be parallel, has been surrounded with difficulties which at times have seemed almost insurmountable. But to apply a law framed upon the theory of parallelism to locations made and patents issued under a system which, as we have heretofore fully explained, contained no such requirement, presents additional complications.

In discussing the subject of locations made under the act of 1866, we have frequently called attention to the fact, that in many instances the location took the form of a many-sided figure—an irregularly shaped surface[2]—constructed without regard to the course of the vein. We have heretofore endeavored to demonstrate what we understand to be the correct rules to be applied with reference to the *one* lode, called by us the original, in defining the extralateral right.[3] But what doctrine may be invoked as to other lodes in cases where the location was made prior to the act of 1872, and where such location has been perpetuated in its original form? We will consider the subject in two aspects:—

(1) Where the end lines of the original location cross the original lode and are parallel;

(2) Where the end lines crossing the original lode are not parallel.

**§ 599. Extralateral right on other lodes where the end lines of the original location cross the original lode and are parallel.**—The case of Walrath *v.* Champion Mining Company, commonly known as the Providence-

[1] See, *ante*, § 576, p. 693.
[2] See, *ante*, § 573.
[3] See, *ante*, §§ 573-576.

Champion case, tried before Judge Hawley, sitting as circuit judge,[1] presented an instance of a patent issued under the act of 1866, with parallel end lines crossing the lode, and a subsequently discovered vein, which crossed neither end line. The case is best illustrated and explained by the use of a diagram (figure 50). The original lode is marked *z z*

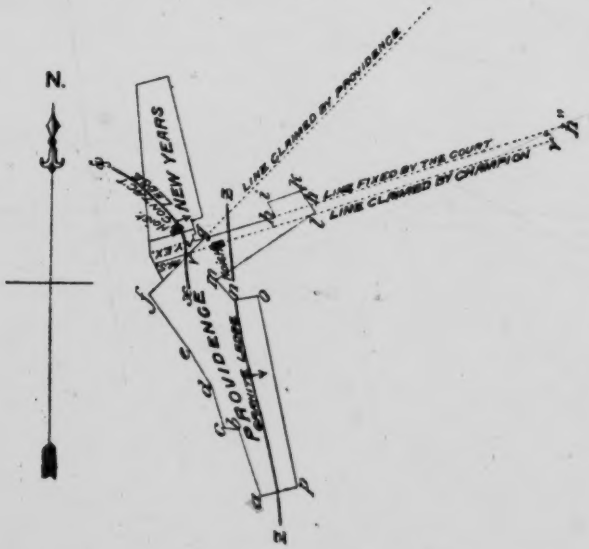



FIGURE 50.

on the figure, and is locally known as the granite ledge. It crossed two parallel end lines, *a p* and *g h*.

Some years after the passage of the act of 1872, another ledge, or vein, called the contact ledge, *x x*, was found to enter the Providence ground across the line *f g*, pursuing a southerly course, but it is not shown to have reached on such course any of the other boundaries. The Champion Company, having subsequent to 1872 located that portion of the contact ledge lying within the New Years and New

[1] 63 Fed. 552.

Years Extension, a controversy arose as to the bounding plane between the two companies on this ledge. There was no controversy between the litigating parties as to the original, or granite, ledge. The Providence contended, that as the contact ledge crossed the line *f g*, that line became in law an end line, and the vertical bounding plane should be drawn through the line *f g*, produced indefinitely.

The Champion contended, that the rights of the Providence on all ledges having their apices within its boundaries must be fixed with regard to the end lines of its *location* and the general direction of such lines, as described in the patent and delineated upon the map accompanying it; that the only lines appearing upon the plat which at all fulfilled the natural or legal definitions of end lines, were the end lines crossed by the original lode, *z z*, to wit: *g h* and *a p*, and that they must be construed to be the "end lines of the "location" referred to in the act of 1872; that the rule enunciated by the circuit court of appeals in Tyler *v.* Sweeney[1] was applicable to the case, and afforded the only consistent legal solution of the controversy between the parties. This rule would apply the plane through *g h*, at the point *v*, where the ledge in controversy crossed on its southward course the boundary line, *f g*, giving the bounding plane, *v v'*.

The court declined to adopt either theory. It announced the following as its views:—

"The act of 1872, in granting all other veins that were "within the surface lines of previous locations, did not "create any new lines for such other veins, nor invest the "court with any authority to make new end lines for such "other veins. And it is apparent from an examination of "the statute that the court has no power to make a new "location for every vein that may be found within the "surface lines of the location, and thereby enlarge the "rights of the original locators. When the end lines of a "mining location are once fixed, they bound the extralateral rights to all the lodes that are thereafter found within

[1] 54 Fed. 284.

"the surface lines of the location. It necessarily follows, "that the end lines of the Providence survey must be con- "sidered by the court as the end lines of any and all other "lodes, or veins, which lie 'inside of such surface lines;' "otherwise, endless confusion would arise in the construc- "tion of the statute. End lines would have to be con- "structed in different directions if the separate lodes, or "veins, found within the surface lines did not run parallel "with each other, and the result would be, that these lines "extended might give to the owners of the claims a greater "length along the lode, as it extended downward, than "they had upon the surface. If the same end lines which "bind the extralateral rights of the Providence surface "survey apply to the contact vein, and to all other veins, if "any are hereafter found, then no such difficulty can arise. "This is the rule that applies to all locations made after "the act of 1872, and it ought not to be presumed that "congress, by its grant to prior locators, intended to give "greater rights to them than were given and granted to "subsequent locators under the same act."[1]

This case was taken to the circuit court of appeals,[2] where the judgment was practically affirmed. A modification was ordered, but it did not affect the principle involved or the interest of either party to the litigation in any appreciable degree.[3]

The principle announced by the circuit court is that suggested by Judge Field in the Elgin case, quoted in a preceding section.[4]

**§ 600. Same—Where the end lines are not parallel.**—If we are correct in the conclusions reached in a preceding section,[5] that whatever may be the form of a surface area described in a patent issued or a location made and perpetuated under the act of 1866, whether the end lines converge or diverge in the direction of the dip, the extra-

[1] Walrath *v.* Champion M. Co., 63 Fed. 552, 557.

[2] Walrath *v.* Champion M. Co., 72 Fed. 978.

[3] The Providence owners applied to the supreme court of the United States for a writ of *certiorari*, which was denied. Subsequently an appeal was taken to that tribunal, which is now pending.

[4] See, *ante*, § 593.

[5] See, *ante*, § 577.

lateral right on the original lode is to be defined by drawing vertical planes through the end lines produced in their own direction, we cannot see how we can escape the necessity of applying the same rule to all other lodes whose apices are found within the boundaries. The language of section twenty-three hundred and twenty-two of the Revised Statutes, quoted and commented on in a preceding section,[1] admits of but one construction. To say that the extralateral right as to the other lodes within the boundaries of a location made prior to May 10, 1872, could only be exercised in the event that the end lines of such antecedent locations should be parallel, is to import something into the statute. While this construction may at times be productive of awkward and, considered in the light of the existing system, exaggerated results, yet we cannot see who has the right to complain. Congress certainly had the power to grant the whole or any part of these veins which had not been previously appropriated and held under local rules or under the act of 1866. That the language of the section referred to is to be interpreted as a grant, is, in our judgment, beyond dispute. Those who come afterwards take in subordination to this prior grant.

## Article V. Construction of Patents Applied for Prior, but Issued Subsequent, to the Act of 1872.

§ 604. Patents applied for under the act of 1866, but issued after May 10, 1872, to be construed as if issued under the prior law.

**§ 604. Patents applied for under the act of 1866, but issued after May 10, 1872, to be construed as if issued under the prior law.**—At the time the act of July 26, 1866, was repealed, and the old system gave place to the new, a great many applications for patent were pending before the

[1] See, *ante*, § 576.

land department, based upon locations made either under the repealed law or prior to its enactment. In some instances, final entry and payment had been made, and the receiver's receipt or certificate of purchase had been issued, leaving nothing further to be done save the formal issuance of the patent. In other cases, action on the part of the land department was suspended, awaiting the determination of adverse conflicting claims. In still others, the preliminary steps had been taken, and only awaited the lapse of the requisite period enabling the applicant to make final entry and payment. Recognizing these conditions, congress incorporated into the new law the following provisions:—

"Sections one, two, three, four, and six of an act entitled, 'An act granting the right of way to ditch and canal owners over the public lands, and for other purposes,' approved July 26, 1866, are hereby repealed, but such repeal shall not affect existing rights. Applications for patents for mining claims now pending may be prosecuted to a final decision in the general land office; but in such cases, where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this act; and all patents for mining claims heretofore issued under the act of July 26, 1866, shall convey all the rights and privileges conferred by this act, where no adverse rights exist at the time of the passage of this act."[1]

". . . *Provided*, that nothing contained in this act shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws."[2]

This manifests the unequivocal intention of congress to preserve all rights previously acquired, and the act must be so construed.[3]

There is nothing in the terms of the new act which required the applicant to institute proceedings *de novo*, or to go into the field and re-form the lines of his survey so as to include within his boundaries only so much surface as

[1] Act of May 10, 1872, § 9, 17 Stats. at Large, 94.
[2] *Id.*, § 10.
[3] Eclipse G. & S. M. Co. v. Spring, 59 Cal. 304.

was permitted under the act of 1872, where under the pre-existing law and local rules he might have been entitled to more. He was not required to republish a notice of his application for patent, and open the door to outside claimants who had been barred by the lapse of time under the previous law.

The object of the original act, as well as the one which superseded it, was to require the claims of all parties to be adjusted prior to the issuance of a patent. The proceedings before the land department are judicial in character, and the publication of notice as required, brings all parties into court; and if outside claimants stand by and allow the statutory time for filing adverse claims to elapse, their rights, so far as the same might have been determined in such proceedings, are forever lost.[1]

To insist that the applicant should abandon his proceedings initiated prior to the passage of the act of 1872, reopen his case, and proceed thereafter in strict conformity with the new law, would be to deprive him of a substantial right which was preserved to him by the law itself.

The land department, which had acquired jurisdiction under the original law, was not deprived of that jurisdiction under the new act. If it had power to issue the patent at all, in doing so it could only recognize the conditions as they existed at the time the application was filed.

We therefore encounter numerous patents, bearing date subsequent to the passage of the act of May 10, 1872, which describe surface areas of such form and extent as to be practically invalid if issued under that act, but which are not open to objection where it is shown that they were issued upon proceedings instituted while the act of 1866 was still in force. Such patents are to be construed as if they had been issued under the act of 1866, while receiving the supplemental rights and privileges conferred by the act of 1872.

[1] Kannaugh v. Quartette M. Co., 16 Colo. 341; Wolfley v. Lebanon M. Co., 4 Colo. 112.

As a patent relates back to the inauguration of the right,[1] the proceedings under which title originated may be proved. This is no attack upon the patent.[2]

## ARTICLE VI. LEGAL OBSTACLES INTERRUPTING THE EXTRALATERAL RIGHT.

§ 608. Classes of impediments interrupting the right of lateral pursuit.
§ 609. Prior appropriation by a regular valid location of a segment of the same vein without conflict as to surface area.
§ 610. Qualification of the doctrine that the extent of the extralateral right of different locators on the same vein is to be determined by priority of location.
§ 611. The encountering of a vertical plane drawn through a surface boundary of a prior grant, which grant did not in terms or inferentially reserve the right of underground invasion — Senior mining locations not of this class.
§ 612. Same — Prior agricultural grants.
§ 613. Same — Other classes of grants.
§ 614. Union of veins on the dip.
§ 615. Identity and continuity of veins involved in the exercise of the extralateral right.

**§ 608. Classes of impediments interrupting the right of lateral pursuit.**— There are conditions under which the pursuit of a vein on its downward course, outside of and beyond the vertical planes drawn through the side lines, may be interrupted, and the extralateral right absolutely cease, although the surface conditions as to apex, course of the vein, and the boundary lines, may approximate the ideal standard. The legal obstacles which may thus be interposed to obstruct the right are, generally speaking, referable to the necessity for recognizing prior grants and the application of the maxim, "First in time, "first in right."

[1] St. Louis Smelting Co. *v.* Kemp, 104 U. S. 636; Kahn *v.* Old Telegraph Co., 2 Utah, 174; Deno *v.* Griffin, 20 Nev. 249; Eureka Case, 4 Saw. 302; Smokehouse Lode Cases, 6 Mont. 397; Talbot *v.* King, *Id.* 76; Silver Bow M. & M. Co. *v.* Clarke, 5 Mont. 378.

[2] St. Louis Smelting Co. *v.* Kemp, 104 U. S. 636; Kahn *v.* Old Telegraph Co., 2 Utah, 174; Last Chance M. Co. *v.* Tyler, 61 Fed. 557.

We can conceive of three classes of such obstacles:—

(1) Prior appropriation by a regular valid location of a segment of the same vein not involving any conflict as to surface area;

(2) The encountering of a vertical plane drawn through a surface boundary of a prior grant, which grant did not in terms or inferentially reserve the right of underground invasion to the prospective proprietor of a lode location;

(3) The union on the dip of the vein of a junior with that of a senior locator.

**§ 609. Prior appropriation by a regular valid location of a segment of the same vein without conflict as to surface area.**—It is axiomatic, that the government has no more power to grant the same thing twice than a private proprietor.[1]

It is bound by the same rules of good faith and good conscience which bind ordinary individuals. A patent issued for lands which have been previously granted, reserved from sale, or appropriated, is void.[2]

A valid mining location, perfected and maintained under the law, is a grant from the government,[3] and the estate granted in the vein in depth, beyond the boundaries, is of the same dignity as that conveyed within the boundaries.[4]

A perfected valid lode location is predicated upon the existence, within the defined boundaries, of the apex of a discovered lode.[5] To the extent, at least, that this top, or apex, is included within vertical planes drawn through the surface boundaries, the lode is granted. If the position of the lode, with reference to the surface boundaries, is such that the locator is entitled, under the rules heretofore

[1] Fremont v. Flower, 17 Cal. 199.

[2] Morton v. State of Nebraska, 21 Wall. 660; Davis v. Wiebbold, 139 U. S. 507; United States v. Winona & St. Paul R. R., 67 Fed. 948.

[3] See, *ante*, § 539.

[4] See, *ante*, § 508.

[5] See, *ante*, § 364.

enumerated, to pursue the vein on its downward course beyond the vertical bounding planes, drawn through his side lines, he is granted such segment of the lode in its entire depth as lies between vertical bounding planes drawn through his end lines produced indefinitely in their own direction, subject only to the condition, that no portion of such segment has been the subject of a prior grant which is still valid and subsisting. Let us illustrate this by the use of a diagram.

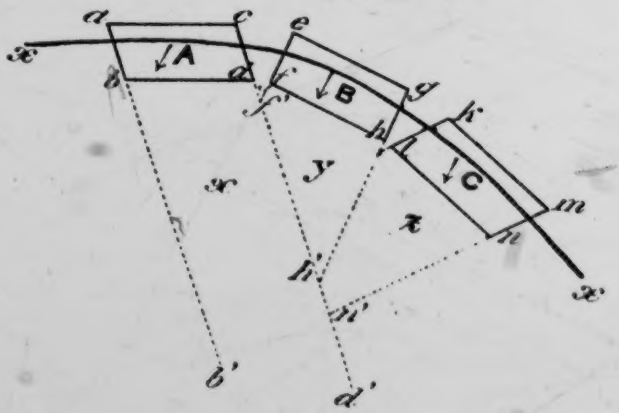



FIGURE 51.

In figure 51 we have represented a lode, *x x*, with a dip in the direction indicated by the arrow, passing on its onward course, or strike, through the respective locations of A., B., and C. Of these locations, B. alone conforms to the ideal standard. Its end lines cross the lode at right angles to its general course as it traverses the location. A. and C. each have parallel end lines crossing the vein, but at obtuse or acute angles. As we have heretofore observed,[1] this is no objection to either the validity or regularity of the locations. The law does not require that end lines

[1] See, *ante*, § 365, p. 473.

shall be at right angles to the course of the vein. It inflicts no punishment upon A. or C. for failure to so construct them. Individually considered in the eyes of the law, A. and C. are just as complete and regular locations as B. Each carves out a segment of the vein at the surface, fifteen hundred feet in length, included within parallel end lines, which are crossed by the lode on its onward course; and if found isolated and unaffected by rights asserted by neighboring locators, each would be entitled to that segment throughout its entire depth—that is, so much of the vein as is found between vertical bounding planes drawn through their respective end lines produced indefinitely.

The priorities as to title are in the order named, A. being prior in point of time to both B. and C., and B. being prior to C. When we speak of priority of title, we mean priority of location.

A junior locator may have a patent, while the senior's title rests in a perfected and subsisting location. Under such circumstances the patent has been issued in subordination to the senior locator's rights. When the latter receives his patent, the title thus obtained will relate back to the date of his location.[1]

A., being the prior locator, has secured by his perfected location a grant to the segment of the vein found between vertical bounding planes drawn through his end lines produced indefinitely in their own direction ($a\ b\ b'$, $c\ d\ d'$)—that is, the segment $x$.

The title to this segment of the lode in its entire depth, beyond the vertical plane drawn through the side line, $b\ d$, has been severed from the title to the superjacent soil, and no subsequent grant, appropriation, or reservation, whether of the overlying surface or of any other part of the lode, can curtail or abridge any of A's rights, so long as his

[1] Stark v. Starrs, 6 Wall. 402; Talbott v. King, 6 Mont. 76; Jacob v. Lorenz, 98 Cal. 332; Last Chance M. Co. v. Tyler M. Co., 61 Fed. 557; St. Louis Smelting Co. v. Kemp, 104 U. S. 636; Kahn v. Old Telegraph Co., 2 Utah, 174; Deno v. Griffin, 20 Nev. 249; Eureka Case, 4 Saw. 302; Smokehouse Lode Cases, 6 Mont. 397; Silver Bow M. & M. Co. v. Clarke, 5 Mont. 378.

location is preserved in its integrity. He has the right to the pursuit of this segment in depth until he encounters some legal obstacle interrupting its further pursuit. A subsequent grant is not such a legal obstacle. B., the junior locator, cannot locate a continuation of the outcrop, and so construct the end lines of his location that vertical planes drawn through them and their extension would intersect the vertical end-line planes of A., the senior locator, and deprive him of any portion of the segment *x*. B., by his junior location, obtains title to the segment *y*, and C., who follows him, takes the segment *z*. As was said by the supreme court of the United States in the Argentine-Terrible case,—

"Assuming that on the same vein there were surface "outcroppings within the boundaries of both claims, the "one first located necessarily carried the right to work the "vein."[1]

An inspection of the diagram (figure 40) presented on page 713, in connection with a previous discussion of this case,[2] forcibly illustrates the rule. The prior valid appropriation by the Adelaide of a portion of the apex, as indicated in figure 40, interrupted the extralateral right of the junior locators holding a portion of the apex of the same vein in the Camp Bird and Pine claims.

As was said by Judge Hawley, speaking for the circuit court of appeals, ninth circuit, in the Tyler-Last Chance case,—

"In cases of controversy, where the right exists under "each valid location to follow the lode in its downward "course, it necessarily follows that both locations cannot "rightfully occupy the same space of ground; and in all "cases where a controversy of this kind arises, the prior "locator must prevail, precisely as in cases of like contro- "versy between locations overlapping each other length- "wise on the course of the lode."[3]

[1] Argentine M. Co. v. Terrible M. Co., 122 U. S. 478.
[2] See, *ante*, § 587.
[3] Tyler v. Sweeney, 54 Fed. 284, 296.

A simplified diagram of the Tyler case will illustrate the doctrine, as applied to the hypothetical case under consideration.

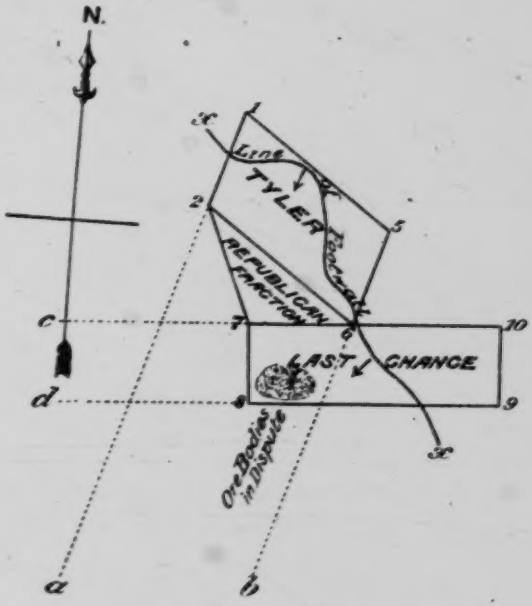



FIGURE 52.

Figure 52 is based upon the diagram appearing in connection with the opinion of the supreme court of the United States,[1] and which we reproduced with slight elaboration as figure 45, shown on page 722. It eliminates the triangular tract which involved a surface conflict between the Tyler and Last Chance claims, and presents the Tyler claim as patented, a claim regular in form, with the vein passing through two end lines. The Last Chance presents a location with the vein crossing two side lines. With the priority established in favor of the

[1] Last Chance M. Co. v. Tyler, 157 U. S. 684.

Tyler, there can be no question but that the owners of that claim would be entitled to the segment of the vein found within vertical planes drawn through the end lines as produced (*1 2 a* and *5 6 b*). With the priorities established in favor of the Last Chance, and assuming that the owners of the latter claim have a right to produce their side-end-line planes westerly in the direction of *c* and *d*, respectively, of the correctness of which assumption there can be no doubt,[1] the extralateral right of the Tyler is interrupted and ceases when the vertical plane drawn through *10 7 c* is encountered. As was said in this case by the supreme court of the United States:—

"On the assumption that the action of the owners of "the Tyler claim, in excluding from their application a "portion of their claim, was legal, obviously the priority "of location becomes a pivotal question. For while the "disputed ore is on the dip of the vein within the ex- "tended vertical planes of the end lines of the Tyler "claim, it is also within the legal end lines of the Last "Chance claim and on the dip of the vein as it passes "through that claim. Naturally, therefore, the contro- "versy in the circuit court was upon the priority of loca- "tion."[2]

With respect to the rights of the Republican Fraction, with an assumed priority over the others, it will be observed, from an examination of figure 45, shown upon page 722, that the Republican location was based upon a part of the width of the apex, the apex being about three hundred feet wide.[3] This fact,[4] together with the form of the location,[5] it having been made under the act of 1872,[6] deprives the locator of all extralateral right.

To what extent the Republican Fraction would, by reason of its priority, prevent the Tyler from penetrating underneath the surface of the former in the lateral pursuit

[1] See, *ante*, § 589; Tyler v. Sweeney, U. S. Circuit Court of Appeals, Feb. 1, 1897.

[2] 157 U. S. 687.

[3] Republican M. Co. v. Tyler M. Co., U. S. Circuit Court of Appeals, Ninth Circuit, 1897.

[4] See, *ante*, § 583. [5] *Id.*, § 582. [6] *Id.*

of the vein, to the extent that the latter held the apex in its full width, may be determined from an application of the principles announced in the next section, and illustrated, by reference to figure 53.

It may be remarked, however, that the manner in which the apex is cut by the common side boundary presents a condition altogether different from that illustrated and discussed in a previous section.[1]

**§ 610. Qualification of the doctrine that the extent of the extralateral right of different locators on the same vein is to be determined by priority of location.**—What we have heretofore said upon the subject of prior appropriation has been based upon the assumption of the existence of regular valid locations—that is, locations each embracing within its respective boundaries some portion of the apex of the same vein, each having the right of extralateral pursuit, to some extent at least.

It does not necessarily follow, nor is it to be inferred from the authorities cited, that the existence of any portion of the apex of a vein within the boundaries gives the owner of a prior location all of the vein which may be found within the vertical planes drawn through those boundaries. We have heretofore endeavored to show, that according to the spirit and intent of the existing law the owner of a lode location is entitled to only so much of the vein on its downward course as he has apex overlying it, and that the vertical planes bounding this right must under all circumstances be parallel, or, at least, non-divergent in the direction of the dip.

What we now wish to establish is, that any portion of the lode lying outside of and beyond these vertical end-line planes, found underneath the surface of the prior location, will belong to a subsequent locator who, by a regular valid location, appropriates such part of the apex as is found outside of the boundaries of the first locator. That

[1] See, *ante*, § 583, fig. 35, p. 702.

our meaning may be plain, let us again resort to the use of a diagram.

Figure 53 represents two locations (A. and B.) on the same vein, *x x*, A's being prior in point of time. As to A's location, the lode crosses one end line, *c d*, and a side line, *a c*,

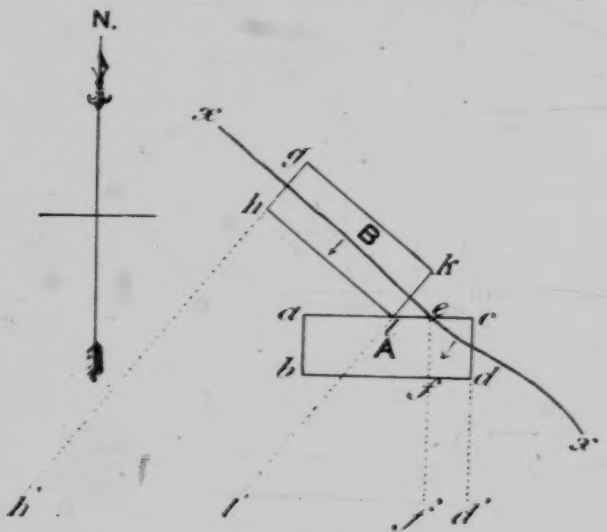



FIGURE 53.

having within its boundaries, let us say, four hundred linear feet of the apex of the vein. If the views heretofore announced are sound,[1] A's extralateral right is defined by vertical planes drawn through *c d d'* and *e f f'*. What becomes of that portion of the vein lying underneath A's surface west of the vertical plane drawn through *e f*? It may be admitted that, *prima facie*, it belongs to A. But when B. makes his location, including the apex, as shown on the diagram, without in any way conflicting with A's surface boundaries, is his right of extralateral pursuit interrupted and abridged by a vertical plane drawn through

[1] See, *ante*, § 591.

A's north side line, *a c c'*. Such result would ensue if the vein crossed both side lines in the manner shown in the Flagstaff-Tarbet, Argentine-Terrible and King-Amy cases, *because* the side lines in that class of cases perform *all* of the functions of *end lines*. But in the case now supposed, the line *a c c* does not perform all of such functions, because its direction does not, under any circumstances, operate to determine the limits of the extralateral right. It stops the pursuit of the vein on its onward course. But this is true of any line crossed by a vein on its course. It is our view of the law, that A. is, in the presence of junior locators, such as B., entitled to only so much of the vein in depth as he has apex, *i. e.* four hundred feet. In other words, the segment of the vein underneath A's surface, lying west of the bounding plane drawn through *c f*, is reserved by operation of law out of the grant to A., and B. owns the segment of the vein within the bounding planes *g h h'* and *k l l'*, although a portion of such segment underlies A's surface. This is an instance where the question of priority is immaterial.

"This consequence would follow, irrespective of the "priority of the locations. It would depend on the ques- "tion as to what part of the vein the respective locations "properly cover and appropriate."[1]

The circuit court of appeals for the eighth circuit, in the case of the Colorado Central Consolidated Mining Co. *v.* Turck,[2] held, that the statute conferring the right to follow a lode outside of the side lines of a location, when the top, or apex, of the lode lies within the boundaries of the location, does not, in terms or by necessary implication, limit the exercise of that right, especially where mining claims are involved, to cases where the adjoining claims are held under junior locations or patents;[3] and in the Providence-Champion case,[4] Judge Hawley determined

[1] Flagstaff S. M. Co. *v.* Tarbet, 98 U. S. 463, 469.

[2] 50 Fed. 888.

[3] See, *ante*, § 364, p. 470, note 2.

[4] Walrath *v.* Champion M. Co., 63 Fed. 552; S. C. on appeal, 72 Fed. 978.

that the Champion, the junior locator, might follow that portion of the contact vein underlying its apex, underneath that part of the Providence surface lying beyond the planes determined by the court to be the end-line planes of the location. The court awarded to the junior apex locator that segment of the vein on its dip underlying the parallelogram *h i k h'*, shown upon figure 50, on page 740, although such overlying surface was covered by the senior location and patent.

We think the doctrine is in consonance with the spirit and intent of the law.

The contrary rule applied to the hypothetical case illustrated in figure 53 would result in giving to A. practically fifteen hundred linear feet of the vein within the bounding planes drawn through his surface lines, with only four hundred feet of apex. If A. had simply located the parallelogram *a e f b*, he would acquire nothing as against B., because of the non-existence of apex within his boundaries.[1] Should he be permitted to hold the segment of the vein underlying this parallelogram, as against the locator of the apex (B.), simply because he included at the end of his claim a small portion of the apex cut by one end line and one side line? We think not.

**§ 611. The encountering of a vertical plane drawn through a surface boundary of a prior grant, which grant did not, in terms or inferentially, reserve the right of underground invasion—Senior mining locations not of this class.**—To say, that the right to pursue a vein on its downward course, outside of and beyond vertical planes drawn through the lateral boundaries, is interrupted when a plane drawn through the surface boundaries of a prior grant is encountered, which grant did not in terms or inferentially reserve the privilege of underground invasion, is but the statement of a self-evident proposition. In such a case the segment of the vein underlying the surface of the prior

[1] See, *ante*, § 361.

grant has been conveyed, the title to it has passed out of the government, and the government cannot grant the same thing twice. This is elementary. The difficulty lies in determining to what extent, if any, this right of invasion is preserved. In other words, when and under what conditions is this underground segment of the vein deemed to be severed from the estate in the superjacent surface, so that a subsequent locator may acquire title to it by appropriating its apex?

As between mining proprietors, that is, where all the parties hold and claim under the mining laws of congress, it seems to be generally conceded, that the apex proprietor, having a location in such form and with his vein in such a position within the boundaries of his location as to warrant the right of lateral pursuit under ordinary circumstances, may follow such vein in its downward course, into and underneath the surface of all other mining locations, either lode or placer, whether they be prior in time or subsequent, unpatented or patented. In other words, there is reserved, as a matter of law, out of every grant of an estate created under the federal mining statutes, all portions of veins underlying the location, which veins have their tops, or apices, outside of the located boundaries.

To state the proposition in another form: The apex lode proprietor with a regular valid location is granted the right to pursue his vein on its downward course into and underneath the land adjoining. His boundaries may, in like manner, be invaded by outside apex proprietors. The right is reciprocal. A placer locator takes, subject to this privilege of a lode proprietor, present or prospective, for the reason that the law under which he acquires the right to locate is found in the general body of the mining statutes, and must be construed in connection with the entire system, of which it forms but a part.

The reservation of "known lodes" out of placers refers to such lodes as have their apices within the placer boundaries, and which are subject to appropriation *within* such

boundaries, notwithstanding the existence of the placer location. A vein penetrating underneath a placer surface could not be so appropriated. Therefore, in dealing with placer locations and placer patents, it is not necessary that the underlying segment of the vein penetrating underneath the placer surface from an outside apex should be known to exist at the time of filing the application for a placer patent, in order to effect a reservation out of such patent. It is reserved by the theory of the law. It is severed from the public domain, and is subject to appropriation by the discoverer of the apex. It does not pass by the placer patent.

We think that the doctrine herein outlined finds ample justification in the authorities cited and reasoning applied in the preceding section. As was said by the circuit court of appeals, eight circuit, in a case heretofore referred to:—

"The statute conferring the right to follow a lode out-
"side of the side lines of a location, when the top, or apex,
"of the lode lies within the boundaries of the location,
"does not, in terms or by necessary implication, limit
"the exercise of that right, especially where mining claims
"are involved, to cases where the adjoining claims are held
"under junior locations or patents, and we think we would
"not be justified in placing such a limitation upon the
"right by construction. The practice of the general land
"office for many years appears to have been opposed to
"the existence of any such limitation."[1]

And in another case between the same parties the same court reannounced the doctrine as follows:—

"If the patents were offered for the purpose of showing
"that they were older than the patent for the Aliunde claim,
"then the proof was immaterial, for the reason, that the
"plaintiff's right to the lode in controversy did not depend
"upon the age of his patent, but upon the fact that the
"apex of the lode was within the surface boundaries of the
"Aliunde location."[2]

[1] Colorado Cent. Cons. M. Co. v. Turck, 50 Fed. 888, 895.
[2] *Id.*, 70 Fed. 294, 298.

We think that a consideration of the elements presented and discussed in the next section clearly justifies the conclusions announced by the circuit court of appeals.

§ 612. **Same—Prior agricultural grants.**—Has the proprietor of a regular valid lode location the right to pursue his vein in depth, outside of his lateral bounding planes, into and underneath the surface of an agricultural grant, the title to which grant passed to the grantee prior to the discovery and location of the mining claim inclosing the apex? In other words, is the underground segment of the vein underlying such agricultural surface, the apex lying without it, reserved by the law out of the agricultural patent, although at the time of the issuance of such patent such vein had not been discovered or located? In fact, we suppose a case where the existence of such vein was absolutely unknown.

The question has never been determined by the supreme court of the United States. It has been answered in the negative by Judge Sawyer, late circuit judge in the ninth circuit, in a case, the facts of which were as follows:—[1]

On June 15, 1874, one Hammack entered at the local land office, and paid for, a tract of agricultural land, and received a certificate of purchase, which the court very properly treated as the equivalent of a patent, although such patent did not in fact issue until September 13, 1876. On July 18, 1876, one McKim located and acquired the right to a gold mining claim situated on lands adjacent to the tract embraced in Hammack's entry. McKim subsequently conveyed to the South Spring Hill Mining Company, and the title of Hammack passed ultimately to the Amador-Medean Gold Mining Company. The South Spring Hill in working its lode, followed it on its downward course across the vertical plane drawn through the boundary of the Hammack tract. The action was ejectment, to recover the possession of that portion of the vein lying underneath

[1] Amador-Medean G. M. Co. v. South Spring Hill G. M. Co., 13 Saw. 523.

the surface of the agricultural patent. The patent contained, after the granting clause, the following:—

"And also subject to the rights of the proprietor of a "vein, or lode, to extract and remove his ore therefrom "should the same be found to penetrate or intersect the "premises hereby granted as provided by law."

We may suggest, that the insertion of this reservation is of no particular significance. Independent of the question of its proper interpretation, unless the law authorized it, it could neither enlarge or abridge the rights conferred by the patent.

The patentee's right to follow the dip of his vein exists by virtue of the law, whether the express grant of such right is contained in the patent or not;[1] and conversely, if this right is reserved by the law out of a prior grant, it is immaterial whether any clause of exception or limitation is embodied in the patent. It is the law, and not the instrument of conveyance, which creates the reservation. As there is nothing cabalistic in the phraseology of the patent, it is an element of no moment, except in so far as it has a tendency to exhibit the rule of construction applied by the land department to the law it is called upon to administer. The question under consideration is to be solved without regard to the precise language embodied in patents.

Upon the conceded state of facts above outlined, Judge Sawyer, in deciding in favor of the agricultural proprietor, said:—

"The only question is, whether, under the Revised "Statutes, a party discovering and acquiring title by patent "from the United States to a mineral gold-bearing vein, or "lode, having its apex within the land purchased, is en- "titled to follow the vein, or lode, down on its dip, across "the boundaries of his own lands, into the agricultural "lands of an adjoining proprietor who has the elder title? "In my judgment, he clearly has not. . . . By the entry "and payment of Hammack, there being no known mine "on the land, the entire interest to the center of the earth "vested in him, and there was nothing left in the United

[1] Doe v. Waterloo M. Co., 54 Fed. 935, 941.

"States for a subsequent grant to other parties to operate "upon. The only exceptions in the patents relate to ease- "ments and other prior rights already vested in other par- "ties before the date of the entry, as was held in the case "of P. C. Milling and Mining Co. *v.* Spargo.[1] No other ex- "ceptions are authorized by the statute to be inserted, and "exceptions not so authorized, if inserted, would be void. "Section twenty-three hundred and twenty-two of the Re- "vised Statutes, relied on by defendant, does not authorize "any such exception, and it only applies, at most, to public "lands and to rights acquired to such lands before other "parties acquire interests therein. It certainly does not "apply to agricultural lands disposed of years, perhaps "half a century, before, by the government, and before "any easement or other right has become vested in other "parties. The United States can undoubtedly grant ease- "ments and other limited rights in any portion of the "public lands, and subsequent purchasers must take them "burdened with such easements or other rights; but when "it has once disposed of its entire estate in the lands to "one party, it can afterwards no more burden it with other "rights than any other proprietor of lands. The defend- "ant acquired no rights in the premises in question under "the section cited, or any other statute of the United States "brought to the notice of the court, as against the prior "grant under which plaintiff holds."[2]

With all deference to the views of the distinguished jurist, we think that his opinion begs the question.

We may readily concede all that is said by him with reference to the subject of easements. We have followed his views in this behalf in a preceding section.[3] But we have also announced the view, based as we think upon

[1] 8 Saw. 645.

[2] This case was appealed to the supreme court of the United States. When it came on for argument, the attorney for the South Spring Hill Co., plaintiff in error, called attention to the fact, that since the decision in the circuit court the control of both corporations, parties to the suit, had come into the hands of the same persons. Therefore, without considering or passing upon the merits of the case in any respect, the appellate tribunal reversed the judgment, and remanded the case for further proceedings, "in conformity to law."

South Spring Hill G. M. Co. *v.* Amador-Medean G. M. Co., 145 U. S. 300.

[3] See, *ante*, § 531.

sound reason, that the nature of the estate in the vein, created by a grant of the dip or extralateral right, is something more than a mere easement. It is a title in fee as to the vein granted.[1]

If the segment of the vein underlying the Hammack tract was, in fact, granted by the patent or by the certificate of purchase, which is the legal equivalent of a patent, it must be conceded that the subsequent location of the apex of the vein would not confer the right to enter underneath the surface of the agricultural entry in pursuit of the vein on its dip. Whether such patent conveyed such underground segment is to be determined, not from the inspection of the patent alone, but from a consideration of the state of the law as it existed when the certificate was issued; and this state of the law is not to be determined only from an examination of the particular statute under which the agricultural title was acquired, but from a fair consideration of the entire body of the federal laws providing for the sale and disposal of the public lands—laws which are essentially *in pari materia*. A statute must be construed with reference to the whole system of which it forms a part.[2]

"Where enactments separately made are read *in pari* "*materia*, they are treated as having formed in the minds "of the enacting body parts of a connected whole, though "considered by such body at different dates and under "distinct and varied aspects of the common subject. Such "a principle is in harmony with the actual practice of "legislative bodies, and is essential to give unity to the "laws, and connect them in a symmetrical system."[3]

We have heretofore said, that the act of 1866 was, in effect, a proclamation severing veins and lodes from the body of the public domain; that it was the announcement of a governmental policy whereby ledges within the earth were to be considered as distinct entities, and to be dealt with as such in administering the public land system.

[1] See, *ante*, § 568, p. 678.
[2] Sutherland on Statutory Construction, § 284.
[3] *Id.*, § 288.

That this act was but a crystallization of the local rules and customs existing at the date of its passage has been abundantly established.[1] In construing a statute, aid may be derived from attention to the state of things as it appeared to the legislature when the statute was enacted.[2]

What was this "state of things" existing in the mining regions when congress first recognized these local rules and perpetuated the extralateral or dip right as it was enjoyed under these rules? Judge W. H. Beatty, speaking for the supreme court of the state of Nevada, in an opinion rendered in July, 1866, sheds some light upon the subject:—

"Whilst we depart from the rules of the common law "so far as to let the miner follow his lode of quartz where- "soever it may go, even though it runs under public land "which was in the occupancy of another before the mine "was located, on the other hand the occupier of the sur- "face is equally entitled to protection in the use of that "surface, if a miner having a senior location should, in "course of time, be found to run under his improvements. "The doctrine of the common law, that he who has a right "to the surface of any portion of the earth has also the "right to all beneath it and above that surface, has but a "limited application to the rights of miners and others "using the public lands of this state. Necessity has com- "pelled a great modification of that doctrine. The depar- "ture from those old and established doctrines of the law "will, doubtless, lead to many complications. To adhere "to common law rules on this subject is simply impossible. "To attempt to carry out common law doctrines on this "point would either give all the houses in Virginia City "to the mining corporations, or else all the most valuable "mines to those occupying the houses. The well-estab- "lished custom of miners, to locate veins of mineral, claim- "ing to follow them with all their dips, spurs, and angles, "without reference to the occupancy of the surface, has "compelled a departure from the common law rules."[3]

[1] See, *ante*, § 56.

[2] United States v. Union Pac. R. R., 91 U. S. 72; Platt v. Union Pac. R. R., 99 U. S. 48; Smith v. Townsend, 148 U. S. 490; Johnston v. Morris, 72 Fed. 890.

[3] Bullion M. Co. v. Croesus G. & S. M. Co., 2 Nev. 168, 178.

If it be true, and as we have shown in the preceding sections the courts seem to so decide, that the senior location may be invaded by the junior apex proprietor pursuing his vein on its downward course outside of his lateral boundaries, why should not the same rule be applied to senior agricultural grants? There is no particular magic in the position a given statute occupies in a cognate system.

As is said by Mr. Sutherland in his work on statutory construction,[1] it is to be inferred that a code of statutes relating to one subject was governed by one spirit and policy, and was intended to be consistent and harmonious in its several parts and provisions. Title thirty-two of the Revised Statutes of the United States embraces all legislation of a general and permanent character on the subject of public lands which was in force on the first day of December, 1873. It is subdivided into chapters, each dealing with a particular branch of the system, including the method of acquiring title to agricultural, mineral, townsite, and other lands. Subsequent legislation on the same subject becomes a part and parcel of the system. It would be impossible to administer and execute these public land laws on intelligent or symmetrical lines unless the entire system is considered, and each part is construed in the light and according to the spirit and intent of the whole.

In comparing the federal land system and the governmental theories upon which it is based, we have noted[2] that, unlike the regalian system prevalent in England, France, Spain, and Mexico, a grant or conveyance by the United States carries all the minerals, unless reserved expressly or by implication in the law or instrument purporting to pass the title. The doctrine for which we are now contending is in harmony with this rule. We simply affirm that lodes, or veins, having their apices outside of the agricultural grant are, to the extent that such lodes, or veins, on their downward course underly it, reserved by law out of such grant. Nor does this doctrine militate against the well-

[1] § 288, and cases cited in note 5.

[2] See, *ante*, § 80, p. 83.

established rule of law, that the patent is conclusive evidence of the character of the land. The land covered by an agricultural patent is conclusively deemed to be agricultural, but this does not necessarily imply that a lode under its surface, apexing outside of it, cannot be reserved without impeaching the patent and changing the legal character of the land. The two classes of grants may exist without conflicting, in a legal sense. As a matter of course, the agricultural grantee may insist upon the doctrine of lateral and subjacent support, as this is necessarily involved in the severance of the title to the underlying vein, and is one of the essential concomitants of the extralateral right.

**§ 613. Same—Other classes of grants.**— We may admit, without deteriorating from the doctrine announced in the preceding section, that grants of all classes, the titles to which became vested prior to the passage of the act of 1866, form exceptions to the rule, for the simple reason, that according to the state of the law theretofore existing there was no recognized legislative declaration authorizing or sanctioning such a reservation. In the case of Mexican grants, we will concede that the rule does not apply, for two reasons: The titles to them originated prior to the enactment of any congressional laws, and their subsequent conveyance by the government to the confirmees was in fulfillment of treaty obligations. In addition to this, acts of congress providing for the settlement of private land claims are special in their nature, and form no part of the public land system. With reference to railroad grants and grants for educational purposes, the state of the law at the time the grants take effect, as to particular tracts, will control their administration.[1]

It may be said that this doctrine is radical, and that its application will carry us beyond the limits of judicial conservatism. This is of no moment if the rule be founded in logic and reason. It is upheld by many able and

[1] See, *ante*, §§ 141-159.

earnest men in the active walks of professional life, who are impressed with the conviction that the established policy of the federal government, traditional and legislative, on the subject of the dip or extralateral right, has released us from the thraldom of the common law.

**§ 614. Union of veins on the dip.**— The last clause of section twenty-three hundred and thirty-six of the Revised Statutes provides, that "where two or more veins unite, "the oldest, or prior, location shall take the vein below the "point of union, including the space of intersection." This, of course, refers to a union on the dip.[1] We have heretofore fully considered the subject of cross lodes, such as intersect or cross on the strike— a class of cases provided for in the first clause of the section of the Revised Statutes referred to.[2]

The law defining the rights of the parties in cases of veins uniting on the downward course, seems to be clear and unambiguous. The object of the statute was to supplement the provisions of section twenty-three hundred and twenty-two and to prescribe rules under which different locations by different proprietors should be held, and to determine the rights of such proprietors in case of intersecting veins.[3] When such an intersection is established, priority of location governs. The senior title takes the entire united vein below the line of junction.[4]

The problem is so simple that diagrams are hardly required to exhibit the practical application of the law. But even the statement of plain propositions may often be emphasized by apt illustration. The case of the Little Josephine Mining Co. *v.* Fullerton, considered by the circuit court of appeals for the eighth circuit,[5] affords us such an

[1] Lee *v.* Stahl, 13 Colo. 174.

[2] See, *ante*, §§ 557-560.

[3] Stinchfield *v.* Gillis, 107 Cal. 84, 89.

[4] Champion M. Co. *v.* Cons. Wyoming M. Co., 75 Cal. 78; Cons. Wyoming M. Co. *v.* Champion M. Co., 63 Fed. 540; Stinchfield *v.* Gillis, 96 Cal. 33; Little Josephine M. Co. *v.* Fullerton, 58 Fed. 521.

[5] 58 Fed. 521.

excellent opportunity of representing actual conditions to which the law has been applied that we consider it not altogether inappropriate to illustrate it.

Figure 54 shows, approximately, the relative position on the surface of the three locations involved, the veins dipping respectively in the direction of the arrows.

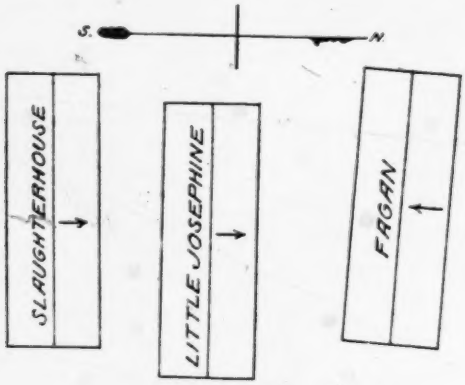



FIGURE 54.

Figure 55, is a cross section, exhibiting the junction of veins underneath the surface.

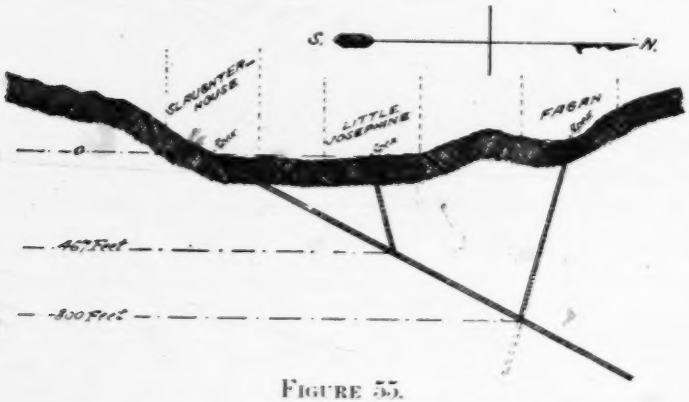



FIGURE 55.

As to the priorities, the Slaughterhouse was located in 1866 and patented in 1871. The Fagan was originally located in 1876, and an amended location was made in 1887. The Little Josephine's rights dated from 1877. As the Slaughterhouse and Little Josephine were both held by the Little Josephine Company, the court did not undertake to determine the priorities between the Fagan and the Little Josephine. The Slaughterhouse, being the older location, took the entire vein below the junctions. With priorities in favor of the Fagan, the right of lateral pursuit of the Slaughterhouse would be interrupted at the point of junction. It would absolutely cease if the Slaughterhouse vein did not cross and continue below the line of junction. As it was, the extralateral right of the Fagan was lost at this point or line, unless it demonstrated that the vein passed through the Slaughterhouse and continued downward in the direction of the dotted lines. This fact was asserted, but not satisfactorily proven at the trial. Had it so passed through, the ore through the space of intersection from wall to wall would have been the property of the Little Josephine Company, but the Fagan would have had the right of way through the space of lode intersection. These diagrams illustrate the rule more forcibly than pages of descriptive geology.

The embarrassment surrounding this class of cases arises from the difficulty of establishing the facts. If the union of the veins occurs at a point underneath the surface of neither of the contending parties, there are no presumptions indulged in. The burden of proof would naturally rest with the party having the affirmative of the issue.

**§ 615. Identity and continuity of veins involved in the exercise of the extralateral right.**—Whenever the extralateral right of an apex proprietor is challenged, he is called upon to establish,—

(1) The existence of an apex within his boundaries, to the extent necessary to cover the disputed segment of the vein;

(2) The identity and continuity of the vein from its top, or apex, within his own boundaries to the point in dispute.

As to the length of apex required to be shown, it is not necessary that it should be physically demonstrated that the vein passes through both, or even either, of the end lines, so long as it appears that the course of the vein through the location is not such as prevents the exercise of the extralateral right. It will be sufficient if apex is shown to the extent that is necessary to cover the underground portion of the vein in dispute within the end-line bounding planes. If a lode proprietor with a location fifteen hundred feet long follows the vein on its dip underneath the surface of a parallel location seven hundred and fifty feet in length, apex need only be shown to the extent of the seven hundred and fifty feet, or to the extent that the claims parallel each other.[1]

Where a vein passes through an end line of a claim and extends for a considerable distance in a general direction parallel to the side lines of the location, there being no evidence to show that the vein departs through a side line, the presumption will be indulged in that the vein continues regularly on its course.[2]

Where a vein was shown to abruptly terminate against a "crossing," near the west end of the claim, but from the crossing easterly pursued a uniform course for a considerable distance practically parallel to the side lines to a point within one hundred feet of the east end line, it was said that the presumption was, that the vein crossed the east end line.[3]

While an apex proprietor pursuing his vein on its dip underneath adjoining lands is called upon to overcome certain legal presumptions flowing from surface ownership,[4]

[1] Hyman v. Wheeler, 29 Fed. 347.

[2] Argonaut Cons. M. Co. v. Turner, 23 Colo. —, cited in Catron v. Old, Sup. Ct. of Colo., Feb. 3, 1897.

[3] Carson City G. & S. M. Co. v. North Star M. Co., 73 Fed. 597.

[4] Leadville M. Co. v. Fitzgerald, 4 Morr. Min. Rep. 389; Iron S. M. Co. v. Campbell, 17 Colo. 267; Cheesman v. Shreve, 37 Fed. 36; Cheesman v. Hart, 42 Fed. 98; Jones v. Prospect Mt. T. Co., 21 Nev. 339; Bell v. Skillicorn, 28 Pac. 768.

so far as the conditions within his own boundaries are concerned he is entitled to such presumptions of fact as rationally flow from other facts satisfactorily established.

The supreme court of Colorado has gone as far as to announce, that when one has discovered a lode upon the unappropriated public domain and has within the proper time, and in good faith, performed all of the subsequent acts essential to a valid location as provided by law, he is entitled to the presumption that his lode extends throughout the full length of the claim,[1] it having been established that the apex existed within the location, and its course was shown to a slight extent.[2]

Many patents are issued which include a description of the lode line as surveyed, with reference to which the side lines are constructed, and it is quite common for the official plat to show this line. Strictly speaking, in the nature of things, this is but the representation of the hypothetical course of the lode.

"The court cannot presume that the land department "determined the course of the lode. The marking of an "ideal line across the survey and diagram did not have "the effect of putting a lode into the ground if there was "no vein there."[3]

One whose territory is invaded has a right to show the actual course of the lode, independent of the lode line established by the surveyor. The course of a vein through a location is not the subject of adverse claim, and outside claimants are not concluded, in this respect at least, by the issuance of the patent.[4]

Slight interruptions and dislocations will not disturb the legal identity or continuity of a lode. As was said by the supreme court of the United States:—

"A vein is by no means always a straight line, or of "uniform dip, or thickness, or richness of mineral matter,

[1] Armstrong *v.* Lower, 6 Colo. 393, 398.

[2] *Id.*, on rehearing, 6 Colo. 581, 586.

[3] Cons. Wyoming G. M. Co. *v.* Champion M. Co., 63 Fed. 540, 552.

[4] See, also, Stevens & Leiter *v.* Williams, 1 McCrary, 480; Fed. Cases, No. 13,413.

"throughout its course. The cleft, or fissure, in which a "vein is found may be narrowed or widened in its course, "and even closed for a few feet and then found further on, "and the mineral deposit may be diminished or totally "suspended for a short distance; but if found again in the "same course, with the same mineral, within that distance, "its identity may be presumed."[1]

A vein to be followed upon the dip must be continuous only in the sense that it can be traced by the miner through the surrounding rocks.[2]

The occurrence of intrusive dykes, faults, and casual displacements do not destroy the legal continuity or identity of the vein.[3]

[1] Iron S. M. Co. *v.* Cheesman, 116 U. S. 529.
[2] Cheesman *v.* Shreve, 40 Fed. 787.
[3] Stevens & Leiter *v.* Williams, 1 Morr. Min. Rep. 557.

# CHAPTER IV.

## THE NATURE AND EXTENT OF PROPERTY RIGHTS CONFERRED BY PLACER LOCATIONS.

§ 619. Rights conferred by placer locations as compared with lode locations.

**§ 619. Rights conferred by placer locations as compared with lode locations.**—The rights conferred by a valid placer location differ in degree from those inuring to a lode locator, owing to the difference in the nature of the thing appropriated. While the estate is of the same dignity and is held by the same tenure, there are no extralimital privileges accruing to a placer locator, and the intralimital rights may, under certain conditions, be abridged. Veins having their apices within the limits of a placer claim, whose existence becomes known prior to the filing of an application for placer patent, do not vest in the placer claimant by virtue of his placer location. Should he fail to discover and claim such veins, the placer claim may be entered by others, who may locate them, thus subjecting the placer claim to delimitation to the extent of such surface inclosing the lode as may be selected by the lode claimant. The subject of locating lodes within placers, has been fully presented in a preceding article,[1] and repetition is unnecessary. With the exception of the right to locate known veins, which may be exercised by strangers, the placer claimant has the same dominion over the located surface as a lode locator has over the surface of his lode claim; and as in case of lode claims, the placer boundaries

[1] See, *ante*, §§ 413, 415.

underneath the surface may be invaded by the proprietor of a vein, or lode, having its apex outside of the placer boundaries, in the exercise of the extralateral right.[1]

It is unnecessary to assert that neither a placer location nor a placer patent, as such, will confer extralateral rights as to any lodes, the tops, or apices, of which are found within the limits of a placer claim. In order to confer such rights, the lode must be located the same as if it were situated elsewhere upon the public domain. In such case, the extralateral right as to the lode is defined by the lode boundaries, which may or may not be coincident with some of the placer boundaries. Should veins, or lodes, having their apices within the limits of a placer claim be discovered after patent, the placer claimant will hold only so much of them as may be included within vertical planes drawn through his surface boundaries.

The rights flowing from a perfected placer location may be thus briefly stated:—

"The discovery and location of a placer mining claim "establishes in the owner the right to the possession of the "superficial area within its boundaries for all purposes "connected with and incident to the use and operation of "the same as a placer mining claim. Such location, how-"ever, does not operate to give title or right of possession "to veins, or lodes, within its limits, or preclude the right "of discovery and location thereof by others."[2]

[1] See, *ante*, § 611.

[2] Aurora Lode *v.* Bulger Hill Placer, 23 L. D. 95.

# CHAPTER V.

## PERPETUATION OF THE ESTATE BY ANNUAL DEVELOPMENT AND IMPROVEMENT.


§ 623. Annual labor under local rules—Provisions of the federal law.

§ 624. Requirement as to annual labor imperative.

§ 625. Annual labor upon placer claims.

§ 626. Supplemental state legislation.

§ 627. Division of the subject.

§ 628. "Claim" defined.

§ 629. Work done within the limits of a single location.

§ 630. Work done within the limits of a group of claims in furtherance of a common system of development.

§ 631. Work done outside of the boundaries of a claim or group of claims.

§ 632. Period within which work must be done—Can preliminary work required by state laws as an act of location be credited on the first year's work?

§ 633. By whom labor must be performed.

§ 634. Circumstances under which performance of annual labor is excused.

§ 635. Value of labor and improvements—How estimated.

§ 636. Proof of annual labor under state laws.

§ 637. Obligation to perform labor annually ceases with the final entry at the land office.

§ 638. Millsites.


**§ 623. Annual labor under local rules—Provisions of the federal law.**—From the earliest period of mining in the west, the locator of mining claims of all classes was required to perform a certain amount of labor, or expend a certain amount of money in betterments and improvements upon, or for the benefit of, his located claim, as a condition upon which he might continue in the possession and enjoyment of the mining ground appropriated by him. A failure to perform the necessary work required by the local rules or customs amounted to an abandonment of the

claim, and thereupon it might be occupied and appropriated by another.[1] The regulations of miners which required that so much work should be performed upon each claim were conditions subsequent, subject to which the locator acquired his rights. So long as he complied with these conditions, the right to possess and mine his claim remained with him.[2] The nature and extent of the work required to be performed varied according to the character of the ground appropriated. The periods within which the expenditure was required to be made also varied. Certain classes of claims, such as placers, on the beds, bars, and banks of streams, could only be worked at certain seasons of the year, while quartz claims might be exploited at any time. Different rules obtained in different localities, but in all there were regulations and customs well understood and generally observed, compliance with which was insisted upon to protect the claim from being "jumped" or appropriated by another.

As noted in a previous section,[3] discovery was made the source of title, and development or working the condition of the continuance of that act. This development work was called by the miners "assessment work," and the performance of it a *representation* of the mine; that is, when the work had been performed for a given period, the claim was *represented* for that period. Both of these terms are frequently encountered in the decisions of the courts, and they each have a recognized meaning.

The congressional law of July 26, 1866, made no attempt to legislate on the subject of working mining claims, leaving it entirely to local district or state regulation.

The act of May 10, 1872, however, made provision for the performance of work annually on all claims theretofore or thereafter located.

[1] Depuy *v.* Williams, 26 Cal. 310, 314; Kramer *v.* Settle, 1 Idaho, 485; Cons. Repub. M. Co. *v.* Lebanon M. Co., 9 Colo. 343; Jennison *v.* Kirk, 98 U. S. 453; St. John *v.* Kidd, 26 Cal. 263.

[2] King *v.* Edwards, 1 Mont. 235, 240.

[3] See, *ante*, § 335, p. 434.

As originally passed, this act required that, on all claims located prior to its passage, ten dollars' worth of labor should be performed, or improvements made each year, for each one hundred feet in length along the vein, until a patent issued. On each claim located after the act went into effect, and until patent should issue, not less than one hundred dollars' worth of work was required to be performed, or improvements made, during each year.

By the phrase "each year," as applied to pre-existing locations, was meant each year from and after the passage of the act. Work done before the act went into effect could not be estimated.[1] By the several amendments subsequently passed,[2] the time for making the first annual expenditure on previously located claims was extended to January 1, 1875.

As to claims located since the act of May 10, 1872, the year within which work was required to be performed was computed from the date of the respective locations, until, by an act passed January 22, 1880,[3] congress provided that the period within which the work to be done annually on all unpatented claims located since May 10, 1872, should commence on the first day of January next succeeding the date of location of such claim.

The object of the act of 1880 was to render the annual periods for performing work uniform as to all mining claims, by reference to the calendar year.[4] It did not act retrospectively, so as to save a claim from forfeiture incurred before its passage,[5] nor to divest a right already acquired under the existing law;[6] but the exemption of claims from the performance of labor for a portion of a year, in certain cases, was a necessary result of the act.[7]

[1] Thompson v. Jacobs, 3 Utah, 246.

[2] March 3, 1873, 17 Stats. at Large, 483; June 6, 1874, 18 Stats. at Large, 61.

[3] 21 Stats. at Large, 61.

[4] McGinnis v. Egbert, 8 Colo. 41.

[5] Slavonian M. Co. v. Vacavich, 7 Saw. 217.

[6] Hall v. Hale, 8 Colo. 351.

[7] McGinnis v. Egbert, 8 Colo. 41, citing Wade's Am. Min. Law, § 29, p. 54, Sickle's Min. Laws, p. 393. See, also, Hall v. Hale, 8 Colo. 351.

This act of January 22, 1880, is now in force, and in connection with such valid supplemental state legislation, if any, as exists in the several local jurisdictions, is operative as to all locations made since the passage of the act of May 10, 1872. It is not likely that there are now many claims located prior to that date which still remain unpatented. There is no necessity for giving this class of locations any further consideration. We shall discuss the law as it applies to present conditions.

§ 624. **Requirement as to annual labor imperative.**— The requirement as to the performance of annual labor is imperative. While a timely resumption of work may save a forfeiture, the law contemplates that the labor or improvements, actual and valuable, to the amount of one hundred dollars in each year, computed from the first day of January next succeeding the date of location, should be performed in good faith.[1]

There is probably no single provision of the law which is evaded to a greater extent than this one. While, of course, there are many exceptions, the average locator exhausts his ingenuity in attempting to avoid this plain and wholesome requirement. The courts are disposed to deal with these drones in the hive with much more leniency than they deserve. The statute is too frequently applied on sentimental lines. Forfeitures, say these tribunals, are odious, and in many cases the reluctance with which they enforce the law encourages, rather than deters, the systematic evasion of it.

The statute is extremely liberal as to the time in which the specified amount of work shall be performed. A location made on January 1, 1897, may, in the absence of state laws or local rules requiring development work to be performed as an act of location, be held without a stroke of labor until December 31, 1898, and in no case is the period less than a full year. It would seem that a more

[1] Morgan v. Tillottson, 73 Cal. 520; Jackson v. Roby, 109 U. S. 440; Chambers v. Harrington, 111 U. S. 350; Anthony v. Jillson, 83 Cal. 296.

rigid enforcement of the rule would not only command more respect for the law, but would, in a great degree, tend to promote the general object and intent of the mining statutes —the development of the mining resources of the country.

As was said by the supreme court of the United States, speaking through Justice Miller,—

"Clearly, the purpose was . . . to require every person who asserted an exclusive right to his discovery or claim to expend something of labor or value on it as evidence of his good faith, and to show that he was not acting on the principle of the dog in the manger."[1]

As it was in the days when mining privileges upon the public domain were governed by local rules, so it is now the invariable rule, that the locator's only right to possession depends upon the performance annually of the specified labor.[2] The grant flowing from a perfected valid location is only perpetuated by "representation."[3]

**§ 625. Annual labor upon placer claims.**—The language of the statute under consideration does not in terms specify that placer claims are to be subjected to the provisions of the law requiring the performance of annual labor. Acting Commissioner Curtis originally expressed the view, that under the act of 1872 it was the intention of congress to require annual expenditures only upon lode, or vein, claims, leaving placers as they had been, previous to the passage of that act, subject to the operation of the local laws;[4] but later instructions issued by the land department insist that annual expenditures must be made upon placer claims as well as lode claims.[5]

The courts have uniformly held that the law was alike applicable to both classes of locations.[6] In section twenty-

[1] Chambers v. Harrington, 111 U. S. 350, 353.
[2] Du Prat v. James, 65 Cal. 555, 557.
[3] Renshaw v. Switzer, 6 Mont. 464.
[4] 1 Copp's L. O. 18.
[5] Min. Circ., March 24, 1887, 8 L. D. 505.
[6] Carney v. Arizona G. M. Co., 65 Cal. 40; Jackson v. Roby, 109 U. S. 440; St. Louis Smelting Co. v. Kemp, 104 U. S. 636; Sweet v. Webber, 7 Colo. 443; Morgan v. Tillottson, 73 Cal. 520.

three hundred and twenty-nine of the Revised Statutes it is declared, that claims usually called *placers* shall be subject to entry and patent under like circumstances and conditions and upon similar proceedings as are provided for vein, or lode, locations. This removes all doubt and ambiguity, if any exist, in the previous sections.[1]

§ 626. **Supplemental state legislation.**— By the terms of section twenty-three hundred and twenty-four of the Revised Statutes, which is but a re-enactment of section five of the act of May 10, 1872, the amount of work necessary to hold possession of a mining claim may be controlled by local regulation, subject, however, to the requirements of the federal law, that the amount shall be at least one hundred dollars each year for each claim. As we have heretofore observed, no state has a right to decrease the amount of labor which the congressional law requires to be done annually on a mining claim.[2]

Before passing to a discussion of the character of the work and improvements which will satisfy the law and preserve the locator's estate, it is advisable to briefly epitomize the nature of supplemental state and territorial legislation upon the subject. In doing so, we have at present no reference to the preliminary development work required by the several states and territories *as an act of location*, a subject fully discussed in a preceding article.[3] We are to consider the scope of state legislation upon the subject of the *annual* or *assessment work*.

There is no legislation of this character in either Idaho, Montana, Nevada, New Mexico, California, or Utah.

In Arizona,[4] North Dakota,[5] and South Dakota,[6] provisions are found which in terms adopt the federal law. This,

[1] Carney v. Arizona G. M. Co., 65 Cal. 40.
[2] See, *ante*, § 250, p. 316.
[3] See, *ante*, §§ 343-346.
[4] Stats. 1895, p. 53, § viii.
[5] Rev. Code, 1885, § 1438.
[6] Pol. Code of Dak. 1887, p. 442, § 2009. Adopted by South Dakota — Laws of 1890, ch. cv., § 1.

of course, gives no additional force to the requirements of the congressional law; but the effect is to prevent the adoption of local district regulations increasing the burdens imposed by the acts of congress. Other states require detailed consideration.

*Colorado.*—There is no legislation on the subject as to lode claims. As to placers, the legislature in 1879 passed an act requiring, that on each claim of one hundred and sixty acres, or more, there must be at least one hundred dollars' worth of work done annually before August 1st of each year; the amount of work on smaller claims to be in proportion, except that not less than twelve dollars' worth be done on any claim. Where two adjoining claims are owned by one person, the work may all be done on one claim. The work may consist of building or repairing ditches, or making other improvements.[1] This law was held by the supreme court of Colorado to contravene the federal law, and to be therefore void.[2] The objection to it is two-fold. It limits the period in which the work is to be performed, and except where a claim embraces one hundred and sixty acres or more, requires less work than is demanded under the congressional act. Colorado has therefore no valid state legislation on the subject.

*Oregon.*—A statute of this state[3] requires that every person or company of persons, after establishing their claims, shall, within one year after recording or "taking" such claim or claims, work, or cause the same to be worked, to the amount of fifty dollars for each and every claim. The fulfillment of this requirement, in connection with the making and filing of an affidavit that such work has been performed, gives to the claim the legal status of "real estate." To this extent, and for this purpose, the act may not be obnoxious to the federal law. But manifestly, a failure to comply with its provisions would not subject the claim to relocation, for the obvious reason,

[1] Mills' Annot. Stats., § 3137.
[2] Sweet v. Webber, 7 Colo. 443.
[3] Hill's Annot. Stats., § 3830.

that as the act requires less annual work than is specified in the congressional mining law, as a condition upon which the estate of the locator is perpetuated, and also fixes a different period within which such labor is to be performed, the state law is repugnant to the federal, and is therefore inoperative.

*Wyoming.*—The laws of the state of Wyoming[1] divide placer claims into two classes: (1) those not situated in an organized district, and (2) those which are so situated. Upon claims of the first class, containing an area of one hundred and sixty acres, not less than one hundred dollars' worth of work must be performed within the period fixed by the federal law. On claims having less than one hundred and sixty acres, the amount of annual assessment work is fixed at sixty-two and a half cents per acre, provided that the total amount to be annually expended be in no case less than fifteen dollars. Upon claims of the second class, *i. e.* those situated in an organized mining district, the amount of assessment work is to be regulated entirely by the district laws, regardless of the state laws fixing the amount to be performed on claims not so situated.

It is quite manifest that this statute is amenable to the same objections urged by the supreme court of Colorado in construing a similar law, heretofore referred to.

*Washington.*—In this state a law appears upon the statute books[2] which practically embodies the terms of the federal statute, with the exception, that it provides that the first year shall date from the date of the location of the claim. As the object of the federal law was to fix a uniform period, regulated according to the calendar year, commencing with the first day of January next succeeding the date of the location,[3] we do not think that the individual states have the power to destroy this uniformity.

[1] Laws of 1888, pp. 90, 91, § 23.
[2] Hill's Annot. Stats., § 2213.
[3] See, *ante*, § 623.

It will thus be observed that, strictly speaking, there does not exist any valid supplemental state legislation regulating the extent of annual labor. In enacting these laws, as heretofore outlined, the several states seem to have overlooked the fact that the public lands belong to the government; that the paramount proprietor is alone competent to prescribe rules for their primary disposal; that the individual states cannot interfere with this right, or exercise any privilege, unless under the terms of the federal law the power is delegated to them. The scope of permissive state legislation is limited and defined by the congressional acts. Any attempt to exceed the power therein granted necessarily results in inoperative and void state legislation. The period during which states and local assemblages absolutely controlled the possession and right of enjoyment of the public mineral lands has long since passed into history. As we have heretofore said, if the state may prescribe any additional or supplemental rules, increasing the burdens or diminishing the benefits granted by the federal laws in lands of the public domain, it is simply because the government, as the owner of the property, sanctions, expressly or by implication, the exercise of such powers.[1]

§ 627. **Division of the subject.** — Assuming that the nature and extent of annual labor and improvement which will suffice to perpetuate the estate of the locator is to be determined by reference solely to the federal laws, the subject may be considered in three different aspects: —

(1) Work done within the limits of a single location, or claim;

(2) Work done within the limits of a group of claims in furtherance of a common system of development;

(3) Work done outside of the boundaries of a claim, or group of claims.

[1] See, *ante*, § 249.

§ 628. **"Claim" defined.**— Before entering upon a discussion of the subject of annual labor, it is necessary to determine what is meant by the word "claim," as used in section twenty-three hundred and twenty-four of the Revised Statutes, upon which the required work must be annually performed.

In a preceding section,[1] we have noted the different shades of meaning between "location" and "mining claim," and have there observed, that if the miner has only the ground covered by one location, his "mining claim" and his location are identical, and the two designations may be indiscriminately used to denote the same thing. But if by purchase he acquires other adjoining "locations" and adds them to his own, then his "mining claim" covers the ground embraced by *all* the locations.

In applying the law upon the subject of annual labor, it is obvious that this statement requires qualification. For example: A., B., and C. each perfect a lode location on the same vein, the locations being contiguous. Each is required, under the law, to work, or represent, his individual claim to the extent of one hundred dollars annually. A. subsequently purchases the locations of B. and C., and the three locations constitute his "claim," in a colloquial sense. But he will not be permitted thereafter to hold all three by performing simply one hundred dollars' worth of work within the limits of one, or distributing that amount in labor and improvements over the three. It is obvious, that by purchasing from B. and C. he has simply stepped into their shoes, and the full amount of statutory work must be done upon each, or three hundred dollars' worth for all. The word "claim," as used in the statute, must, in this instance, necessarily mean "location," as if the statute read, on each *location*.

The same rule applies to placers. The unit of placer locations is, as we have heretofore observed, twenty acres.[2] But if appropriated by an association of persons, a location

[1] See, *ante*, § 327. [2] See, *ante*, § 448.

may include one hundred and sixty acres, or any less number.

The individual locator of a twenty-acre tract must, necessarily, perform one hundred dollars' worth of labor on his claim annually. By a purchase of other contiguous locations, and thus augmenting his surface area, we do not see how he can be relieved from fulfilling the requirement as to every individual location which may be ultimately grouped and constitute his "mining claim," in a colloquial sense. If such a rule were to prevail—as there is no limit to the number of claims which one may acquire by purchase,—he might hold five hundred or more acres with the aggregate annual expenditure of one hundred dollars, and thus practically defeat the purpose of the law.

A location by an association of persons, embracing more than twenty acres, may undoubtedly be perpetuated by the performance of the same amount of labor required of an individual locator. Work need not be done on each twenty-acre tract of a location embracing one hundred and sixty acres made by such association.[1] But the appropriation by eight persons of one hundred and sixty acres is accomplished by one *location*. While this suggests an inequality of burdens, it is, in our judgment, the only consistent method of construing the statute. A lode claimant or an association of persons may locate a full claim of fifteen hundred feet in length. A location of less than the maximum would not decrease the burden as to the annual work. The volume of work is not gauged by the size of the claim located. There is no sliding scale adjusting the matter according to area. In determining, therefore, the amount of annual work to be performed in connection with an aggregation of locations, each *location* is to be considered as a *claim* within the meaning of the law, regardless of the superficial area comprised in any one or more of them.

[1] McDonald v. Montana Wood Co., 14 Mont. 88.

§ 629. **Work done within the limits of a single location.**—The object of the law requiring annual work is, that the holder of a mining claim shall give substantial evidence of his good faith.[1] The labor is not required to be applied in any particular manner, so long as it is unquestionably devoted to the claim. It must not be such as to raise a question as to its purpose.[2] This labor may be in excavating, erection of works for mining, and placing machinery.[3]

It ought not to be difficult in investigating the character of work done upon a mining claim to determine whether it is legitimately done, with a view to develop or protect the claim, or whether it is a mere flimsy attempt to evade the law.

Commissioner Williamson, in a communication to the surveyor-general of Colorado, thus reflected the views of the land department:—

"All improvements made upon a mining claim having "a direct relation to the development thereof may be "taken into consideration— . . . any building, machin- "ery, roadway, or other improvements used in connection "with, and essential to the practical development of the "claim. . . . Necessarily, however, improvements of the "character indicated must be associated with actual exca- "vations, such as cuts, tunnels, shafts, etc., so as to clearly "show that they are intended for use in connection with "the claims under consideration."[4]

A liberal construction should be given to the mining laws, but it should not be so liberal as to authorize a claim to be held without representation.[5]

Labor and improvements within the meaning of the statute are deemed to be done on a mining claim, or lode, when the labor is performed or improvements made for the purpose of working, prospecting, and developing the

[1] Royston v. Miller, 76 Fed. 52.
[2] Lockhardt v. Rollins, 2 Idaho, 503, 509.
[3] *Id.*
[4] 7 Copp's L. O. 179.
[5] Remmington v. Baudit, 6 Mont. 138; Honaker v. Martin, 11 Mont. 91.

ground embraced in the location,[1] or for the purpose of facilitating the extraction of the mineral it may contain.[2]

Work done for the purpose of discovering mineral, whatever particular form or character of the deposit which is the object of the search, is within the spirit of the statute. So, work done within the limits of placer claims in search for lodes has been held to satisfy the law;[3] but when ground sought to be patented as placer is used exclusively for reservoir purposes for the storage of water to be conducted elsewhere, the cost of constructing such reservoir cannot be credited as work done on the claim.[4]

Picking rock from the walls of a shaft or from the outcroppings of a ledge, in small quantities, from day to day, making tests for the purpose of sampling it, breaking and examining it under a glass, crushing it in a mortar and panning it out, carrying it away and making assays of it in an attempt to find the "pay shoot," is not such as the law will permit the claimant to be credited with upon his account for annual labor performed. Such labor does not add to the value of the claim, nor does it tend to the development of the mine.[5]

In an early case in California it was held, construing a rule requiring two days' work in every ten, that *bona fide* efforts of the owners to procure machinery for working the claim might be justly considered as work done upon the claim by relation and intendment;[6] but this is a manifest straining of the law. In later years the same court held that time consumed and money expended for traveling, in an endeavor to arrange for the conduct of water to the claim for mining purposes, did not satisfy the law.[7]

Placing upon the ground mining tools, implements, lumber, and other material, which are not used to any

[1] Book v. Justice M. Co., 58 Fed. 106, 117.
[2] St. Louis Smelting Co. v. Kemp, 104 U. S. 636, 655.
[3] United States v. Iron S. M. Co., 24 Fed. 568.
[4] Hale's Placer, 3 L. D. 536; Chessman's Placer, 2 L. D. 774.
[5] Bishop v. Baisley (Ore.), 41 Pac. 936.
[6] Packer v. Heaton, 9 Cal. 569.
[7] Du Prat v. James, 65 Cal. 555.

extent and are subsequently removed, perhaps for the purpose of doing similar duty on some other location, is a mere sham and a fraud.[1]

In a case decided by the supreme court of Montana,[2] an ambulatory building intruded itself on the attention of the court, in regard to which Chief Justice Wade said:—

"An attempt seemed to have been made to make this "house a sort of a traveling representation of mines where- "ever it went. If it could represent the Elmira claim, it "might have represented the others as well. If building "that house was one representation, taking it down might "have been another; and so by building, taking down, "and rebuilding that house the plaintiff might have rep- "resented all the mines in that district, and this process "might go on for years, until sufficient building and "rebuilding had been done to entitle the party to a "patent before a stroke of work had been performed on "the claim."

This class of cases illustrates the extremes to which locators will sometimes resort to save from relocation claims which they never intended to develop, and which they hold in utter defiance of the law.

It has been said that buildings erected upon mining claims may be considered as improvements. This is no doubt true if they were erected for any purpose reasonably connected with mining operations.

To make such a building an improvement under the annual labor law, it must have been erected for the purpose of benefiting the claim and for its development. It is absurd to say that a building is an improvement on such claim when it is not, and was not intended to be, of any use or benefit to the claim.[3]

Roadways are necessities, and where such have been constructed on the claim for the manifest purpose of assisting in the development of the mine, such as transporting machinery and materials to, and ore from the mine, it is a

[1] Honaker v. Martin, 11 Mont. 91.
[2] Remmington v. Baudit, 6 Mont. 138.
[3] McCraig v. Bryan, 10 Colo. 309.

legitimate expenditure.[1] But manifestly, such a roadway constructed for the purpose of reaching other properties would not satisfy the law. So the construction of a flume over premises claimed as a mining claim, and their use as a deposit for the waste material from an adjoining claim owned by the same person, is not such an expenditure as is required by law regulating the performance of annual work.[2]

The wages paid to a watchman employed to take care of and protect mining property while it is idle have been held to satisfy the law as to annual expenditure;[3] provided such services were necessary to preserve tunnels, buildings, or any structures erected to work the mine, and which would be necessary in case active work was resumed. But if there was only a naked claim to be looked after, and a watchman were placed there merely to warn prospectors, and thus prevent relocation, the rule would be different.[4]

**§ 630. Work done within the limits of a group of claims in furtherance of a common system of development.**—Long before patents were allowed, indeed from the earliest period in which mining for gold and silver was pursued as a business, miners were in the habit of consolidating adjoining claims, whether they consisted of one or more original locations, into one, for convenience and economy in working them.[5] This method of representing groups of claims was perpetuated by the act of May 10, 1872, and is found embodied in section twenty-three hundred and twenty-four of the Revised Statutes, which provides that, "where such claims are held in common, such "expenditure may be made upon any one claim."

As was said by the supreme court of the United States:—

[1] Doherty v. Morris, 18 Colo. 105; Emily Lode, 6 L. D. 220.
[2] Jackson v. Roby, 109 U. S. 440.
[3] Lockhart v. Rollins, 2 Idaho, 503.
[4] Altoona Q. M. Co. v. Integral Q. M. Co., 114 Cal. 100.
[5] St. Louis Smelting Co. v. Kemp, 104 U. S. 636.

"It often happens that, for the development of a mine "upon which several claims have been located, expendi- "tures are required exceeding the value of a single claim, "and yet without such expenditures the claim could not "be successfully worked. In such cases it has always "been the practice for the owners of the different locations "to combine and work them as one general claim; and "expenditures which may be necessary for the develop- "ment of all the claims may then be made on one of "them. . . . In other words, the law permits a general "system to be adopted for adjoining claims held in com- "mon, and in such case the expenditures required may be "made or the labor be performed upon any one of them."[1]

In order to receive the benefit of the law in this behalf, certain conditions are essential:—

(1) The claims must be contiguous, so that each claim thus associated may in some way be benefited.[2]

(2) There must be a community of interest in each claim. This interest need not be of a strictly legal nature. Thus, it has been held, that though the names of three persons claiming to hold three mines in common did not appear in the location notice of each mine, but each mine was located in the name of one of such persons, and the legal title to each was therefore in the respective locator, all the locations having been made under an oral agreement that they should be located for the common benefit, each locator had such an equitable interest in the others as to make the work done on one mine for the development of the three, satisfy the mining laws, if sufficient in quantity and value;[3] but where a number of persons located fifteen hundred feet upon a lode, dividing the same into three parcels held in severalty, work done upon one of the parcels will not inure to the benefit of the others.[4] There

[1] Jackson *v.* Roby, 109 U. S. 440; De Noon *v.* Morrison, 83 Cal. 163; McNeil *v.* Pace, 3 L. D. 267; Nichols *v.* Becker, 11 L. D. 8; Dolles *v.* Hamberg Cons. M. Co., 23 L. D. 267.

[2] Chambers *v.* Harrington, 111 U. S. 350, 353; Mt. Diablo M. & M. Co. *v.* Callison, 5 Saw. 439; Royston *v.* Miller, 76 Fed. 50; Gird *v.* California Oil Co., 60 Fed. 531.

[3] Eberle *v.* Carmichael (New Mex.), 42 Pac. 95.

[4] Zeckendorf *v.* Hutchinson, 1 New Mex. 476.

was a severance of the community of interest, and each parcel constitutes a separate claim.

(3) The aggregate amount of the expenditure of money or labor on one claim must equal in value that which would be required on all the claims if they were separate or independent.[1] The land department follows this rule in cases of both lode and placer claims, as to annual labor;[2] but it has not been uniform in its rulings as to the aggregate volume of work or improvements required as a condition precedent to the issuance of a patent for group claims. We will consider this subject more fully under the head of patent proceedings.

(4) The work performed or improvements made must manifestly tend to the development of all the claims in the group.[3] The burden of proof is on the owner to show that the work done or improvement made does, as a matter of fact, tend to the development of the property as a whole, and that such work is a part of the general scheme of improvement.[4]

As to the nature and character of the work required to be performed, what we have said in a preceding section with reference to single locations applies with equal force to group claims. The quality required in both instances is the same, but the quantity in the case of groups depends upon the number of claims sought to be represented by means of a common system of development.

**§ 631. Work done outside of the boundaries of a claim or group of claims.**— By an act passed February 11, 1875, commonly known as the "tunnel amendment,"[5]

[1] Chambers v. Harrington, 111 U. S. 350; Eberle v. Carmichael, 42 Pac. 95.

[2] Sweeney v. Northern Pac. R. R., 20 L. D. 394; Good Return M. Co., 4 L. D. 221; *In re* Kinkaid, 5 L. D. 25.

[3] McCormick v. Baldwin, 104 Cal. 227; Jackson v. Roby, 109 U. S. 440; *In re* Folsom, 16 Copp's L. O. 279.

[4] Dolles v. Hamberg Cons. M. Co., 23 L. D. 267.

[5] 18 Stats. at Large, 315.

section twenty-three hundred and twenty-four of the Revised Statutes was amended,—

"So that where a person or company has, or may run, "a tunnel for the purpose of developing a lode or lodes "owned by said person or company, the money so expended "in said tunnel shall be taken and considered as expended "on said lode or lodes, whether located prior to or since "the passage of said act, and such person or company "shall not be required to perform work on the surface of "said lode or lodes in order to hold the same as required "by said act."

This act did not affect the character of other work to be done or improvements to be made according to law as it stood before, except as it gave special value to working by tunnel.[1] The land department held, prior to the passage of this amendment, that development by means of a tunnel satisfied the law,[2] although a contrary rule had been previously announced by Commissioner Drummond.[3]

The rule is well settled, that work done outside of a claim or group of claims, if done for the purpose and as a means of prospecting or developing the claim, as in the case of tunnels, drifts, etc., is as available for holding the claim or claims as if done within the boundaries. One general system may be formed, well adapted and intended to work several contiguous claims or lodes, and when such is the case, work in furtherance of the system, whether done within or without the claim or claims, is work on the claims intended to be developed.[4]

[1] Chambers v. Harrington, 111 U. S. 350, 355.

[2] *In re* Coleman, 1 Copp's L. O. 34.

[3] Copp's Min. Dec. 136, 142.

[4] Mt. Diablo M. & M. Co. v. Callison, 5 Saw. 439, 457; Jupiter M. Co. v. Bodie Cons. M. Co., 7 Saw. 96, 116; Jackson v. Roby, 109 U. S. 440; St. Louis Smelting Co. v. Kemp, 104 U. S. 636; De Noon v. Morrison, 83 Cal. 163; Chambers v. Harrington, 111 U. S. 350; Remmington v. Baudit, 6 Mont. 138; Harrington v. Chambers, 3 Utah, 94; Packer v. Heaton, 9 Cal. 568; Hall v. Kearny, 18 Colo. 505; Doherty v. Morris, 17 Colo. 105; United States v. Iron S. M. Co., 24 Fed. 568; Kramer v. Settle, 1 Idaho, 485; Eberle v. Carmichael, 42 Pac. 94; Book v. Justice M. Co., 58 Fed. 106; English v. Johnson, 17 Cal. 107; Kirk v. Clark, 17 L. D. 190; Emily Lode, 6 L. D. 220.

Work done outside of the claim upon another patented claim, if for the benefit of the one unpatented, may be considered as work done upon it;[1] but where improvements not situated upon the claim are alleged to have been made for the development of such claim, it must be clearly demonstrated that such improvements have a direct tendency to such development.[2] They must have direct relation to the claim, or be in reasonable proximity to it.[3]

It is hardly necessary to enumerate the various methods by which mines may be worked under a common system, necessitating the performance of labor or the erection of improvements outside the boundaries of a claim or claims. It is not within the province of the courts to question the judgment of a property owner in the legitimate use of his property, or to determine whether one mode of use would be more beneficial than another.[4] It depends largely upon local environment and the character of the ground to be developed.

As water is essential to the development and working of placers, expenditures made in constructing ditches, flumes, and pipe lines, for the purpose of conducting water to the property for *use on such property*, will undoubtedly satisfy the law. The cost of a survey preliminary to the location of a ditch for the development of the claim will not, however, be credited on the required statutory expenditure, where the ditch has not been dug.[5]

Dams and reservoirs constructed upon outside lands, for the purpose of storing water or acquiring requisite pressure, the water to be conducted from such dams or reservoirs to, and used upon, the mining claim, are certainly legitimate expenditures, to be credited upon the claim where the water is used, or to be used, although the cost of constructing such dams under such circumstances could

[1] Hall v. Kearny, 18 Colo. 505.
[2] Louise M. Co., 22 L. D. 663.
[3] McGarrity v. Byington, 12 Cal. 426, 432.
[4] Stone v. Bumpus, 46 Cal. 218.
[5] Stork & Heron Placer, 7 L. D. 359.

not be credited to the land upon which they were constructed.[1]

So a flume constructed for the purpose of carrying away tailings and waste material from a claim may be credited to the claim from which the material is taken in the conduct of mining operations: but is not considered as labor performed or improvements made upon the land whereon the flume is erected or tailings deposited.[2]

A ditch constructed and actually reaching a claim, but not used or intended to be used in connection with it, is not work for which the claim is entitled to credit.[3]

As we have heretofore observed, roadways are necessary,[4] and where constructed in good faith and for the manifest purpose of aiding in the conduct of mining operations on the particular claims sought to be represented by this character of work, the cost of their construction in connection with active mining operations may be entitled to consideration; but this rule is to be applied cautiously and on the lines of obvious common sense. In a general way, all roads within a mining district are convenient and necessary; but to say that work done upon the general highways within a mining district may be done by mining locators and applied in lieu of assessment work on their respective claims, would be absurd.[5] A road is not *necessarily* a mining improvement. The construction of a road, no portion of which is on the claim, and which is not intended to be used in connection with such claim, cannot be accepted as a compliance with the law relative to annual expenditure.[6]

Considering the manifest object and purpose of the law requiring annual development work as a condition upon

[1] Hale's Placer, 3 L. D. 536; Chessman's Placer, 2 L. D. 774.

[2] St. Louis Smelting Co. v. Kemp, 104 U. S. 636; Jackson v. Roby, 109 U. S. 440.

[3] *In re* Downs, 7 L. D. 71; Trickey Placer Claim, *Id.* 52.

[4] See, *ante*, § 629.

[5] Gird v. California Oil Co., 60 Fed. 531.

[6] White Cloud C. M. Co., 22 L. D. 252. See, also, Alice Edith Lode, 6 L. D. 711.

which the locator's estate is to be perpetuated, the courts and the land department will readily discriminate between a *bona fide* effort to fulfill its requirements and a fraudulent attempt to evade it, and this applies to work done, or pretended to be done, without, as well as within, the limits of a particular claim or group of claims. The tribunals do not measure a locator's acts by hard and fast lines, but they will readily detect the difference between the genuine and the sham.

**§ 632. Period within which work must be done—Can preliminary work required by state laws as an act of location be credited on the first year's work?**—The law fixes no time within the year when the work must be done. Consequently, if done at any time during the year, it is enough, and there can be no forfeiture until the entire year has lapsed.[1]

A local regulation requiring work to be performed every sixty days contravenes the federal law, and is therefore void.[2]

We have heretofore noted that the state statutes enacted on this subject in Oregon and Colorado are open to this objection.[3]

As heretofore noted, the year within which work is to be performed is the calendar year commencing with the first day of January next succeeding the date of the location, and ending with the thirty-first day of December. A location made on January 1, 1897, need not be represented until December, 1898, thus permitting the claim to be held practically two years, without the necessity of performing any work whatever, except such preliminary development as may be required by the laws of the several states as an act of location.

[1] Belk *v.* Meagher, 3 Mont. 65; S. C. on appeal, 104 U. S. 279, 283; McGinnis *v.* Egbert, 8 Colo. 41, 47; Atkins *v.* Hendree, 1 Idaho, 95; Hall *v.* Hale, 8 Colo. 351; Mills *v.* Fletcher, 100 Cal. 142; Slavonian M. Co. *v.* Vacavich, 7 Saw. 217.

[2] Original M. Co. *v.* Winthrop M. Co., 60 Cal. 631.

[3] See, *ante*, § 626.

As to whether or not work performed during the year in which the location is made, that is, prior to the first day of January next succeeding the date of the location, may be credited on the first year's representation, is a matter involved in some doubt. Logically, we can see no objection to the locator performing the full amount of the first year's labor at any time after the inception of his right by discovery. While his location is not perfected until all the requisite acts are performed, yet when completed his rights relate back to the date of his discovery, and that should be considered as the date of his location, as it is the inception of his right.[1] The object and intent of the law would seem to be to require a certain amount of labor to be performed before the end of a certain period next succeeding the date of location.

Commissioner Williamson at first accepted this construction of the law,[2] but subsequently announced a different view; not, it is true, in a contested case, but in the form of a letter, wherein he states, that a claim located on October 1, 1879, requires the expenditure of one hundred dollars' worth of labor or improvements thereon within the calendar year 1880, and that whatever may have been expended during the year 1879 will not answer the requirements of expenditures in 1880.[3] The effect of this rule, if maintained, will, in states requiring preliminary development work as an act of location, deny the locator any credit for such preliminary work, unless his discovery fortuitously occurs in the latter part of a year and he is enabled to delay such work until after January 1st. If the date of discovery is not, by relation, to be considered as the date of the *location*, then, as a matter of course, the preliminary work cannot be estimated in any event.

If the views last expressed by Commissioner Williamson are recognized by the land department,—and informal letters of the land officers frequently ripen into

[1] Talbott v. King, 6 Mont. 76.
[2] *In re* Hale, 7 Copp's L. O. 115.
[3] *In re* Haynes, 7 Copp's L. O. 130.

formal rules—the locator's only safe course is to follow them without waiting for the courts to pass upon the question.

Of one thing we are quite sure: No matter how extensive a development or how large an expenditure may be made during any one calendar year, the excess over one hundred dollars cannot be carried forward and credited on the next year.[1] The obligation to perform the statutory amount each year is not satisfied by doing two or more years' work in one.

The mere pendency of patent proceedings does not, prior to the issuance of a certificate of purchase, excuse the performance of annual labor.[2]

If after filing an application for patent and prior to entry the applicant neglects to perform the necessary work, the department may cancel the application; or if an entry has been made after protest filed, alleging failure to perform the work, the entry may be canceled.[3]

The pendency of an action instituted in the courts to determine an adverse claim under section twenty-three hundred and twenty-six of the Revised Statutes stays all further proceedings in the land office, but does not dispense with the necessity for performing the annual labor.[4]

§ 633. **By whom labor must be performed.**—Manifestly, the mine must be represented and the annual work performed by, or at the instance of, the owner or some one in privity with him. Work done by a mere trespasser or stranger to the title will not inure to the benefit of the locator,[5] although ultimately paid for by the claimant; but work done for the benefit of the claim by one holding

[1] *In re* Merrell, 5 Copp's L. O. 5.

[2] South End M. Co. *v.* Tinney (Nev.), 35 Pac. 89; Ferguson *v.* Belvoir Mill Co., 14 L. D. 43; McNeil *v.* Pace, 3 L. D. 267.

[3] Sweeney *v.* Wilson, 10 L. D. 157.

[4] Continental G. & S. M. Co., 10 L. D. 534; Clark *v.* American Flag G. M. Co., 7 Copp's L. O. 5; Higgins *v.* John G. M. Co., 14 Copp's L. O. 238.

[5] Little Gunnell M. Co. *v.* Kimber, 1 Morr. Min. Rep. 536.

the equitable title will operate to preserve the claim from forfeiture and inure to the benefit of the claim.[1]

Compliance with the law by a mineral claimant, who is at such time holding under color of title, will accrue to his benefit on the acquirement of the legal title.[2]

The purchaser of a claim from a prior locator is entitled to the benefit of all expenditures made by his grantor in the development thereof.[3]

§ 634. **Circumstances under which performance of annual labor is excused.**—During certain periods of industrial depression, congress has passed special laws suspending the provisions of the section of the Revised Statutes requiring the performance of annual labor,[4] upon the condition, that the claimant file with the recorder of mining locations in the locality in which his claim was situated a declaration of intention to hold and work the claim in good faith; but these are mere transitory acts, which have fully accomplished the object for which they were passed, and no longer require consideration. The existence of Indian hostilities in the border regions,—a not infrequent occurrence in the past—where an attempt to comply with the law as to annual labor would jeopardize the life of the locator, would certainly excuse the strict fulfillment of the requirements of the law, provided, of course, that the locator returns within a reasonable time after the cessation of such hostilities, and resumes his efforts to represent his claim. This is but the application in a larger sense of the rule which excuses the performance of work when the claim is in the hostile possession of another, rendering it impossible to comply with law without incurring risk of injury to life or limb, or committing or inviting a breach of the peace.

[1] Book *v.* Justice M. Co., 58 Fed. Rep. 106; Jupiter M. Co. *v.* Bodie Cons. M. Co., 7 Saw. 96.

[2] Dolles *v.* Hamberg Cons. M. Co., 23 L. D. 267.

[3] Tam *v.* Story, 21 L. D. 440.

[4] Act of Nov. 3, 1893, 28 Stats. at Large, 6; Act of July 18, 1894, *Id.* 114.

A person in the peaceful and lawful occupancy of public land, for the purpose of initiating a title, having established his right so far as he could or was permitted, acquires a title which entitles him to the possession of the land as against all persons except the government. When he is forcibly prevented from fulfilling the letter of the law, it will be presumed that he would have fulfilled it if permitted so to do.[1] So it has been held that where adverse possession of a mining claim is taken and held wrongfully, the rightful owner or locator is excused from doing the assessment work during the continuance of such adverse holding.[2]

A locator cannot be deprived of his inchoate rights by the tortious acts of others,[3] but there must be a *bona fide* effort to perform the work. The acts and hostile declarations of one asserting an adverse right must be of so serious and menacing a character as to satisfy a man of ordinary prudence that it would be unsafe to begin work. Threats made at long range, when a relocator is not in the physical possession of the claim, or if made upon the claim, are of such a negative character as to preclude the idea that an attempted resumption of work would be met with force, will not excuse a reasonable attempt to comply with the law.[4]

It may be suggested that third parties disconnected with either the original locator or the hostile relocator might effect a relocation, which would defeat the title of both contending parties. The answer to this is found in the fact, that no one could initiate a right by force and violence;[5] and if the *status* of the claim as to physical occupancy is such as to admit of its peaceable relocation by outsiders, it is open to a peaceful re-entry by the original locator for the purpose of performing his labor.

[1] Robinson *v.* Imperial S. M. Co., 5 Nev. 44; Alford *v.* Dewin, 1 Nev. 207.
[2] Utah M. & Mfg. Co. *v.* Dickert M. S. Co., 6 Utah, 183; Mills *v.* Fletcher, 100 Cal. 142; Trevaskis *v.* Peard, 111 Cal. 599; Erhardt *v.* Boaro, 8 Fed. 692.
[3] Erhardt *v.* Boaro, 113 U. S. 527, 534.
[4] Slavonian M. Co. *v.* Vacavich, 7 Saw. 217.
[5] See, *ante*, § 217.

**§ 635. Value of labor and improvements — How estimated.** — In some of the mining districts, attempts have been made to fix the value of a day's labor, and in the territory of New Mexico we encounter a state statute prescribing the number of hours which shall constitute a day's work upon a mining claim, and providing that such day's work shall be of the value of four dollars.[1]

It seems to us that it is not within the power of any state or territorial legislature or local district assemblage to arbitrarily fix the value of any marketable commodity.

The following instruction upon the method of determining values, has been approved by the supreme court of Montana: —

"In determining the amount of work done upon a claim, "or improvements placed thereon for the purpose of repre- "sentation, the test is as to the reasonable value of the said "work or improvements — not what was paid for it or "what the contract price was, but it depends entirely upon "whether or not the said work or improvements were rea- "sonably worth the said sum of one hundred dollars."[2]

Nor is it material whether or no the labor performed is paid for or not, provided it is done at the instigation of the owner.[3] The fulfillment of the provision of the law lies in the performance of the labor or the making of the improvements required,[4] and not in the payment for it.

Experience teaches us that this question of value of annual labor forms the basis of innumerable controversies. Every relocator is interested in depreciating the value of work performed by the original locator, and the latter in saving his claim from forfeiture is interested in extolling its worth. It is largely a question of opinion, upon which both practical miners and experts will disagree. As was observed by the supreme court of Colorado, —

"It is probable that testimony could be obtained to "show that nearly all the annual assessment work done

[1] Comp. Laws New Mex. 1884, § 1568.
[2] Mattingly v. Lewisohn, 13 Mont. 508, 520.
[3] Lockhardt v. Rollins, 2 Idaho, 503.
[4] Coleman v. Curtis, 12 Mont. 301.

"upon mining claims was of less value than the law "required, excepting those instances where it greatly "exceeds the sum of one hundred dollars; and while the "amount paid is not conclusive that work of that value "has been done, but the actual value is the true test "whether or not the law has been complied with, yet, "where the testimony is conflicting as to the value, it is "proper to consider whether there has been a *bona fide* "attempt to comply with the law."[1]

**§ 636. Proof of annual labor under state laws.**— Most of the states and territories subject to the congressional mining laws have enacted statutes providing for proof, in the form of affidavits establishing the fact that the annual labor for a given year has been performed. Such affidavits are required to contain a statement as to the nature and value of the work performed and improvements made, and are to be filed before the end of a given period with the recording officer in whose office record of mining locations is made pursuant to local or state legislation. This class of legislation is found in California,[2] Colorado,[3] Idaho,[4] Montana,[5] New Mexico,[6] Utah,[7] Wyoming,[8] Arizona,[9] and Nevada.[10]

The full text of state legislation on this subject will be found under appropriate heads in the appendix. It is unnecessary to consider here anything beyond the general object of this class of state laws.

The failure to file affidavits of annual labor is accompanied by no serious penalty. There is no provision in any of the statutes to the effect that a failure to comply with its terms will work a forfeiture.[11] If any such conditions

[1] Quimby v. Boyd, 8 Colo. 194, 208.
[2] Stats. 1891, p. 219.
[3] Mills' Annot. Stats., § 3161, as Am. Ses. Laws 1889, p. 261.
[4] Laws of 1895, p. 25.
[5] Rev. Code of 1895, § 3614.
[6] Act of March 18, 1897.
[7] Act of 1897, § 6.
[8] Laws of 1888, pp. 90-91, § 23.
[9] Stats. 1895, p. 54, §§ ix and x.
[10] Stats. 1887, p. 136. [11] Book v. Justice M. Co., 58 Fed. 106, 118.

THE LAW ASSOC... PHILADEL...

were inserted, or if any of the laws in question were susceptible of any such construction, they would undoubtedly be considered as unreasonable, and repugnant to the federal law. A forfeiture of a mining claim cannot be established, except upon clear and convincing proof of the failure of the locators or owners of the claim to have the work done or improvements made to the amount required by law.[1] All these statutes provide that the affidavits when filed, or certified copies of them, shall be *prima facie* evidence of the facts therein stated, which, of course, means such facts as are required by the law to be stated therein.

In Idaho it is provided that the failure to file such an affidavit shall be considered *prima facie* evidence that the requisite labor has not been performed, and likewise in New Mexico such failure places the burden of proof upon the owner or owners of such claim to show that such work has been done according to law. Ordinarily the burden of proof rests with the party charging a forfeiture, to show that the work has not been performed by the previous locator.[2]

In Idaho and New Mexico, where there is a failure to file the proof of annual labor, it would seem that this rule is modified and the burden is shifted. We cannot see any objection to this class of state legislation. The several states have a right to define the nature, degree, and effect of evidence, within rational limits, and we do not think these provisions unreasonable.

The general purpose and object of state laws authorizing the making and filing of proofs of annual labor is fully stated by Judge Hawley in Book *v.* Justice Mining Co., in construing the Nevada statute:—

"The object of this act was evidently to fix some defi-
"nite way in which the proof as to the performance of the
"work or expenses incurred in the making of improve-
"ments might be in many cases more accessible. In all
"mining communities there is liable to be some difficulty

[1] Book *v.* Justice M. Co., 58 Fed. 106, 118; Hammer *v.* Garfield M. & M. Co., 130 U. S. 291.

[2] Hammer *v.* Garfield M. & M. Co., 130 U. S. 291; Johnson *v.* Young, 18 Colo. 625; Quigley *v.* Gillett, 101 Cal. 462; Coleman *v.* Curtis, 12 Mont. 301.

"in finding the men who actually performed the labor or "made the improvements, and procuring their testimony, "in order to establish the facts necessary to show a com- "pliance with the mining law in this respect. . . . Lo- "cators of mining claims would doubtless often save much "time and trouble, as well as hardship, inconvenience, and "expense, by complying with the provisions of the act; "but the act does not prevent, and was not intended to "prohibit, the owners of a mining claim from making the "necessary proof in any other manner, nor does it pro- "hibit the contesting party from contradicting the facts "stated in the affidavit."[1]

As was said by the supreme court of Montana:—

"The statute provides a convenient method of preserving "*prima facie* evidence of the annual representation of min- "ing claims, by the performance of the labor or making "of the improvements of the value required thereon, "by putting such evidence in the form of an affidavit, "stating the facts required. This statute relates not to the "effect of doing the work or making the improvements as "required by law, but to the method of preserving *prima* "*facie* evidence of the fact that such requirement has been "fulfilled."[2]

The affidavit may be filed at any time after the work has been performed, and prior to the lapse of the period fixed by the statute.[3]

There is no requirement in any of these laws that there should be a separate affidavit for each claim represented;[4] but in cases of groups represented by work done within the limits of one of the claims comprising it, or where it is asserted that work done outside of a claim or group of claims was so performed for the benefit of such claim or group, the affidavit to possess any value or force should clearly demonstrate that the work so done related directly to the claims, and that such work obviously tended to their development. A mere conclusion of the affiant to that effect would not be accepted.

[1] 58 Fed. 106, 118.

[2] Coleman *v.* Curtis, 12 Mont. 301, 305; Davidson *v.* Bordeaux, 15 Mont. 245, 250.

[3] McGinnis *v.* Egbert, 8 Colo. 41, 48. [4] *Id.*

**§ 637. Obligation to perform labor annually ceases with the final entry at the land office.**—The law requires that labor shall be performed or improvements made upon each claim until a patent has been issued therefor.

"The true rule of law governing entries of public land, "to which mineral lands form no exception, is, that when "the contract of purchase is completed by the payment of "the purchase money and the issuance of the patent cer- "tificate by the authorized agents of the government, the "purchaser at once acquires a vested interest in the land, "of which he cannot be subsequently deprived if he has "complied with the requirements of the law prior to entry, "and the land thereupon ceases to be a part of the public "domain, and is no longer subject to the operation of the "laws governing the disposition of the public lands. In "such cases there is part performance of a contract of sale, "which entitles the purchaser to a specific performance of "the whole contract without further action on his part. "When the proofs are made and the purchase money paid, "the equitable title of the purchaser is complete, and the "patent when issued is evidence of the regularity of the "previous acts, and relates to the date of the entry to "the exclusion of all intervening claims. In short, an "entry made is in all respects equivalent to a patent "issued, in so far as third parties are concerned."[1]

This view was accepted by the courts as a proper interpretation of the law,[2] and the supreme court of the United States quoted approvingly the ruling of the land department, and held that when the price is paid the right to a patent immediately arises. If not issued at once, it is because the magnitude of the business in the land department causes delay; but such delay in the mere administration of affairs does not diminish the rights flowing from the purchase, or cast any additional burdens upon the purchaser, or expose him to the assaults of third parties.[3] The

[1] Secretary Schurz, *in re* American Hill Quartz Mine, Sickle's Min. Dec. 377, S. C. Com'rs' Dec., *Id.* 384. See, also, Gold Blossom Quartz Mine, 2 L. D. 767; American Hill Quartz Mine, 5 Copp's L. O. 114; *Id.*, 6 Copp's L. O. 1.

[2] Aurora Hill Cons. M. Co. *v.* '85 M. Co., 34 Fed. 515; Deno *v.* Griffin, 20 Nev. 249; Alta M. & S. Co. *v.* Benson M. & S. Co. (Ariz.), 16 Pac. 565.

[3] Benson M. & S. Co. *v.* Alta M. & S. Co., 145 U. S. 428. See, also, Deffeback *v.* Hawke, 115 U. S. 392.

obligation to perform the annual labor ceases, therefore, when final entry and payment is made and the certificate of purchase is issued. This obligation, however, may be revived by either a cancellation or suspension of the entry.

The commissioner of the general land office has power to suspend the entry on which the certificate is founded, by virtue of his supervisory control over the acts of his subordinates,[1] and when suspended the certificate of purchase cannot be used as evidence as long as the suspension continues.[2] He has also the power to cancel the certificate upon due notice and under proper conditions;[3] but so long as the certificate remains uncanceled or unsuspended, the annual labor need not be performed.

**§ 638. Millsites.**—Millsites are not subject to the annual labor law. Their use and occupancy for purposes connected with mining operations on the lodes to which they are extralimital adjuncts, is all that is required. This is the rule followed by the land department in relation to the expenditures required for patent purposes.[4]

It is difficult to see how a millsite can be *developed*. It is not a mining claim. It must be located on non-mineral land, and its continued existence depends entirely upon its use in connection with a located vein. We, of course, have no reference to millsites upon which are erected custom mills or reduction works under the last clause of section twenty-three hundred and thirty-seven of the Revised Statutes.

It is unnecessary to add anything to that which we have heretofore said on the subject of millsites.[5]

[1] Hosmer *v.* Wallace, 47 Cal. 461.

A full discussion of the powers and duties of the land department will be found in the next title.

[2] Figg *v.* Hensley, 52 Cal. 290; Murray *v.* Polglase, 17 Mont. 455.

[3] Caldwell *v.* Bush (Wyo.), 45 Pac. 488; Parsons *v.* Venzke, U. S. Sup. Ct., Nov. 2, 1896.

[4] Com'rs' Letter, 1 Copp's L. O. 2; Alta Millsite, 8 L. D. 195.

See, *ante*, §§ 519–524.

# CHAPTER VI.

## FORFEITURE OF THE ESTATE, AND ITS RESTORATION BY RESUMPTION OF WORK.

ARTICLE I. ABANDONMENT AND FORFEITURE.

II. RESUMPTION OF WORK.

### ARTICLE I. ABANDONMENT AND FORFEITURE.


§ 642. Circumstances under which the locator's estate is terminated.

§ 643. Distinction between abandonment and forfeiture.

§ 644. Acts constituting abandonment—Evidence establishing or negativing it.

§ 645. Forfeiture.

§ 646. Forfeiture to co-owners.


**§ 642. Circumstances under which the locator's estate is terminated.**—In the case of Black *v.* Elkhorn Mining Co., a recent decision rendered by the supreme court of the United States upon the subject of dower in unpatented mining claims, we find the following statement as to the nature of a locator's title and the circumstances under which it may be extinguished:—

"To sum up: As to the character of the right which "is granted by the United States to a locator, we find,—

"(1) That no written instrument is necessary to create "it. Locating upon the land and continuing yearly to do "the work provided for by the statute gives to and contin- "ues in the locator the right of possession as stated in the "statute.

"(2) This right, conditional in its character, may be "forfeited by the failure of the locator to do the necessary "amount of work; or if, being one among several locators,

"he neglects to pay his share for the work which has been "done by his co-owners, his right and interest in the claim "may be forfeited to such co-owners under the provisions "of the statute.

"(3) His interest in the claim may also be forfeited by "his abandonment, with an intention to renounce his right "of possession. It cannot be doubted that an actual aban- "donment of possession by a locator of a mining claim, such "as would work an abandonment of any other easement, "would terminate all the right of possession which the "locator then had."[1]

In support of the last proposition, the court says:—

"An easement in real estate may be abandoned without "any writing to that effect, and by any act evincing an "intention to give up and renounce the same. If the loca- "tor remained in possession and failed to do the work pro- "vided for by the statute, his interest would terminate "under such circumstances. If he convey to another a "right which may be thus lost, that conveyance would "seem to be equivalent to an abandonment by him of all "rights under the statute. What could be better evidence "of an intention to abandon than an actual conveyance of "his right to another, ceasing to do any work thereon, and "giving up of his possession in accordance with his convey- "ance? The abandonment by simply leaving the land is "no more efficacious than conveying his rights and also "leaving possession without any intention of returning."

This characterization of the nature of the estate in a perfected mining location does not, at the first glance, seem to blend harmoniously with other previous declarations of the same tribunal. For example, that court has said:—

"A mining claim perfected under the law is property "in the highest sense of the term[2]—in the fullest sense of "the word.[3] A valid and subsisting location of mineral "lands, made and kept up in accordance with the provi- "sions of the statutes of the United States, has the effect "of a grant by the United States of the right of present "and exclusive possession of the lands located."[4]

[1] Black v. Elkhorn M. Co., 163 U. S. 445, 450.
[2] Forbes v. Gracey, 94 U. S. 762; Belk v. Meagher 104 U. S 279, 283
[3] Manuel v. Wulff, 152 U. S. 505, 510.
[4] Gwillim v. Donnellan, 115 U. S. 45, 49.

If the decision in Black *v.* Elkhorn Mining Company had been promulgated by any court of less dignity than the supreme court of the United States, we might deferentially suggest that while the view announced upon the subject of abandonment, as distinguished from forfeiture, was undoubtedly applicable to the early mining tenures as they existed prior to the enactment of the federal mining laws, by legislative construction and judicial interpretation the character of the estate in later years had been raised to such a dignity that it required something more than a mere parol abandonment to terminate it.

While it is true that no written instrument creating the grant is signed by the grantor, yet in at least twelve out of the fourteen states and territories subject to the federal mining laws, with the consent and under the sanction of the federal government, a record title is established. "A statutory writing affecting realty, being in part the basis of a miner's title,"[1] is required.

While as between the government and the locator the title of the latter is equitable, the courts of the mining states have uniformly held that as against every one else the estate was that of a freehold.

The supreme court of the United States has said that a written conveyance is not necessary to the transfer of a mining claim,[2] citing, as authority for this doctrine, an early California case;[3] but ever since 1860 the supreme court of that state has, by a uniform line of decisions, held that a written instrument was necessary to pass the title to a located mine.[4]

The same rule obtains in Montana,[5] and we think we are justified in making the statement, that at the present time, in every state and territory subject to the federal

[1] Pollard *v.* Shively, 5 Colo. 309, 312.

[2] Union Cons. S. M. Co. *v.* Taylor, 100 U. S. 39, 42.

[3] Table Mt. T. Co. *v.* Stranahan, 20 Cal. 198.

[4] Goller *v.* Fett, 30 Cal. 481; Folger *v.* Coward, 35 Cal. 650; Hardenburgh *v.* Bacon, 53 Cal. 381; Melton *v.* Lambard, 51 Cal. 258; Garthe *v.* Hart, 73 Cal. 541; Moore *v.* Hamerstag, 109 Cal. 122.

[5] Hopkins *v.* Noyes, 4 Mont. 550.

mining laws, a perfected mining location is treated as real estate, and that the same formalities are required to transmit the title as in case of other real property. The estate is treated as a legal one. It will support the action of ejectment. It may be mortgaged and generally dealt with as if the absolute fee were vested in the locator.[1]

A conveyance is not an abandonment. Abandonment terminates a right. A conveyance transmits it.[2]

Judge Field, while on the supreme bench of California, announced the doctrine, that,—

"The right of the occupant originating in mere possession may, as a matter of course, be lost by abandonment. Where there is title, to preserve it there need be no continuance of possession, and the abandonment of the latter cannot affect the rights held by virtue of the former."[3]

And the supreme court of the United States has said, that,—

"There is nothing in the act of congress which makes actual possession any more necessary for the protection of the *title* acquired to such a claim by a valid location, than it is for any other *grant* from the United States."[4]

The abandonment of possession is one thing. The abandonment of a right of exclusive possession and enjoyment granted by a statute which is a muniment of title, is another. If the estate of the locator is a legal estate, it can only be divested by abandonment when the circumstances are sufficient to raise an estoppel; but when such abandonment is not accompanied by circumstances sufficient to raise an estoppel, no matter how formal the abandonment may be, if it fall short of a legal deed of conveyance, it has no effect whatsoever upon the title.[5]

There is another consideration which may add some weight to the contention that such an estate cannot be lost

[1] See, *ante*, § 539.

[2] Richardson v. McNulty, 24 Cal. 339.

[3] Ferris v. Coover, 10 Cal. 589, 632.

[4] Belk v. Meagher, 104 U. S. 279, 283.

[5] Tiedeman on Real Property, § 439; 3 Washburn on Real Property, p. 65.

or terminated by mere parol abandonment: The statute which creates and authorizes the grant specifies the conditions under which the estate granted shall be forfeited. The question may be plausibly asked, Can the estate be lost or terminated lawfully in any other manner or for any other cause than that specified in the statute?

But as the supreme court of the United States seems to assume that the locator's estate may be lost either (1) by forfeiture for non-performance of annual labor, or (2) by voluntary parol abandonment, it will be necessary for us to consider the essential differences between the two.

**§ 643. Distinction between abandonment and forfeiture.**—Abandonment is always a question of intention.[1] In forfeiture the element of intent is not involved. It rests entirely upon the statute, and involves only the question, whether the terms of the law have been complied with.[2]

Abandonment operates *instanter*. Where a miner gives up his claim and goes away from it without any intention of returning, and regardless of what may become of it, or who may appropriate it, an abandonment takes place, and the property reverts to its original *status* as part of the unoccupied public domain. It is then *publici juris*, and open to location by the first comer.[3] Forfeiture is not complete until some one else enters with intent to relocate the property.[4]

[1] Omar v. Soper, 11 Colo. 380; Mallett v. Uncle Sam M. Co., 1 Nev. 188, 204; Weill v. Lucerne M. Co., 11 Nev. 200; Bell v. Bedrock T. & M. Co., 36 Cal. 214; Stone v. Geyser Q. M. Co., 52 Cal. 315; Derry v. Ross, 5 Colo. 295; St. John v. Kidd, 26 Cal. 263; Waring v. Crow, 11 Cal. 367; Davis v. Butler, 6 Cal. 510; Richardson v. McNulty, 24 Cal. 339; Morenhaut v. Wilson, 52 Cal. 263; Marshall v. Harney Peak T. M. Co., 1 S. Dak. 350; Myers v. Spooner, 55 Cal. 257; Dodge v. Nearden, 7 Ore. 456; Trevaskis v. Peard, 111 Cal. 599; Doe v. Waterloo M. Co., 70 Fed. 455.

[2] St. John v. Kidd, 26 Cal. 263, 272; Bell v. Bedrock T. & M. Co., 36 Cal. 214, 218.

[3] Derry v. Ross, 5 Colo. 295; Davis v. Butler, 6 Cal. 510; Richardson v. McNulty, 24 Cal. 339; Mallett v. Uncle Sam M. Co., 1 Nev. 188; Morenhaut v. Wilson, 52 Cal. 263; St. John v. Kidd, 26 Cal. 263; Harkrader v. Carroll, 76 Fed. 474.

[4] Little Gunnell M. Co. v. Kimber, 1 Morr. Min. Rep. 536, 539; Lakin v. Sierra Buttes G. M. Co., 25 Fed. 337, 343.

Abandonment may occur at any time, even after full compliance with the law as to performance of annual labor. Forfeiture will only ensue upon the lapse of the statutory period, and upon failure to represent the claim.

Abandonment may be proved under the general issue.[1] Forfeiture must be specially pleaded,[2] although this rule does not obtain, necessarily, in proceedings to determine adverse claims under section twenty-three hundred and twenty-six of the Revised Statutes, where the title of each party is put in issue.[3] Where, however, either abandonment or forfeiture are relied upon, the burden of proof rests with the party asserting.[4]

**§ 644. Acts constituting abandonment—Evidence establishing or negativing it.**—Abandonment is a question of fact to be determined by the jury.[5] No arbitrary rule can be laid down which will satisfy all cases. The question being one purely of intent, the fact is to be determined by the acts and conduct of the party.

Upon a question of abandonment, as upon a question of fraud, a wide range is allowed, for it is generally only from facts and circumstances that the truth is to be discovered, and both parties should be allowed to prove any fact or

[1] Willson v. Cleaveland, 30 Cal. 192; Bell v. Bedrock T. & M. Co., 36 Cal. 214; Bell v. Brown, 22 Cal. 671; Morenhaut v. Wilson, 52 Cal. 263; Trevaskis v. Peard, 111 Cal. 599.

The supreme court of Montana, while not undertaking to decide the question, intimated that it would be safer to plead it. McShane v. Kenkle, 44 Pac. 979.

[2] Renshaw v. Switzer, 6 Mont. 464; Garfield M. & M. Co. v. Hammer, 6 Mont. 53; Morenhaut v. Wilson, 52 Cal. 263; Mattingly v. Lewisohn, 13 Mont. 508; Bishop v. Baisley (Ore.), 41 Pac. 936; Wulff v. Manuel, 9 Mont. 286, S. C. reversed on appeal but not on this point, 152 U. S. 505; Altoona Q. M. Co. v. Integral Q. M. Co., 114 Cal. 100.

[3] Steel v. Gold Lead M. Co., 18 Nev. 80.

As to what is necessary to be alleged and proved in this class of actions and the relationship between the state courts and the land department, see subject of "adverse claims" in a succeeding chapter.

[4] Oreamuno v. Uncle Sam M. Co., 1 Nev. 215; Quigley v. Gillett, 101 Cal. 462; Coleman v. Clements, 23 Cal. 249; Bishop v. Baisley (Ore.), 41 Pac. 939; Johnson v. Young, 18 Colo. 625.

[5] Taylor v. Middleton, 67 Cal. 656; Myers v. Spooner, 55 Cal. 257, 260.

circumstance from which any aid for the solution of the question can be derived.[1] The *animus revertendi* is the simple test.[2] There must be a leaving of the claim without any intention of returning or making any further use of it, to sustain the charge of abandonment. The leaving having been shown, it is competent for the opposite party to show any acts explaining it.[3]

If tools or mining implements are left on the ground, this fact would be a circumstance negativing the idea of abandonment.[4]

Mere failure by one colocator to contribute his proportion of the expense of performing assessment work would not be conclusive evidence of an intention to abandon, although it is a circumstance which may be considered in connection with others.[5]

Lapse of time, absence from the ground, or failure to work it for any definite period, unaccompanied by other circumstances, are not evidence of abandonment.[6]

The declarations of a party against his own interest, accompanying his removal from the claim, would certainly be admissible to show intent, and this, independent of the fact that others acted upon such declarations, which would involve the element of estoppel. Estoppel *in pais* does not constitute an element in abandonment, nor is it one of the circumstances from which an abandonment may be found.[7]

It has been held that, when the question of abandonment is in issue, the declarations in his own favor, made by

[1] Willson *v.* Cleaveland, 30 Cal. 192; Bell *v.* Bedrock T. & M. Co., 36 Cal. 214, 218.

[2] Stone *v.* Geyser Q. M. Co., 52 Cal. 315, 318.

[3] Bell *v.* Bedrock T. & M. Co., 36 Cal. 214.

[4] Harkness *v.* Burton, 39 Iowa, 101, S. C. on appeal, 9 Morr. Min. Rep. 318; Morenhaut *v.* Wilson, 52 Cal. 263.

[5] Oreamuno *v.* Uncle Sam M. Co., 1 Nev. 215; Waring *v.* Crow, 11 Cal. 367, 372.

[6] Mallett *v.* Uncle Sam M. Co., 1 Nev. 157; Wade's Am. Min. Law, § 33; Seamen *v.* Vawdrey, 16 Vesey Jr. 390, S. C. 13 Morr. Min. Rep. 62; Partridge *v.* McKinney, 10 Cal. 181; Dodge *v.* Marden, 7 Ore. 456, S. C. 1 Morr. Min. Rep. 63.

[7] Marquart *v.* Bradford, 43 Cal. 526.

the party against whom it is alleged, negativing any intention to abandon, may be admitted in evidence for the special purpose only of showing an absence of such intention.[1] Abandonment may also be proved by the acts and conduct of a party, even against his express declarations to the contrary.[2]

§ 645. **Forfeiture.**— The penalty for failure to comply with the requirements of the law, in respect to the performance of annual labor, is found in section twenty-three hundred and twenty-four of the Revised Statutes:—

"Upon a failure to comply with these conditions, the "claim or mine upon which such failure occurs shall be "open to relocation in the same manner as if no location "of the same had ever been made."

The term "forfeiture" does not appear in the statute, but the courts employ it as a comprehensive word indicating a legal result flowing from a breach of condition subsequent, subject to which the locator acquires his title.

In a previous section we have noted the distinction between forfeiture and abandonment, and have there enumerated the leading characteristics of both.[3] We have heretofore observed the reluctance with which the courts enforce this penalty.[4] They have firmly established the doctrine, that the forfeiture cannot be established except upon clear and convincing proof of the failure of the former owner to have work performed or improvements made to the amount required by law.[5] The courts do not incline to the enforcement of this class of penalties, which have always been deemed in law odious.[6]

[1] Noble v. Sylvester, 42 Vt. 146, 150.

[2] Trevaskis v. Peard, 111 Cal. 599, 605; Myers v. Spooner, 55 Cal. 257, 260.

[3] See, *ante*, § 643.

[4] See, *ante*, § 624.

[5] Hammer v. Garfield M. & M. Co., 130 U. S. 291, 301.

[6] Mt. Diablo M. & M. Co. v. Callison, 5 Saw. 439, 457; Belcher Cons. G. M. Co. v. Deferrari, 62 Cal. 160, 163; Quigley v. Gillett, 101 Cal. 462; Johnson v. Young, 18 Colo. 625; Book v. Justice M. Co., 58 Fed. 106; Colman v. Clements, 23 Cal. 245.

Of course, while a claim is subject to relocation for failure to perform the requisite annual labor, no forfeiture is worked, and the estate of the locator is not divested until there has been a peaceable entry for the purpose of perfecting the relocation. The right of the original claimant is terminated only by the entry of a new one.[1]

We have heretofore dealt with the subject of forfeiture for failure to comply with the requirements of local rules other than those governing the subject of annual labor,[2] and have also considered the effect of a failure to comply with the provisions of state laws regulating the manner of initiating and perfecting locations.[3] The class of forfeitures which we are now considering are those only which may result from a failure to perform the annual labor required by the federal law.

Succinctly stated the rule is, that the work prescribed in the act must be done, or the claim is open to relocation, and a forfeiture may thus ensue.[4]

The subject of relocation after the original claimant has failed to comply with the law, is fully discussed in a preceding article.[5]

§ 646. **Forfeiture to co-owners.**—Section twenty-three hundred and twenty-four of the Revised Statutes, after providing for the performance of annual labor or the making of improvements to the value of one hundred dollars during each calendar year, contains the following additional provision:—

"Upon the failure of any one of several co-owners to "contribute his proportion of the expenditures required "hereby, the co-owners who have performed the labor or "made the improvements may, at the expiration of the "year, give such delinquent co-owner personal notice in "writing, or notice by publication in the newspaper

[1] Little Gunnell M. Co. v. Kimber, 1 Morr. Min. Rep. 536, 539.
[2] See, *ante*, § 274.
[3] See, *ante*, §§ 384, 390.
[4] Russell v. Brosseau, 65 Cal. 605; Du Prat v. James, *Id.* 555.
[5] See, *ante*, §§ 402, 409.

"published nearest the claim, for at least once a week for "ninety days, and if at the expiration of ninety days after "such notice in writing, or by publication, such delinquent "should fail or refuse to contribute his proportion of the "expenditure required by this section, his interest in the "claim shall become the property of his co-owners who "have made required expenditures."

The manifest object of these provisions is, to afford a speedy and convenient method of taking away the property of one cotenant and giving it to another without the troublesome intervention of either courts or juries. There is no antecedent adjudication of either the fact of delinquency on the part of one co-owner or the making of the required expenditures by the other. The proceeding by which the forfeiture is worked is *ex parte*, extrajudicial, and deserves to be classified under the head of extraordinary remedies.

In the case of Brundy *v.* Mayfield, considered by the supreme court of Montana,[1] it was urged that this portion of the federal statute was repugnant to the constitution of the United States, as it was an attempt to deprive persons of property without due process of law. The court did not pass upon the question. The exigencies of the case did not require it. Another method, quite as efficacious, was discovered, which enabled the court to declare null and void the proceedings under which one co-owner sought to acquire the title of the other by "advertising out." In this case there was a total absence of any delinquency.

The supreme court of the United States, in the case of Turner *v.* Sawyer,[2] held that the statute was one of forfeiture and should be strictly construed. The estate of the alleged delinquent co-owner in this case was saved from forfeiture for the reason, that the person attempting to advertise him out was not a co-owner. In deciding the case the court takes special pains to reannounce the familiar rule heretofore referred to,[3] that cotenants stand in a certain

[1] 15 Mont. 201.
[2] 150 U. S. 578.
[3] See, *ante*, § 406.

relation to each other of mutual trust and confidence; that neither will be permitted to act in hostility to the other in reference to the joint estate, and that a distinct title acquired by one will inure to the benefit of all.

In the case of Black *v.* Elkhorn,[1] the same tribunal, speaking through Justice Peckham, stated that this was one of the methods by which a locator's estate might be lost; but in that case no question concerning this portion of the statute was involved. The fact was recited to show that the locator's estate was not subject to a wife's dower, because it might be subject to forfeiture.

In Royston *v.* Miller,[2] one cotenant claimed to have performed the assessment work for 1893, and his co-owner, having failed to contribute, was "advertised out." Judge Hawley held that the performance of annual labor for that year was excused by the act of congress referred to in a preceding section,[3] and therefore there was no delinquency, and the attempt to create a forfeiture was a failure.

In Billings *v.* Aspen Mining and Smelting Co.,[4] an effort to forfeit the interest of a co-owner was defeated, because at the time notice was published the delinquent co-owner was dead.

In a recent case decided by the supreme court of South Dakota,[5] it appeared that the Golden Sand Lode was located in 1878 by Havens and Wilsey. Wilsey died the same year. An administrator of his estate was appointed, but died in 1888, leaving a vacancy in the administration until 1893. After Wilsey's death, Havens performed the annual work each year from 1880 until 1887. Thereafter and during the vacancy in the administration, Havens published two notices, one demanding contribution for labor

[1] 163 U. S. 445, 450. See, *ante*, § 642.
[2] 76 Fed. 50.
[3] See, *ante*, § 634.
[4] 51 Fed. 338, 349.
[5] Elder Adm'r *v.* Horseshoe M. Co. (not reported). I am indebted to Mr. Edwin Van Cise of Deadwood, S. D., for a newspaper print of the decision.

performed during the eight years, and one covering the period of 1887. The notices were addressed, "To Rufus "Wilsey, his heirs, administrators, and to all whom it may "concern." Presumptively this notice was published for the statutory period. There was no personal service. The heirs-at-law were all non-residents of South Dakota. In 1892 Havens sold to one White, by deed purporting to convey the entire claim. White caused the claim to be relocated under the name of the North Lode, under which relocation the claim passed to patent, and in 1893 as patented was conveyed to the Horseshoe Mining Company. It was claimed that White, in making the purchase, perfecting the relocation and securing patent, acted as the agent of this company.

In 1893 Elder, who had been appointed administrator of the Wilsey estate, together with Wilsey's heirs, tendered to the Horseshoe Mining Company one half of the amount of the annual expenditures required to be made on the claim from 1878 to 1893, and demanded a deed for one half of the property. The tender and demand being refused, Wilsey's administrator and the heirs brought the suit to recover one half of the property.

At the trial the published notices were offered in evidence, and objection to their introduction was made on numerous grounds. The trial court sustained the objection, giving as a reason for its ruling that,—

"The evidence in this case shows that Rufus Wilsey was "dead, and that there was no legal administrator; his "administrator was also deceased at the time this notice of "forfeiture was published, and that therefore, his co-owner "gained nothing by it,"

practically following the ruling in Billings *v.* Aspen M. & S. Co., heretofore referred to.

The appellate court held this to be error, and reversed the judgment, ruling that the direction in the notice to the heirs was sufficient, as upon the death of Wilsey they became tenants in common with Havens, and that it was unnecessary to designate them by name. We note

the following as the court's views upon the character of the proceeding by which a forfeiture is worked.

"We feel justified in the conclusion, that congress, in "adopting the provisions in regard to the disposition to be "made of a defaulting co-owner's interest in the claim, "acted upon the same theory, and the published notice "was intended to accomplish the same result as the pub- "lished notice of application for a patent; that is, to cut off "the claims of all persons, and vest in the co-owner a clear "title to his co-owner's interest, without regard to the "interest of miners, lien-holders, or incumbrances."

In other words, according to the supreme court of South Dakota, the proceeding is one *in rem*, not carried on under the supervision, or subject to the ultimate sanction or approval of any tribunal, but conducted solely by the individual who receives the benefit of the forfeiture.

As we shall hereafter have occasion to note, the proceedings by which a patent is obtained are essentially *in rem*. The notice of an application for patent, issued by the official charged in the first instance with passing upon a claimant's rights, is a summons, by the publication of which the land department acquires jurisdiction to grant the land. The mere publication of the notice passes no title. So in case of substituted service by publication of summons, it is upheld only upon the theory that the property involved, or which is taken under mesne process, has been, or is by virtue of the proceeding, subjected to the jurisdiction of some *competent tribunal*, which ultimately is called upon to determine the validity of the asserted right and the regularity in the service of process. Nor is the proceeding taken by one co-owner to divest the title of the other analagous to a sale under a deed of trust containing ample powers. In this class of cases the power of sale is expressly granted by the trustor. The right to sell exists by virtue of a contractual relation — a delegated power coupled with an interest, to wit, the *quasi* legal title. The method provided for in the statute under consideration is wholly *in invitum*.

We would not be justified in dogmatically asserting that this process of advertising a co-owner out is clearly unconstitutional. But we think we may safely assert that wherever the law is invoked the courts will demand strict proof of the fact of delinquency, and of the full and fair compliance with each requirement of the law.

Of course, to prevent a mining claim from becoming subject to relocation, it must be fully represented. A partial performance by one co-owner will not save his interest. Representation is a unit,[1] and as one cotenant, in order to protect his interest in the location, may be compelled to expend more than his just share, those associated with him should be compelled to contribute their respective proportions. Failing so to do, the one performing the labor or making the required expenditures would have his right of action against the delinquent co-owner.[2] The right of one cotenant to contribution from others for expenditures made in removing a common burthen is well settled.[3] This method of obtaining redress would seem to fully protect the diligent cotenant, and would not be subject to any constitutional objection.

The federal statute does not seem to provide any adequate method of establishing the jurisdictional facts upon which the right to forfeiture is based, nor of proving or making a record of a compliance by the diligent co-owner with the requirements of the law in securing a forfeiture to himself. An *ex parte* affidavit, made by a co-owner claiming a forfeiture, could not be admitted in evidence, nor would the record of such affidavit impart notice to any one. Constructive notice by recording is wholly a creature of the statute. A record not provided for by statute, or recognized by law, gives no notice.[4] The lameness and imperfections of the federal statute, to use mild

[1] Saunders v. McKay, 5 Mont. 523.

[2] Holbrooke v. Harrington (Cal.), 36 Pac. 365.

[3] Freeman on Cotenancy and Partition, § 322.

[4] Golden Fleece M. Co. v. Cable Cons. M. Co., 12 Nev. 312; Mesick v. Sunderland, 6 Cal. 298, 315. See, *ante*, § 392.

terms, have tempted several of the states to supply the deficiencies by supplemental enactments.

We have heretofore expressed the view that such statutes are not within the legitimate scope of supplemental state legislation.[1]

The land department follows the rule, that where one of several co-owners applies for a patent, and in doing so excludes his cotenants, the latter can only protect themselves by proceedings to determine an adverse claim under section twenty-three hundred and twenty-six of the Revised Statutes.[2] In other words, the department will not try the question of forfeiture nor adjust equities between co-owners. But it is not to be inferred from this that the excluded cotenant is, by a failure to adverse, barred from asserting his rights after patent. If he has been wrongfully excluded, he may have a trust declared at any time.[3] The regulations of the land department, whereby a party may be held to prove his better claim to enter, do not oust the jurisdiction of the courts.[4]

A cotenant excluded from a patent application *may* adverse, and perhaps under certain circumstances, where the claim is held in open hostility and there is an emphatic and well recognized repudiation of his title brought to the notice of the delinquent, his asserted rights may be jeopardized by failure to adverse;[5] yet, as a rule, his equities may be asserted after patent has issued.

It is not our purpose to consider here the relative rights, duties, and obligations existing between tenants in common of mining claims. We have heretofore discussed the subject of relocation by one cotenant in hostility to the others,[6] and in future chapters will have occasion to

[1] See, *ante*, § 251 (5), p. 320.

[2] Grampian Lode, 1 L. D. 544; Hussey Lode, 5 L. D. 93; Monitor Lode, 18 L. D. 358.

[3] Turner v. Sawyer, 150 U. S. 578; Sussenbach v. First National Bank, 41 N. W. 662; Brundy v. Mayfield, 15 Mont. 201.

[4] Turner v. Sawyer, 150 U. S. 578.

[5] Judge Elliott's concurring opinion in Tabor v. Sullivan, 12 Colo. 136, 151.

[6] See, *ante*, § 406.

consider the general subject of mining partnerships and cotenancy.

The object of this section is simply to invite attention to that portion of the federal law which purports to sanction a forfeiture for the benefit of a co-owner. All courts agree that the statute must be strictly construed. Certainly no presumptions of either fact or law will be indulged in when its application is invoked. Drastic punishments for minor offenses frequently secure immunity to the offender. The same principle applies with equal force where unusual and severe methods of redressing private wrongs or enforcing private rights are attempted. The courts are not disposed to deal with them in a spirit of liberality.

## Article II. Resumption of Work.

§ 651. Resumption of work prevents forfeiture.
§ 652. What constitutes a valid resumption of work.
§ 653. When right to resume work must be exercised.
§ 654. Conclusions.

**§ 651. Resumption of work prevents forfeiture.**— It might be inferred from the caption of this chapter, "Forfeiture of the estate and its restoration by resumption of work," that the estate of a locator in a mining claim once forfeited for failure to perform his annual assessment work might be restored by resuming work. The expression is, legally speaking, inaccurate. A forfeiture does not ensue from the mere failure to comply with the law. It requires the intervention of a third party and a relocation of the ground before any forfeiture can arise.[1] When such forfeiture becomes effectual, the estate of the original locator is hopelessly lost, and there is no possibility of its being restored.

The statute provides that,—

"Upon a failure to comply with these conditions, the "claim or mine upon which such failure occurs shall be

[1] See, *ante*, § 643, 645.

"open to relocation in the same manner as if no location "of the same had ever been made; *provided, that the origi-* "*nal locators, their heirs, assigns, or legal representatives, have* "*not resumed work upon the claim after failure and before such* "*location.*"[1]

Resumption of work at any time prior to the lawful inception of an intervening right *prevents* forfeiture.[2] It does not restore a lost estate.

**§ 652. What constitutes a valid resumption of work.** — With the doctrine established, that all forfeitures are odious, and that one seeking to avail himself of the failure of a preceding locator to comply with the law, in order to secure a relocation of the ground, must establish such failure by clear and convincing proof,[3] it is natural that the courts should lean toward a liberal construction of the law of resumption. In order that we may be able to intelligently deduce a correct rule from the decisions, it is necessary for us to briefly consider the leading cases and the facts surrounding them. For illustrative purposes, in epitomizing these cases, let us assume that in all of them the original locator and alleged delinquent is represented by "A." and the relocator by "B." This will avoid confusion and more readily exhibit the analogies or differences, as the case may be.

Case 1.—A., owning two claims, performed on the two during the year 1880 only one hundred dollars' worth of work; that is, fifty dollars upon each. His claims were subject to relocation on January 1, 1881. During January of that year he performed work that was actual and

[1] Rev. Stats. § 2324.

[2] Belk *v.* Meagher, 104 U. S. 279; Pharis *v.* Muldoon, 75 Cal 284; Belcher *v.* Deferrari, 62 Cal. 160; McGinnis *v.* Egbert, 8 Colo. 41; Belk *v.* Meagher, 3 Mont. 65; Gonu *v.* Russell, *Id.* 358; Honaker *v.* Martin, 11 Mont. 91; Lacey *v.* Woodward (New Mex.), 25 Pac. 785; North Noonday M. Co. *v.* Orient M. Co., 6 Saw. 299, 314; Jupiter M. Co. *v.* Bodie Cons. M. Co., 7 Saw. 96, 115; Lakin *v.* Sierra Buttes M. Co., 11 Saw. 231, 241; Little Gunnel M. Co. *v.* Kimber, 1 Morr. Min. Rep. 536; Oscamp *v.* Crystal River M. Co., 58 Fed. 293; Anderson *v.* Byam, 8 L. D. 388.

[3] See, *ante*, § 645.

valuable, to the extent of twenty-four dollars on the two claims, or twelve dollars each. No other or further work was performed. B. entered and located in August, 1881. It was held, that the work done by A. in January constituted a sufficient resumption; B's relocation was therefore void.

In affirming a judgment in A's favor, the supreme court of California said:—

"It is not necessary to decide that an attempt to assert "a continuous right may be based upon a pretense of work "so plainly a sham as that it will be disregarded; but here "the work done was actual and valuable. The letter of "the statute upholds the view as to the resumption of work "taken by the court below, and forfeitures and denounce- "ments are not to be favored by basing them upon language "which does not plainly and unmistakably provide for "them."[1]

Mr. Morrison says of this case, "Such a decision is only "trifling with the law and the rights of parties based upon "the law."[2]

The supreme court of Montana quotes this approvingly, and adds the further comment:—

"The result of the holding in Mining Co. *v.* Deferrari, "*supra*, is to defeat the real objects of the statute, which "are the exploration and development of mining claims. "Every person who continues in possession of such prop- "erty upon the public domain of the United States with- "out performing annually the labor that has been specified, "violates the conditions of the grant from the government. "The resumption of work by the original locator, whose "rights are subject to forfeiture without the expenditure, "with reasonable diligence during the year, of the sum "of one hundred dollars for labor or improvements upon "the mine, is an evasion of the statute."[3]

The latest exposition of the law by the supreme court of California will be found stated under case 3, *post*.

[1] Belcher *v.* Deferrari, 62 Cal. 160, 163.
[2] Morr. Min. Rights, 8th ed., p. 70.
[3] Honaker *v.* Martin, 11 Mont. 91-97.

CASE 2.—A. located the claim in controversy on July 10, 1884. Prior to January 1, 1886, he performed labor to the aggregate value of sixty dollars only, the last work having been done on December 24, 1885. On January 1, 1886, at one o'clock in the morning, B. entered and posted a notice of relocation. On January 1st and 2d A. performed labor of the value of ten dollars, and quit. On January 5th B. marked the boundaries of his relocation, and otherwise complied with the law. Thereafter both A. and B. performed the annual work.

The supreme court of California held,[1] that the relocation not having been completed until January 5th, it was void, as in the meanwhile A. had resumed work, citing case 1, *supra*. In addition to this, the court intimated that B. was a moral delinquent, because he entered by stealth at an unusual hour. That the relocation was made at an unusual hour from a professional standpoint, is quite true. It is also true that this hour is the fashionable one for *resuming* work and making relocations in mining camps. There is nothing in the record justifying the suggestion that B's entry was by stealth.

CASE 3.—A. located two claims in 1885. He did practically no work until January, 1893, when he worked about three hours upon each claim on one day, and on the next sunk a shaft about six feet deep on one of them. This was all. The supreme court of California upheld as correct the following instructions to the jury:—[2]

"A party cannot hold a mining claim for several years "without doing in any year the work required, by simply "going on it at the beginning of each year and doing a "few hours' work, with no *bona fide* intent to comply with "the statutory requirement as to the amount of work to be "done. . . . It is against the policy of the law, and a "fraud against the government and the law, to hold quartz "claims by merely doing a few dollars' worth of work "thereon at or near the beginning of the year next

[1] Pharis v. Muldoon, 75 Cal. 284.
[2] McCormick v. Baldwin, 104 Cal. 227, 228.

"following the year on which claimant failed to do the "necessary work, when such work is not commenced with "the *bona fide* intention of being continued till the full "amount is done. Such labor so done is a mere pretense "and a sham, and will not prevent the relocation for want "of necessary work."

The court makes no reference to its previous decisions in either case 1 or 2, *supra*.

CASE 4.—A., to avoid a forfeiture for failure to perform work he should have done in 1887, relocated the claim January 1, 1888. In December, 1889, he made a contract with a third party to represent the mine for 1889. The employee labored from December 22, 1889, to January 12, 1890, and received from A. one hundred dollars. The value of this labor, estimated by the laborer, was about fifty dollars. Logs, slabs, and lumber, of the value of sixty-three dollars, were conveyed to the premises, but never used. Mining implements were brought there, used slightly, and carried away. B. relocated the claim April 25, 1890. A. claimed that the ground was not subject to relocation, as he had resumed work.

The supreme court of Montana, in reversing a judgment in favor of A., held that when an original locator avails himself of the statutory privilege of resuming work to preserve his estate from forfeiture, he must prosecute the same with reasonable diligence until the requirement for the annual labor and improvements had been obeyed.[1] The same tribunal reannounced this doctrine in a later case.[2]

CASE 5.—A. located in 1864, and the location was valid and subsisting when the act of May 10, 1872, was passed. No work was performed, however, after that date until June, 1875, when A. resumed work upon the claims and *did enough to re-establish his original rights*. B. attempted to

[1] Honaker v. Martin, 11 Mont. 91, 98, cited in Bishop v. Baisley (Ore.), 41 Pac. 966.

[2] Hirschler v. McKendricks, 16 Mont. 211.

relocate on December 19, 1876. It was held that A's resumption protected the claim from relocation until January 1, 1877. There could be no forfeiture until that date. B's relocation was therefore void, and did not take effect on January 1, 1877, although A. failed to perform any work during the year 1876.[1]

**§ 653. When right to resume work must be exercised.**— We have heretofore[2] discussed the rulings of the courts of last resort upon the subject of relocation of claims subject to forfeiture, and have adopted the view announced by Judge Hallett, that the right of the original locator to resume work and prevent forfeiture lapses, unless such right is exercised before another has taken possession of the property with intent to relocate it. The first initiatory step lawfully taken by a relocator after a claim becomes subject to forfeiture will protect him for the period of time fixed by law within which he is called upon to perfect his relocation. An intermediate resumption by the delinquent original locator cannot cut off this privilege. We have endeavored to present this phase of the law fully in the section referred to,[3] and repetition is unnecessary.

**§ 654. Conclusions.**— We are justified in deducing the following conclusions:—

(1) In order to prevent a forfeiture for failure to perform the assessment work required by law, the claimant must resume work in good faith, and prosecute the same continuously and without unreasonable interruption until the full amount of labor is performed. Nothing less than the outward manifestation of an intent to atone for the delinquency by a diligent and continuous prosecution of substantial and valuable development work will satisfy the law; that while the claim will be protected from relocation

[1] Belk v. Meagher, 3 Mont. 65, S. C. on appeal, 104 U. S. 279. See, *ante*, § 218.

[2] See, *ante*, § 408, pp. 520, 521.

[3] *Id.*

so long as the claimant is actually engaged in making up the deficiencies, a suspension of work for any appreciable period before the full amount required has been performed will subject the claim to relocation.

(2) The right to resume work is lost where a qualified relocator enters and initiates a relocation. A resumption between the initiatory and final acts of relocation will not avail.

# TITLE VII.

## OF THE PROCEEDINGS TO OBTAIN UNITED STATES PATENT, AND THE TITLE CONVEYED BY THAT INSTRUMENT.

CHAPTER

I. THE LAND DEPARTMENT AND ITS FUNCTIONS.

II. THE SUPVEY FOR PATENT.

III. THE APPLICATION FOR PATENT AND PROCEEDINGS THEREON.

IV. THE ADVERSE CLAIM.

V. ACTIONS TO DETERMINE ADVERSE CLAIMS, AND THE EFFECT OF JUDGMENT THEREON.

VI. THE CERTIFICATE OF PURCHASE, AND TITLE CONVEYED THEREBY.

VII. THE PATENT.

# CHAPTER I.

## THE LAND DEPARTMENT AND ITS FUNCTIONS.


§ 658. Introductory.
§ 659. The land department—How constituted.
§ 660. Registers and receivers—Their appointment, powers, and duties.
§ 661. The surveyors-general and their deputies.
§ 662. Commissioner of the general land office—Appointment, powers, and duties.
§ 663. Secretary of the interior.
§ 664. Jurisdiction of the land department.
§ 665. The effect of the decisions of the land department upon questions of fact.
§ 666. Decisions of the land department upon questions of law and mixed questions of law and fact.


§ 658. **Introductory.**—As an appropriate introduction to a discussion of the proceedings necessary to obtain the ultimate title to a mining claim by the issuance of a United States patent, as well as for the purpose of determining the force and effect of such patent when issued, it is advisable to consider in brief outline the nature of the tribunal charged with the duty of administering the public land laws, the functions of such tribunal, and the scope of its jurisdiction. While in doing so we may reach beyond the exigencies of this treatise, yet considering the relationship existing between the department and the courts which at times are called upon to construe its rulings and judgments, and in certain phases of the mining laws are supposed to perform certain auxiliary functions, we deem it important that the subject should be briefly presented.

§ 659. **The land department—How constituted.**—What is now known as the general land office was originally a

bureau of the treasury department, under the law of April 25, 1812; but upon the creation of the department of the interior,[1] the land office was transferred to that department, which has ever since supervised the sale and disposal of public lands.

It consists of the secretary of the interior, the commissioner of the general land office, and their subordinates, and as thus constituted is a special tribunal, vested with certain judicial powers to hear and determine the claims of parties to the public lands, and with authority to execute its judgments by conveyances to the parties entitled to them.[2]

The subordinate officers of the department intimately associated with the administration of the public land system are, the registers and receivers, surveyors-general and their deputies.

**§ 660. Registers and Receivers—Their appointment, powers, and duties.**—Registers and receivers are appointed by the president, with the advice and consent of the senate, to hold office for four years. They are required to reside at the place where the land office to which they are appointed is located, and to execute a bond, before entering upon their office.[3]

They are empowered in the first instance to pass upon all claims relating to lands within their districts,[4] except where mineral applications are adversed, in which event the question of conflicting claims is referred to the courts.[5]

The measure of their authority is the acts of congress and such regulations of the general land office as may have been made in pursuance of law. They have no powers except such as are derived from these sources.[6]

Their acts are subject to the supervision and control of

[1] March 3, 1849, 9 Stats. at Large, 395.
[2] United States v. Winona & St. Paul R. R., 67 Fed. 948.
[3] Rev. Stats., §§ 2234, 2237.
[4] Potter v. United States, 107 U. S. 126; Wilcox v. Jackson, 13 Pet. 498.
[5] Rev. Stats., § 2326.
[6] Parker v. Duff, 47 Cal. 554.

the commissioner of the general land office, whether the matter is brought to his attention by appeal or otherwise.[1]

They are required to exercise a judicial judgment and discretion, and their action relating to the disposal of public lands will not be interfered with by mandamus or injunction.[2]

Although each land office to be legally constituted and authorized to do business must have a register and receiver, they need not act jointly in administering oaths or taking testimony.[3]

In passing upon the sufficiency of proofs, they are not required to act concurrently, all that the law requires being that they shall both be satisfied.[4]

Strictly speaking, the local land office is not a place of record. Plats of approved surveys of the public lands are deposited there, and tract books are kept in which are noted the various transactions concerning lands within the district. Where application is made to enter any particular tract or part of a tract of surveyed lands, the *status* of the land as to antecedent applications or filings is ascertained from an inspection of these books, and the judgment of the local officers in accepting or refusing a filing or application is based upon the condition of the land as shown by these notations.

The local officers are clothed with limited powers. They cannot compel the attendance of witnesses, and of course have no power to punish for contempt.

Testimony taken before them is reduced to writing and transmitted with their rulings to the commissioner of the general land office. They receive all testimony offered, and while ruling nominally on objections made as to relevancy, competency, or materiality, no evidence is excluded as the result of an adverse ruling. The practice before

[1] Rev. Stats., § 2273; Hosmer v. Wallace, 47 Cal. 461; Barnard v. Ashley, 18 How. 45; Haydel v. Dufresne, 17 How. 23.

[2] Litchfield v. Register and Receiver, 1 Woolw. 269, 15 Fed. Cases, No. 8388; Mississippi v. Johnson, 4 Wall. 498; Koehler v. Barin, 25 Fed. 161.

[3] Peters v. United States, 33 Pac. 1031.

[4] Potter v. United States, 107 U. S. 126.

these officers is governed by rules and regulations prescribed by the general land office.

Their decisions, being subject to review by the commissioner of the general land office, are not final and conclusive,[1] although they may become so by failure to appeal within the time prescribed by the rules.[2]

All papers filed in proceedings had before them are transmitted to the general land office, where they remain permanently.

**§ 661. The surveyors-general and their deputies.**— The surveyors-general are appointed by the president for the respective surveying districts. They have charge of the public surveys in subordination to the commissioner of the general land office, and exercise a direct supervision over the surveys, of mineral lands. They have the appointment of deputy mineral surveyors at their discretion,[3] although their action in suspending or revoking appointments of deputies is subject to review by the general land office.[4]

The field work of the deputies is returned to the surveyor-general, who must approve the surveys before they can be utilized as the basis of patent applications. Deputy mineral surveyors are required to give a bond in the sum of ten thousand dollars, to be approved by the commissioner of the general land office. They may hold a commission in more than one state,[5] but are not permitted to make mineral surveys within a district for which they hold no commission. They are not permitted to act in the double capacity of surveyors and attorneys for mineral applicants at the same time. They are not prohibited from making mineral entries within the district for which they

[1] Barnard v. Ashley, 18 How. 43; Rush v. Valentine, 12 Neb. 513; Johnson v. Towsley, 13 Wall. 72.

[2] United States v. Marshall S. M. Co., 129 U. S. 579; Seymour v. Fisher, 27 Pac. 240; Craig v. Leitensdorfer, 123 U. S. 189.

[3] *In re* Jacobs, 21 L. D. 379.

[4] *In re* Gorlinski, 20 L. D. 283.

[5] *In re* Helmick, 20 L. D. 163.

are appointed,[1] but in that event they cannot act in any other capacity than that of claimant.[2]

The authority for making a mineral survey is a special order issued by the surveyor-general upon the application of the claimant, who is permitted to select the deputy. In making the survey the deputy is governed by the "Manual of Instructions," emanating from the general land office.[3]

**§ 662. Commissioner of the general land office—Appointment, powers, and duties.**—The head of the land office is the commissioner of the general land office, who is appointed by the president, by and with the advice and consent of the senate. His duty is to perform, under the direction of the secretary of the interior, all executive acts appertaining to the surveying and sale of the public lands, and also such as relate to private claims for lands and the issuing of patents for all grants of land under authority of the government.[4]

He is clothed with liberal powers of control, to be exercised for the purposes of justice and to prevent the consequences of inadvertence, irregularity, mistake, or fraud in the important and extensive operations of that office for the disposal of the public domain.[5]

This general power of superintendence gives the commissioner of the general land office direct supervision over registers and receivers, whose decisions on all questions he is authorized to review.[6]

Under the direction of the secretary of the interior, the commissioner is authorized to enforce and carry into execution, by appropriate regulations, every part of the

[1] Lock Lode, 6 L. D. 105.

[2] Dennison v. Willits, 11 Copp's L. O. 761; *In re* Gurnee, 13 L. D. 608.

[3] The manual now in force was prepared by J. E. Wright, chief of the mineral division of the general land office, under the supervision of Commissioner Lamoreux, and was promulgated October 25, 1895.

[4] Rev. Stats., §§ 446, 453; Cahn v. Barnes, 5 Fed. Rep. 326; Weaver v. Fairchild, 50 Cal. 360; Knight v. U. S. Land Assn., 142 U. S. 161.

[5] Bell v. Hearne, 19 How. 252.

[6] Barnard v. Ashley, 18 How. 43; Swigert v. Walker, 49 Kan. 100, 30 Pac. 162; Hosmer v. Wallace, 47 Cal. 461; Orchard v. Alexander, 157 U. S. 372.

provisions of the federal laws regulating the sale and disposal of the public lands not otherwise specially provided for.[1]

These regulations, when not repugnant to the acts of congress, have the force and effect of laws,[2] and courts take judicial notice of them.[3]

The commissioner of the general land office has authority to cancel an entry illegally allowed. The exercise of this power is necessary to the due administration of the land department. If an investigation of the validity of such entries were required in the courts of law before they could be canceled, the necessary delays attending the examination would greatly impair, if not destroy, the efficiency of the department.[4]

But such authority can only be exercised upon notice to the entryman.[5]

§ 663. **Secretary of the interior.**—The secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the government, which is a party in interest in every case involving the surveying and disposal of the public lands.[6]

He exercises a supervisory control over the decisions, rulings, and acts of the commissioner.[7]

He may exercise this power not only on formal notice or appeal, according to the rules of the department, but on

[1] Rev. Stats., § 2478; Knight v. U. S. Land Assn., 142 U. S. 161.

[2] Poppe v. Athearn, 42 Cal. 606; Chapman v. Quinn, 56 Cal. 266.

[3] Caha v. United States, 152 U. S. 211.

[4] Cornelius v. Kessel, 128 U. S. 456; Barnard's Heirs v. Ashley's Heirs, 18 How. 43; Bell v. Hearne, 19 How. 252; Harkness v. Underhill, 1 Black. 316; Marquez v. Frisbie, 101 U. S. 473; United States v. Schurz, 102 U. S. 378; Steel v. St. Louis Smelting Co., 106 U. S. 447.

[5] Risdon v. Davenport, 57 N. W. 482.

[6] Knight v. U. S. Land Assn., 142 U. S. 161.

[7] Hays v. Steiger, 76 Cal. 555; Magwire v. Tyler, 1 Black. 195; Snyder v. Sickles, 98 U. S. 203; Buena Vista County v. Iowa Falls & S. C. R. R., 112 U. S. 165; Lee v. Johnson, 116 U. S. 48.

his own motion, and his action in such a matter is unassailable in the courts in a collateral proceeding.[1]

**§ 664. Jurisdiction of the land department.**— We have no immediate concern with the powers and functions of the land department in its dealings with any class of the public lands other than those falling within the purview of the mining laws. Yet, in administering these laws, all departments of the public land system are more or less blended. Conflicts are constantly arising between claimants asserting rights under different branches of the system, requiring a consideration of different elements and of different laws in a cognate series. In administering these laws certain powers are confided to the department, in the exercise of which that tribunal is guided and governed by well-defined rules and established principles, applicable alike to their dealings with all classes of public lands.

In outlining in the previous sections the powers and duties of the several officers constituting in the aggregate the land department, we have necessarily presented to some extent the scope of the jurisdiction of that tribunal.

The limit of its authority is found in the acts of congress. It cannot grant land.[2] It cannot direct or permit entries to be made or purchases to be consummated except in cases authorized by some federal law.[3] It cannot take away the property of one and give it to another. Its jurisdiction is suspended where lands theretofore public have, by virtue of congressional legislation or lawful executive order, been withdrawn from the operation of the public land laws. Its jurisdiction terminates and its authority ceases when the land passes into private ownership and the title of the government is transmitted through the forms of law.

With the exercise of its discretionary powers, the courts cannot interfere, and within certain recognized limits its

[1] Knight v. U. S. Land Assn., 142 U. S. 161; Hestres v. Brennan, 50 Cal. 211.

[2] Shanklin v. McNamara, 87 Cal. 371.

[3] Parker v. Duff, 47 Cal. 554.

judgments are final. With these preliminary observations, we will proceed to consider the effect of departmental decisions upon questions of fact and law, and upon mixed questions of law and fact.

**§ 665. The effect of the decisions of the land department upon questions of fact.**—There is one proposition of law involved in the administration of the public land system upon which all courts agree: The decisions of the land department upon questions of fact, in a proceeding within the scope of its jurisdiction, are, in the absence of fraud or imposition, conclusive.[1]

As was said by the supreme court of the United States:—

"It is the established doctrine, expressed in numerous "decisions of this court, that whenever congress has pro- "vided for the disposition of any portion of the public "lands of a particular character, and authorized the offi- "cers of the land department to issue a patent for such "land upon ascertainment of certain facts, that department "has jurisdiction to inquire into and to determine as to "the existence of such facts, and in the absence of fraud, "imposition, or mistake, its determination is conclusive "against collateral attack."[2]

It is useless to multiply authorities in support of a doctrine so well established.

A possible modification of the rule seems to be recognized by the supreme court of the United States.

"Where each party has a patent from the government, "and the question is as to the superiority of the title under "those patents, if this depends upon extrinsic facts not "shown by the patents themselves, we think it is com- "petent, in any judicial proceeding where this question of "superiority of title arises, to establish it by proof of those "facts."[3]

[1] Wilcox v. Jackson, 13 Pet. 511; Johnson v. Towsley, 13 Wall. 72; Shepley v. Cowan, 91 U. S. 330; Moore v. Robbins, 96 U. S. 530; Quinby v. Conlan, 104 U. S. 420; St. Louis Smelting Co. v. Kemp, *Id.* 636; Lee v. Johnson, 116 U. S. 48; Carr v. Fife, 156 U. S. 494; Cath. Bishop of Nesqually v. Gibbon, 158 U. S. 155; Stewart v. McHarry, 159 U. S. 643.

[2] Barden v. N. P. R. R., 154 U. S. 288, 327.

[3] Iron S. M. Co. v. Campbell, 135 U. S. 286, 292.

We shall have occasion to recur to this subject when dealing with the force and effect of a patent.

**§ 666. Decisions of the land department upon questions of law and mixed questions of law and fact.**—The construction given to a statute by those charged with the duty of executing it, if uniform and continuous, is entitled to the most respectful consideration, and ought not to be overruled without cogent reasons,[1] and unless it be clear that it is erroneous.[2] Such construction is in the highest degree persuasive, if not absolutely controlling in its effect.[3]

This principle "is so firmly imbedded in our jurispru-"dence that no authorities need be cited to support it. On "the faith of a construction thus adopted, rights of prop-"erty grow up which ought not to be ruthlessly swept "aside, unless some great public measure, benefit, or right "is involved, or unless the construction itself is manifestly "incorrect."[4]

The rule, however, is subject to the limitation, that the construction must have been continuously in force for a long time,[5] and applies only in cases of ambiguity and doubt.[6]

With language clear and precise, and with its meaning evident, there is no room for construction, and consequently no need of anything to give it aid.[7] No practice inconsistent with that meaning can have any effect.[8]

The existence of these rules suggests that the courts are not *bound* by the departmental decisions on questions of law. They have a right to investigate legal rulings made

[1] United States v. Moore, 95 U. S. 760; Hastings & Dakota R. R. v. Whitney, 132 U. S. 357, 366; Brown v. United States, 113 U. S. 568, 571; Montana, Limited, v. Clark, 42 Fed. 629.

[2] United States v. Johnston, 124 U. S. 236, 253.

[3] United States v. Graham, 110 U. S. 219.

[4] Pennoyer v. McConnaughy, 140 U. S. 1, 23.

[5] Merritt v. Cameron, 137 U. S. 542, 552.

[6] Swift Co. v. United States, 105 U. S. 691; United States v. Tanner, 147 U. S. 661; Merritt v. Cameron, 137 U. S. 542.

[7] United States v. Graham, 110 U. S. 219.

[8] United States v. Alger, 152 U. S. 384.

by the department—a right which, in the absence of fraud or imposition, does not exist where only questions of fact are involved.

Where the land officers have clearly mistaken the law of the case as applicable to the facts, courts of equity may give relief.[1] Therefore the construction of the law by the department as applied to the facts found by them to be true[2] does not conclude the courts.[3]

Where the land officers, upon the uncontradicted facts, commit an error of law by which the land has been awarded to a party to the prejudice of the right of another, the latter is entitled to relief at the hands of the courts.[4]

Where there is a mixed question of law and fact and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive.[5]

[1] Baldwin *v.* Stark, 107 U. S. 463, 465.
[2] Hays *v.* Steiger, 76 Cal. 555.
[3] Wisconsin Cent. R. R. *v.* Forsythe, 159 U. S. 46, and cases cited.
[4] Moore *v.* Robbins, 96 U. S. 530, 535.
[5] Marquez *v.* Frisbie, 101 U. S. 473, 476.

# CHAPTER II.

## THE SURVEY FOR PATENT.


§ 670. Application for survey.
§ 671. The survey of lode claims.
§ 672. The survey of placer claims — Descriptive report.
§ 673. The surveyor-general's certificate as to expenditures.


**§ 670. Application for survey.**— With the exception of placers upon surveyed lands, the initiatory step toward securing a United States patent for a mining claim is an application addressed to the United States surveyor-general of the state or territory in which the claim is situated, for an order for survey.

This application must be in writing, signed by the applicant, his agent, or attorney, and should contain the name of the claimant, the name of the location, the state, county, and mining district wherein it is situated, and if upon surveyed lands, the section, township, and range. As claimants are at liberty to select, for the purpose of making the survey, any United States deputy authorized to act in the land district,[1] the application should designate the deputy.

The application must be accompanied by copies of the location notice or certificate upon which the survey is to be based, duly certified by the officer charged by the state or district laws with recording such notices or certificates. If any amended locations have been made, the notices or certificates of such must also be supplied, as they form the basis of the field work of the deputy surveyor.

[1] Rev. Stats., § 2334.

Upon filing the application, the claimant is furnished an estimate of the amount of fees required to defray the expenses of platting and other work in the surveyor-general's office. The amount of such estimate must be deposited with some assistant United States treasurer or designated United States depository, to the credit of a special fund created by "individual depositors for surveys "of the public lands." Receipts for such deposit are issued in triplicate. One is delivered to the surveyor-general, one forwarded to the secretary of the treasury at Washington, and the other is retained by the claimant.

The government has no concern with the fees of deputy surveyors.[1] The claimant adjusts the compensation with the deputy, the commissioner of the general land office having the power to fix the maximum rate.

Upon the filing of the application, accompanied by the certified copies of location notices or certificates, and receiving the receipt showing that the requisite deposit has been made, the surveyor-general issues his order, directed to the deputy mineral surveyor, authorizing the survey. This order is accompanied by copies of the location notices filed by the claimant with the surveyor-general.

As a rule the order for survey issues as a matter of course. Should it be refused, the claimant's only remedy is by appeal to the commissioner of the general land office.

Where two or more locations are held by one and the same person or association of persons, which locations are contiguous, a survey may be ordered of the entire group.[2] In such case the applications for an order of survey should enumerate all the locations within the group and plainly state the facts of common ownership and contiguity. An entry will be refused at the land office where any of the claims are shown to be noncontiguous.[3] Where a survey

[1] *In re* Foote, 2 L. D. 773.

[2] Champion M. Co., 4 L. D. 362, citing St. Louis Smelting Co. *v.* Kemp, 104 U. S. 636; *In re* Mackie, 5 L. D. 199.

[3] Apple Blossom Placer *v.* Cora Lee Lode, 21 L. D. 438.

of an aggregation of claims is sought, it is of course necessary to file with the surveyor-general certified copies of all location notices upon which a claim to any of the locations within the group is based.

Naturally the deposit required in the case of group applications will be proportionately larger than in those embracing single locations. No definite rule is fixed, however. It is regulated entirely by the circumstances of each particular case.[1]

**§ 671. The survey of lode claims.**—It is not our purpose to deal minutely with the manner in which mineral surveys are to be made. The land department supplies the deputy surveyors with complete manuals of instruction for their guidance,[2] to which they will resort in case of doubt, rather than to a treatise upon mining law. There are a few elements, however, of greater or less importance upon which the validity of subsequent proceedings may depend, which may be appropriately noted.

The surveyor cannot make a location. His functions are limited to a survey of one already made. He determines the *situs* and boundaries of the location from the notices, original and amended, copies of which accompany the order of survey, and from an examination of the ground and surface markings referred to in the notices. He cannot disregard these. He is strictly charged under instructions from the land department that surveys of mining claims must be made in strict conformity to the lines established by the original (or amended, as the case may be,) location as recorded and marked on the ground.[3]

Many difficulties encountered in the progress of patent proceedings are due to imperfect notices and insufficient or irregular marking of the location in the first instance.

[1] *In re* Mackie, 5 L. D. 199.

[2] A copy of this manual will be found in the Mineral Law Digest of Clark, Heltman, and Consaul, at page 140.

[3] Lincoln Placer, 7 L. D. 81; Circ. Instructions, Nov. 20, 1873; Copp's Min. Lands, 2d ed., 58; Com'rs' Letter, 1 Copp's L. O. 12.

These may all be avoided by rectifying lines by an informal or unofficial survey, and the making of an amended notice of location *prior to applying for an order for survey.*[1] A survey cannot be based upon an amended notice of location made after the survey is ordered,[2] without applying for an amended order, which is permissible under the regulations.

Of course, slight variations from the lines as originally marked would not vitiate a survey. The surveyor may draw in the end lines to make them parallel,[3] and is permitted to cast off the area in excess of the statutory limit, by moving the monuments and stakes.[4]

The survey must describe the *locus*, with reference to the lines of public surveys, by a line connecting a corner of the claim with the nearest public corner of the United States surveys, unless such claim be on unsurveyed lands at a distance of more than two miles from such public corner, in which latter case it should be connected with a mineral monument.[5]

Where a survey is ordered of a composite or group of several contiguous locations, the boundaries of each location must be shown;[6] but the former practice was to the contrary. Undoubtedly the land department may require each integral part of the composite to be delineated. This is necessary to enable it to pass upon the question of contiguity, as well as to determine whether the expenditures made in the development of a common system should be applied to one or more claims in the group,

[1] See, *ante*, § 396.

[2] Rose Lode Claims, 22 L. D. 83.

[3] Doe *v.* Sanger, 83 Cal. 203; Doe *v.* Waterloo M. Co., 54 Fed. 935; Philadelphia *v.* Pride of the West, 3 Copp's L. O. 82.

[4] *In re* Empy, 10 Copp's L. O. 102; Howeth *v.* Sullenger, 113 Cal. 547, 552. See, *ante*, § 362.

[5] Par. 45, Gen. Min. Reg. See appendix. *In re* Dodge, 6 Copp's L. O. 122.

The manner of constructing these mineral monuments is provided for in the "Manual of Instruction." Par. 15, 16, 17, Manual of 1895. *In re* Cavanah, 8 Copp's L. O. 5.

[6] *In re* Mackie, 5 L. D. 199; Golden Sun M. Co., 6 L. D. 808.

for which purpose the relative position of each claim is important.[1]

The survey must show the area of the conflict with every prior official survey;[2] otherwise the plat will not be approved.[3] Unofficial surveys, however, may be ignored.[4]

Upon completion of the survey, the deputy forwards to the surveyor-general the field notes, accompanied by a preliminary plat, together with a report of the manner in which the order was executed, a detailed statement of the nature and character of improvements found upon the premises, and an estimate of their value.

In case the survey is of a composite or group of claims, and it is claimed that work done upon one was for the benefit of all, in furtherance of a common system of development, or where work has been done beyond the limits of a claim or group of claims for the purpose of development, the report of the deputy should show all the facts from which the surveyor-general and the officers of the land department may clearly conclude that the claim or claims are entitled to credit for the work so done.[5]

Where insufficient work has been done within the limits of one or more claims to entitle them to be patented, considered separately, but sufficient has been done on others within the group to entitle the entire group to be entered, the surveyor should make an apportionment, so that each claim may be credited with the statutory amount; that is, five hundred dollars to each.

Upon the return of the field notes and report of the surveyor-general, they are examined and officially platted, and if found correct, the plats and field notes are approved.

[1] It has been held, that a patent may be issued describing the exterior boundaries of the composite and elimininating the interior lines of the individual locations.

Carson City G. & S. M. Co. *v.* North Star M. Co., 73 Fed. Rep. 597; St. Louis Smelting Co. *v.* Kemp, 104 U. S. 636.

[2] Thor Mine, 5 Copp's L. O. 51; Russell Lode, 5 Copp's L. O. 18.

[3] Grand Dipper Lode, 10 Copp's L. O. 240.

[4] Wisconsin Mfg. Co. *v.* Cooper, 10 Copp's L. O. 69.

[5] Andromeda Lode, 13 L. D. 146.

In approving mineral surveys the surveyor-general's office is not concerned with the fact that surface conflicts are shown with prior surveys. While these conflicts should be noted, the respective rights of the parties to the conflict area involve questions of title which cannot be passed upon by the surveyor-general. They are the subject of adverse claims.[1]

The claimant is furnished with a set of the approved field notes and copies of the plat, for filing in the local land office and posting upon the claim. A copy of the plat is also transmitted by the surveyor-general to the register of the land office.

Should the surveyor-general refuse to approve a survey, an appeal lies to the commissioner of the general land office, and from him to the secretary of the interior.

§ 672. **The survey of placer claims — Descriptive report.** — Where placer claims are upon surveyed lands and conform to legal subdivisions, no further survey or plat is required.[2] In such cases the surveyor-general has no duty to perform.[3] Where such claims are upon unsurveyed lands, or being upon surveyed lands it is not practicable to make them conform to the public surveys,[4] a mineral survey is required, as in the case of lode claims. In obtaining the order for such survey, and in executing it, the same formalities are observed as in those of lodes, with such slight modifications as are obviously necessary by reason of the differences between the two classes of deposits.

In the case of placers, the deputy is required to add to his field notes a descriptive report upon the quality and composition of the soil, the kind and amount of timber and other vegetation growing thereon, the *locus* and size of streams, and such other matters as may appear upon

[1] Com'rs' Letter, 8 Copp's L. O. 104.
[2] Rev. Stats., § 2331.
[3] Gen. Min. Reg., par. 57. See appendix. *In re* Gerhauser, 7 L. D. 390.
[4] See, *ante*, § 448, p. 560.

the surface of the claim.[1] He is also required to report as to the use or adaptability of the claim for placer mining; whether water has been brought upon it in sufficient quantity to mine the same, or whether it can be procured for that purpose. Also the proximity of the claim to the centers of trade or residence and neighboring well-known lode systems or individual lodes.[2] This report must be under oath, and is required to be corroborated,[3] and in the absence of anything attacking the *bona fides* of the claimant, is sufficient to establish the character of the land.[4]

If a lode exists within the placer, and is claimed by the placer claimant, it must be surveyed the same as if it were elsewhere situated,[5] although the plats of the placer and lode surveys may be combined and constitute but one plat.

**§ 673. The surveyor-general's certificate as to expenditures.**— The claimant is required at the time of filing his application for patent in the local land office, or at any time thereafter within the period of publication of the notice of such application, to file with the register a certificate of the United States surveyor-general, that five hundred dollars' worth of labor has been expended or improvements made upon the claim by the claimant or his grantors.[6] According to departmental rulings this is a mandatory requirement. A certificate filed after the period named will be of no avail, and cannot be considered.[7] A failure to file it will necessitate republication.[8] Ordinarily this certificate is appended by the surveyor-general to the approved field notes, which are delivered to the claimant. This certificate is based upon the report of the deputy surveyor.

[1] Gen. Min. Reg., par. 63 (3).
[2] *Id.*, par. 63 (4).
[3] *Id.*, par. 63 (5).
[4] Lincoln Placer, 7 L. D. 81.
[5] See, *ante*, §§ 413-415.
[6] Rev. Stats., § 2325.
[7] Milton v. Lamb, 22 L. D. 339; White Cloud C. M. Co., *Id.* 252.
[8] *Id.*

In reference to the volume of expenditures necessary to be shown where application is made for a consolidation of claims, the land department has assumed what seems to us to be an illogical position, and one not altogether consistent.

Under a circular issued December 9, 1882, the department promulgated a regulation as follows:—

"If an individual become the purchaser and possessor "of several separate claims (placers) of twenty acres each "or less, he may be permitted to include in his application "for patent any number of such claims contiguous to each "other . . . ; but upon, or for the benefit of, each origi- "nal claim or location so embraced, he or his grantors "must have expended the sum of five hundred dollars in "improvements."

This regulation was subsequently held to be erroneous and illegal.[1]

And the rule adopted, that,—

"Where an application for patent embraces several loca- "tions or claims held in common, constituting one entire "claim, whether lode or placer, an expenditure of five hun- "dred dollars, under section twenty-three hundred and "twenty-five, Revised Statutes, upon such entire claim "embraced in the application will be sufficient, and need "not be shown upon each of the locations included "therein."[2]

This doctrine seems to be somewhat qualified in more recent rulings. In the case of Sweeney *v.* Northern Pacific Railroad,[3] a consolidation of seven lode claims was applied for. The aggregate amount of expenditures shown was thirty-three hundred and five dollars. On four of the claims but little work was done, and that performed on the others was not shown to have been done with a view of developing the four. Secretary Smith ruled in effect, that less than five hundred dollars for each claim (a total

[1] Good Return M. Co., 4 L. D. 221.

[2] Circ. Instructions, Dec. 14, 1885, 4 L. D. 374; *Id.* Mar. 24, 1887, 8 L. D. 503; Andromeda Lode, 13 L. D. 146.

[3] 20 L. D. 394.

of thirty-five hundred dollars) would suffice in the event that the work done on one was in furtherance of a common system of development; otherwise the full amount was necessary. A similar rule was followed in a later case.[1]

We have heretofore noted, when dealing with the subject of annual labor, that work may be done on one claim for the benefit of a group of contiguous claims, but that in such case the aggregate amount of expenditure on the one must equal in value that which would be required on all the claims if they were separately or independently considered, and that this doctrine is accepted by both the courts and the land department.[2]

Why the department should differentiate the principle when dealing with expenditures for patent purposes, we are unable to understand.

It seems to us that the reasoning of the supreme court of the United States on the subject of annual labor, in the case of Chambers *v.* Harrington,[3] applies with equal force to expenditures for patent purposes. Said that court:—

"When several claims are held in common, it is in the "line of this policy to allow the necessary work to keep "them all alive to be done on one of them; but obviously "on this one the expenditure of money or labor must "equal in value that which would be required on all the "claims if they were separate or independent."

The word "claim," as used in section twenty-three hundred and twenty-four of the Revised Statutes, fixing the amount of annual labor, is thus judiciously determined to mean "location." Is there anything in the context of section twenty-three hundred and twenty-five on the subject of expenditures for patent purposes which indicates a legislative intention to use the word "claim" in a different sense from that in which it is used in the preceding section? We think not.

If the construction of the department is correct, any number of contiguous claims—seven, ten, twenty, or more,

[1] Ferguson *v.* Hanson, 21 L. D. 336.
[2] See, *ante*, § 630 (3).
[3] 111 U. S. 350.

—embracing an entire mineral belt, the claims occupying such a relative position that they might be developed by a main working tunnel or shaft, could be passed to patent by simply doing five hundred dollars' worth of work in the tunnel or shaft—an amount much less than the law requires to be performed on the composite for one year's assessment work. We think the spirit of the law is opposed to such an interpretation.

We think the practice outlined in a previous section,[1] defining what we understand to be the duty of the deputy mineral surveyor in this respect, is more in harmony with the true intent of the law than the doctrine at present followed by the land department.

This certificate of the surveyor-general is not binding upon the land department; but unless corrected by the department prior to patent, it must be taken as conclusive.[2]

[1] See, *ante*, § 671.

[2] United States v. Iron S. M. Co., 128 U. S. 673, 685.

# CHAPTER III.

## THE APPLICATION FOR PATENT, AND PROCEEDINGS THEREON.


ARTICLE I. LODE CLAIMS.

II. PLACER CLAIMS—LODES WITHIN PLACERS.

III. MILLSITES.


## ARTICLE I. LODE CLAIMS.


§ 677. Posting of the notice and copy of the plat on the claim.

§ 678. The initiatory proceedings in the land office.

§ 679. Land embraced within the claim must be clear on the tract books.

§ 680. The application for patent—Its contents.

§ 681. Application by one of several co-owners—Corporations.

§ 682. Verification of application and proofs.

§ 683. Proof of posting of notice and plat on the claim.

§ 684. Proof of citizenship.

§ 685. Designation of newspaper—Agreement of publisher.

§ 686. Proof of annual labor.

§ 687. The abstract of title—Certified copies of location notices.

§ 688. Proof of title by possession, without location under section twenty-three hundred and thirty-two of the Revised Statutes.

§ 689. Proof of mineral character of the land.

§ 690. Publication of the notice, and proof thereof.

§ 691. The posting of the notice in the register's office, and proof thereof.

§ 692. Proof that the plat and notice of application for patent remained posted on the claim during the period of publication.

§ 693. Statement of fees and charges.

§ 694. Application to purchase.

§ 695. Résumé.


**§ 677. Posting of the notice and copy of the plat on the claim.**—As a condition precedent to the filing of an application for patent for a lode claim, the claimant is required

to post a copy of the plat of the survey in a conspicuous place upon the claim,[1] together with a notice of his intention to apply for a patent therefor, which notice must state the date of posting, the name of the claimant, the name of the claim, the mining district and county, whether or not the location is of record, and if so where the record may be found, giving the book and page thereof, the number of feet claimed along the vein and the direction thereof, the number of feet claimed on the lode in each direction from the point of discovery or other well-defined place on the claim, the names of all adjoining and conflicting claims, or if none exist the notice should so state.[2]

We may also add, that where amended notices of location occur in the chain of title, the date and place of record of such notices should also be given.

The notice should contain a description of the claim in the form of a condensed transcript of the field notes. It should be practically a counterpart of the notice which is to be published, as well as posted in the office of the register of the land office. There is no necessity for embodying in it the entire field notes, calls for all bearing objects, topography, and other *data* found in the surveyor's report, but it should clearly follow, by course and distance, the exterior lines, specify the monuments and their markings, with the principal calls for bearing trees or other permanent objects, and particularly describe the course and

[1] Rev. Stats., § 2325; De Long v. Hill, 9 Copp's L. O. 114.

[2] Regulation of March 11, 1897, 24 L. D. 295. In effect June 1, 1897. It is not a difficult matter to comply with the regulations, and claimants ought not to be encouraged in the practice of deviating from them, although it seems to us wholly unnecessary to state the number of feet claimed along the vein. The survey is of a tract of surface ground containing a lode. A claimant cannot lawfully claim anything beyond these surface boundaries as delineated on the plat, and the plat and field notes necessarily show the limit of his claim. So as to the direction of the lode. The side lines are required to be equidistant from the center of the lode, and the plat and survey furnish a much better guide to the extent of the claim in this behalf than any assertion of the claimant. If this assertion was not in conformity with the survey, it would have a tendency to impeach it, and if conforming to it, it would be an unnecessary repetition. In other respects the regulation is wise and salutary.

length of the connecting line by which the mineral survey is "tied" to the public surveys, or to a United States mineral monument if the lands in the vicinity are unsurveyed. A failure to observe this important requirement will vitiate the subsequent proceedings and necessitate a commencement *de novo*.[1]

The posting of this notice and its subsequent publication are jurisdictional matters, any serious irregularity in which may jeopardize, if not wholly vitiate, the subsequent proceedings.

The purpose of the law relating to publication and posting of plat and notice of intention to apply for a patent, is to afford an opportunity to adverse claimants or others to object and to present grounds of their objections.[2] It is one of the three methods to be pursued simultaneously, by which all persons are to have notice of the intention to procure title to the land.[3] To this end the law requires the notice to be posted in a conspicuous place on the claim.

It is difficult to lay down any general rule as to what should be construed to be a conspicuous place on a mining claim. Where there are improvements in the shape of buildings used in connection with mining operations, posting on such buildings would certainly fulfill the requirements of the law.[4] In the absence of structures of this character, posting at the discovery shaft or at the mouth of open workings, being the places most likely to attract attention, are suggested by the department as being the proper places for the posting.[5]

A posting within a tunnel, under cover, where the notice could not be seen without the aid of artificial light, was held to be a manifest evasion of the law.[6]

[1] Nil Desperandum Placer, 10 L. D. 198; Tennessee Lode, 7 L. D. 392; Emperor Wilhelm Lode, 5 L. D. 685.

[2] Rowena Lode, 7 L. D. 477, 479.

[3] Byrne v. Stanson, 20 L. D. 43, 45; Ferguson v. Hanson, 21 L. D. 336, 339.

[4] Gowdy v. Kismet M. Co., 22 L. D. 624; Louisville Lode, 1 L. D. 548.

[5] Ferguson v. Hanson, 21 L. D. 336.

[6] Pratt v. Avery, 7 L. D. 554.

It ought not to be difficult to discriminate between a reasonable attempt to comply with the law in good faith and a studied effort to place the notice where it cannot be seen.

Where a millsite is applied for in connection with a lode, a copy of the plat and notice of intention to apply for a patent should also be posted upon it,[1] although the department has at times condoned the failure to comply with this rule,[2] or protected the claimant from the necessity of commencing *de novo*, by a reference of the case to the board of equitable adjudication,[3] as falling within the sanction of section twenty-four hundred and fifty-seven of the Revised Statutes.[4]

In the case of an application for a group of contiguous claims, there does not seem to be any specific regulation on the subject of posting. The law provides that the posting shall be on the land *embraced in the plat*. As the consolidation of claims is shown on the plat, it might reasonably be inferred that a posting at any conspicuous place within the group would suffice, without the necessity of posting on each location within the composite. We think the better practice is to post on each location.

The notice should be posted in the presence of two witnesses, who should sign the same for purposes of identification.

**§ 678. The initiatory proceedings in the land office.**— Upon posting the notice of intention to apply for a patent,

[1] Gen. Min. Reg., par. 66. See appendix.

[2] *In re* Bailey and Grand View M. & S. Co., 3 L. D. 386.

[3] The board of equitable adjudication consists of the secretary of the interior and attorney-general (Rev. Stats., § 2451), and is charged with passing up adjudications made by the commissioner "upon the princi-"ples of equity and justice, as recognized by courts of equity" (Rev. Stats., § 2450). This board gives relief in cases "where the law has "been substantially complied with, and the error or informality arose "from ignorance, accident, or mistake which is satisfactorily explained," and where there is no adverse claim (Rev. Stats., § 2457). It supplies "broken threads" in the chain of title (Pecard v. Cameus, 4 L. D. 152, 156).

[4] New York Lode & Millsite, 5 L. D. 513.

with a copy of the plat, as indicated in the preceding section, the claimant is authorized to make his formal application for patent. The instruments usually presented to the register of the land office for filing, and forming a part of the application for the patent, are substantially as follows:—

I. The application for patent attached to the approved field notes, to which is usually appended the certificate of the surveyor-general as to *quantum* of expenditures;

II. Copy of the plat;

III. Certified copies of all location notices, original and amended, upon which the order of survey was based and under which claimant asserts title;

IV. Proof of posting on the claim the notice of intention to apply for patent, and copy of the plat;

V. Proof of citizenship of the claimant;

VI. Agreement of the publisher of the newspaper published nearest to the claim, designated by the register as the one in which publication is to be made;

VII. Proof that annual labor has been performed, showing the location to be valid and subsisting at the time the application for patent is made;

VIII. Abstract of title or proof of possessory rights where there is no record title;

IX. Where the land is borne on the tract books as agricultural, proof of its mineral character.

The application for patent and accompanying instruments are filed by the register upon the payment of his fees (ten dollars), if the land is clear on the tract books. If the land applied for appears from these books to be wholly or in part covered by a previous entry, a homestead filing, or a prior pending application for mineral patent, or is included within some antecedent reservation or executive withdrawal, the register will decline to receive and file the papers until the obstacle is removed.

Before proceeding with a detailed statement of the

contents of the various instruments above referred to, it is advisable to consider the nature of the obstacles which may prevent their filing, and the steps necessary to be taken to remove such impediments.

**§ 679. Land embraced within the claim must be clear on the tract books.**—In previous chapters of this treatise we have discussed generally the subject of public lands and the manner in which rights thereto are acquired under laws other than those applicable to mining claims.[1] It is quite evident that if the land occupies such a *status* as to title as inhibits the initiation of mining rights by location, so long as that *status* is maintained it will be impossible for the land department to consider an application for a mineral patent. That tribunal would not have jurisdiction to issue a patent for lands which are in a state of reservation, or are covered by such a filing or application as operates as a temporary withdrawal of the land from sale or other disposal. A few illustrations will serve to explain this.

If an inspection of the tract books discloses that a preliminary homestead filing covers the land applied for by the mineral claimant, the application for patent will not be received;[2] but a citation will be issued, requiring the homestead claimant to appear and show cause why his filing should not be canceled as to the land embraced within the mineral survey. A hearing is then had before the land officers for the purpose of determining the character of the land.[3]

The manner of initiating and conducting these proceedings is prescribed by the rules of practice promulgated by the commissioner of the general land office and supplemented by the "General Mining Regulations."[4]

If the land is adjudged to be mineral, a cancellation

[1] See, *ante*, ch. iii., tit. iii., pp. 124-304.
[2] See, *ante*, § 205; Hooper *v.* Ferguson, 2 L. D. 712.
[3] Rev. Stats., § 2335.
[4] Gen. Min. Reg., pars. 108-118. See appendix.

of the homestead entry, *pro tanto*, is ordered, whereupon the mineral claimant may proceed with his patent application.

The same rule applies where an agricultural claim has passed to final entry but the patent has not yet been issued. The mineral claimant will be compelled to file a verified protest, alleging the mineral character of the land as of a date prior to the final entry,[1] and asking for a hearing to determine the truth of the allegation. If the protest and corroborative proof accompanying it present facts sufficient to warrant it, a hearing is ordered, and in the meanwhile the agricultural entry will stand suspended. If the protest is sustained, a segregation survey is ordered. The mineral land thus segregated is restored to the public domain and is subject to disposal under the mining laws.

The existence of a pre-emption filing is no bar to the filing of a mineral application;[2] nor is a pending application to purchase under the stone and timber act;[3] but an agricultural claimant has a right to contest the mineral character of the land embraced in the mineral application, and upon proper protest filed, a hearing will be ordered.[4]

Where an application for a mining patent has been once filed with the register, and the applicant proceeds with reasonable diligence to give the required notice, no subsequent application for the same land, nor one which conflicts with a prior application will be received so long as the first application remains pending. In other words, the department treats a filed application for a mining patent, properly followed up, as a withdrawal of the land embraced therein.[5]

So where pending such application the claimant fails to perform the annual labor, thus rendering the ground subject to relocation, the relocator wishing to secure a

[1] See, *ante*, § 208.
[2] See, *ante*, § 205.
[3] See, *ante*, § 210.
[4] Devereux v. Hunter, 11 L. D. 214.
[5] *In re* Gunnison Crystal M. Co., 2 L. D. 722; Great Eastern M. Co. v. Esmeralda M. Co., 2 L. D. 704; *In re* Rebellion M. Co., 1 L. D. 542.

patent for himself will be compelled to institute proceedings in the land office against the prior applicant, for the purpose of securing a dismissal of the prior pending application. Until this is accomplished the land department will not consider the claim of the relocator to a patent.[1]

This rule, however, is based upon the theory, that the first applicant proceeds to give the notice required by law. The mere application, not properly followed up, confers no exclusive rights to the premises, which others are bound to wait upon indefinitely.[2]

Where two applications for a mining patent conflict, the senior applicant may eliminate from his application and survey the conflict area, in which event the junior applicant may proceed to patent and include the abandoned piece.[3] If the junior applicant is permitted to file an application which conflicts with a senior pending application, and the senior does not abandon, the conflict area must be excluded from the junior entry.[4]

Where an application is offered for a claim within a sixteenth or thirty-sixth section, which is shown by the surveyor-general's return to have been at the date of survey agricultural in character, the land officers will not accept or file it, as, *prima facie*, the title has passed to the state. Upon an allegation, however, that at the date of such survey the land was in fact known to be mineral, an opportunity will be given to impeach the return. A hearing will be ordered to determine the facts *as they existed at the time of the survey*. Of this hearing the state must have notice. If the allegation as to the previous known mineral character of the land is established at this hearing, the

[1] *In re* Gibson, 21 L. D. 219; Higgins *v.* John G. M. Co., 14 Copp's L. O. 238; *In re* Wildman Q. M. Co., Sickles Min. Dec. 270; Steel *v.* Gold Lead M. Co., 18 Nev. 80, 88; Wight *v.* Dubois, 21 Fed. 693, 696; *In re* Rice, 11 L. D. 213; Hall *v.* Street, 3 L. D. 40. See, also, *In re* Rocky Lode, 15 L. D. 571; Daney G. & S. M. Co. *v.* Sapphire S. M. Co., 2 Copp's L. O. 66; *In re* Fox, 2 L. D. 706; Continental G. & S. M. Co. *v.* Gage, 10 L. D. 534.

[2] *In re* Snowflake Lode, 4 L. D. 30.

[3] *In re* Marcus Daly, 10 Copp's L. O. 167.

[4] *In re* Rocky Lode, 15 L. D. 571.

force of the surveyor's return is destroyed, and the government will deal with the land the same as any other public mineral land.

If a section sixteen or thirty-six is returned as mineral, application for mineral patent will be received, subject to protest by the state at any time prior to patent, unless it is shown that the state has accepted the surveyor's return as true and selected other lands in lieu thereof.[1]

**§ 680. The application for patent—Its contents.**—As the land department is a special tribunal, charged with the administration of the public land laws, exercising not only executive but judicial powers, an application to obtain a patent addressed to that tribunal should recite all facts necessary to show jurisdiction in the department to convey the particular tract applied for to the particular individual applying for it. While the department may be satisfied with a less formal document, there is no reason why an application for a patent should not contain a recital in ordinary and concise language of the ultimate facts chronologically arranged, which, if tested by the ordinary rules of pleading, would affirmatively show the right of the claimant to the tract. We should outline the contents as follows, the instrument being addressed to the register and receiver of the land office:—

(1) The name of the applicant, his place of residence, and post office address (his age is immaterial);[2]

(2) The name of the claim;

(3) The claimant's qualification to receive patent, *i. e.* his citizenship, by birth or naturalization;

(4) The *locus* of the claim, district, county, and state, and if upon surveyed lands the section, township and range; the nature and extent of the claim, making special reference to the approved field notes attached;

[1] This subject has been fully presented in a preceding chapter. See, *ante*, §§ 132-145.

[2] See, *ante*, § 225.

(5) The ownership and possession by the applicant of the claim applied for; (*a*) the date of discovery; (*b*) the date of location; (*c*) the date and place of record of all notices or certificates of location, original or amended, referring to the certified copies accompanying the application; (*d*) general allegation of ownership by mesne conveyances from the original locators, referring to the abstract of title filed with the application or to be thereafter filed; (*e*) compliance with the law as to annual labor, showing the location to be valid and subsisting at the time of filing the application; (*f*) the fact of possession;

(6) Facts from which the mineral character of the land may be necessarily inferred;[1]

(7) The nature, extent, and value of improvements; and if it is sought to credit work done upon one claim for benefit of others in a group, a concise statement of facts from which it may reasonably be inferred that such work is in furtherance of a common system of development;

(8) If any rights are asserted by virtue of local rules, the existence of such rules and compliance therewith should be alleged, and duly certified copies should accompany the application; if there are no regulations in force, the fact may be stated;

(9) The fact and date of posting a notice of the application and copy of plat on the premises, referring to the affidavit of such posting accompanying the application.

The application is appropriately closed with a request for the issuance of a patent, and should be attached to the approved field notes.

A petition or application thus framed presents a foundation for such corroborative evidence as is required by the rules. Properly speaking, as it is required by law to be under oath, it should and probably would be accepted by the land department as supplying everything which the claimant personally is called upon in the first instance to verify. An application so framed should dispense with

[1] See, *ante*, § 98.

the necessity for filing separate affidavits of citizenship, performance of annual labor, and other separate instruments, which under the practice in certain localities increase and multiply, in our judgment, uselessly.

Simplicity of procedure is of course commendable. We are convinced that the general adoption of the practice herein suggested, which is undoubtedly contemplated by the departmental regulations,[1] and is followed in some localities, will avoid the frequent demands of the land department for additional affidavits or proof of facts which might have been embodied in the preliminary papers.

The land department is never disposed to be extremely technical, and is quite liberal in overlooking minor defects where the good faith of the applicant is apparent. Yet it is a tribunal of great dignity, and the proceedings by which its jurisdiction is invoked should be conducted fairly on the line of proceedings *in rem* in courts of common law or equity jurisdiction. A claimant has no right to initiate his proceedings to obtain the ultimate title to his mining claim by the presentation of a mere request for a patent, placing the burden upon the department of examining a number of auxiliary papers for the purpose of ascertaining the origin and basis of his equities and the facts upon which he asserts his right to a conveyance from the government.

§ 681. **Application by one of several co-owners—Corporations.**—Where a claim is owned by more than one individual, it is customary to select one to act in behalf of all, for which purpose a special power of attorney is executed and filed with the application; but this is not necessary. The practice of the department has been to recognize such an application, signed by one joint owner in behalf of himself and the remaining owners.[2] Unquestionably an act manifestly done by one co-owner for the benefit of all, would be presumed to be authorized or at least ratified.

[1] Gen. Min. Reg., par. 31. See appendix.
[2] Ayers v. Daly, 3 Copp's L. O. 196.

Where a claimant alleges ownership of a forfeited interest under the last clause of section twenty-three hundred and twenty-four of the Revised Statutes, the department requires the sworn statement of the publisher of the newspaper as to the fact of publication, giving dates and a printed copy of the notice published, and the claimant must swear that the delinquent co-owner failed to contribute his proper proportion. We have heretofore discussed the remedy of the excluded cotenants in such cases.[1]

Where the application is made by a corporation, an officer of the company should be designated by the board of directors or other governing body, by resolution, a certified copy of which resolution should accompany the application.

Where a corporation organized under the laws of one state or territory applies for a patent for a mining claim situated in another, it is required to supply, in addition to a copy of its articles of incorporation filed in the state of its domicile, evidence of its compliance with the law of the state or territory where the claim is situated.[2]

The right of a corporation to carry on business in a state other than the one from which it receives its charter, depends frequently upon its establishing a *status* in such state, by filing evidence of its corporate existence and designating an agent upon whom process may be served. A compliance with these state laws is required by the department to be shown in the patent proceeding.

**§ 682. Verification of application and other proofs.**— The law requires the application for patent to be verified by the claimant[3] before some officer authorized to administer oaths within the land district,[4] except where the applicant is not a resident of or within the district at the

[1] See, *ante*, § 646.

[2] *In re* Alta Millsite, 8 L. D. 195, 197; Hidden Treasure G. & S. M. Co., 16 Copp's L. O. 110; Gold Hill & Lee Mt. M. Co., *Id.*

[3] Rev. Stats., § 2325; Rico Lode, 8 L. D. 223.

[4] Rev. Stats., § 2335.

time of the filing of the application. In such case the application and other required affidavits may be made by a duly authorized agent, when such agent is conversant with the facts.[1] This is construed by the department to apply to a case where the applicant is in fact a resident of the land district, but at the time application for patent is made is temporarily absent therefrom.[2]

With the exception of affidavits of citizenship and verification of adverse claims in cases of nonresidents, which may be made before the clerk of any court of record of the United States, or of a state or territory, or before any notary public,[3] all affidavits required to be made under the mining laws must be made within the land district, before some officer authorized to administer oaths therein.[4]

Where a verification is made before a justice of the peace, the department requires a certificate from the county clerk, showing the official character of the justice and the genuineness of his signature. This certificate need not be attached to every instrument in the set of patent papers verified before that officer. It is sufficient if it is appended to one of them.

§ 683. **Proof of posting of notice and plat on the claim.**— At the time of presenting the application for patent to the register and receiver, the claimant is required to file therewith the affidavit of two creditable witnesses, that the plat and notice of application for patent are posted conspicuously upon the claim, giving the date and place of such posting. A copy of the notice so posted must be attached to and form a part of the affidavit.[5]

§ 684. **Proof of citizenship.**— In case of an individual, proof of citizenship may consist of his own affidavit

[1] Act of Jan. 22, 1880; 21 Stats. at Large, 61, amending § 2325, Rev. Stats.
[2] *In re* Topsey Mine, 7 Copp's L. O. 20.
[3] Act of Apr. 26, 1882; 22 Stats. at Large, 49.
[4] Rev. Stats., § 2335.
[5] Rev. Stats., § 2325; Gen. Min. Reg., par. 30. See appendix.

thereof.[1] This affidavit must show when and where he was born, and his residence.[2] Where the applicant has declared his intention to become a citizen, or has been naturalized, the affidavit must show the date, place, and the court before which he declared his intention or from which his certificate of citizenship issued.[3] Formerly a certified copy of the act of naturalization was necessary, but this is no longer required.

Where the application is made by one co-owner for the benefit of himself and his cotenants, proof of citizenship of each of them must be furnished.

Where the claimant applies in the capacity of trustee, he must disclose fully the nature of the trust and the name of the *cestui qui trust*, and such trustee, as well as the beneficiaries, must furnish satisfactory proof of citizenship.[4]

Where the claimant is not the original locator, the department does not require proof of citizenship of such locator or the intermediate grantees. Proof of citizenship of the claimant is sufficient.[5]

In the case of an incorporated company, a certified copy of its charter or certificate of incorporation must be filed.[6]

Under the alien act of March 3, 1887, the land department, where a domestic corporation sought to patent mining claims in the territories, required, in addition to the certificate of incorporation, an affirmative showing that no more than twenty per cent. of the stock was held by aliens;[7] but by act of March 2, 1897, the inhibition against alien ownership of stock in such corporations has been repealed, and the *status* of aliens in the territories, with reference to the acquisition of public mineral lands, is now the

[1] Rev. Stats., § 2321.

[2] Gen. Min. Reg., par. 77.

[3] Gen. Min. Reg., par. 78.

[4] Circ. Instructions, June 8, 1883, par. 3; 2 L. D. 725; *In re* Capricorn Placer, 10 L. D. 641.

[5] *In re* Wandering Boy, 2 Copp's L. O. 2; *In re* Sanford, 1 Copp's L. O. 98; City Rock and Utah *v.* Pitts., *Id.* 146. See, *ante*, § 227.

[6] Rev. Stats., § 2321; Gen. Min. Reg., par. 76. See appendix.

[7] *In re* Gold Hill & Lee Mt. M. Co., 16 Copp's L. O. 110. See, *ante*, § 244, p. 303.

same in the territories as in the states. Aliens may not acquire unpatented mining claims, but may hold them after patent.[1]

In the case of an association of persons unincorporated, the affidavit may be made by their duly authorized agent upon his own knowledge or upon information or belief, setting forth the residence of each person forming such association.[2] The affidavit must be accompanied by a power of attorney from the parties forming such association, authorizing the person who makes the affidavit of citizenship to act for them in the matter of their application.[3]

Affidavits of citizenship, as heretofore observed,[4] may be taken before any officer authorized by law to administer oaths within the land district. When the applicant is a nonresident of the district, proof may be made before the

[1] See, *ante*, § 237; Rev. Stats., § 2326.

In a preceding article (See, *ante*, §§ 242-244) we have discussed the general property rights of aliens in the territories; have referred to the alien act of March 3, 1887, (24 Stats. at Large, 476; see, *ante*, § 243) and noted that this act inhibited alien ownership of real estate in the territories. As the law then stood, an alien could not lawfully hold a patented mining claim in the territories, as he might in the states in the absence of state constitutional, or legislative inhibition. The act of March 2, 1897, however, passed after the early part of this treatise was printed, seems to have changed this rule. It remodels the original act, and contains the two following provisos:—

"This act shall not be construed to prevent any persons not citizens "of the United States from acquiring or holding lots or parcels of land "in any incorporated or platted city, town, or village, or in *any mine* or "*mining claim*, in any of the territories of the United States." (Act of March 2, 1897, § 3.)

"This act shall not in any manner be construed . . . to authorize "aliens to acquire title from the United States to any public lands in the "United States, or to in any manner affect or change the laws regulating "the disposal of the public lands of the United States. . . ."

This, in our judgment, makes the last clause of section twenty-three hundred and twenty-six of the Revised Statutes: "Nothing herein con-"tained shall be construed to prevent the alienation of a title conveyed "by a patent to any person whatever" operative in the territories as well as in the states.

A full copy of the act will be found in the appendix.

[2] Rev. Stats., § 2321; O'Reilly *v.* Campbell, 116 U. S. 418, 420.

[3] Gen. Min. Reg., par. 76.

[4] See, *ante*, § 682.

clerk of any court of record of the United States, or of a state or territory, or before any notary public.[1]

**§ 685. Designation of newspaper — Agreement of publisher.** — The law requires that upon the filing of the patent application the register shall publish a notice that such application has been made, in a newspaper to be by him designated as published nearest to the claim.[2]

The regulations of the department supplementing this statute declare that the register has no discretion under the law to designate any other newspaper than the one published nearest the claim, when such paper is a newspaper of general circulation. "Nearest to the claim" means distance geographically measured. When two or more such newspapers are published in the same town nearest the land, he may select the one which in his honest and impartial judgment as a public officer will best subserve the purpose of the law and the general interests of the public.[3] As to whether a newspaper is one of general circulation or not, and is the one published nearest the claim, is determined by the register, and his judgment in this respect, unless arbitrarily exercised, will be upheld by the department.[4]

Secretary Smith thus sums up his views of the departmental rulings:—

"The consensus of the rules and decisions seems to be "that the notices must be published in an established "newspaper, with a *bona fide* circulation in the neighbor- "hood of the claim; one that is printed at the place of its "publication and is, in the best judgment of the register, "permanently established and recognized by the commu- "nity, its advertisers, and readers as being a fixture. I "take it that newspapers of this character are to be "selected in preference to those predatory journals that

[1] Gen. Min. Reg., par. 70.

[2] Rev. Stats., § 2325.

[3] Gen. Min. Reg., par. 37.

[4] Tomay v. Stewart, 1 L. D. 570; *In re* Arnold, 2 L. D. 758; Erie Lode v. Cameron Lode, 10 L. D. 655; Condon v. Mammoth M. Co., 15 L. D. 330; Bretell v. Swift, 16 L. D. 178.

"are frequently found in new localities. . . . In the "exercise of this function the register is clothed with dis- "cretion . . . in the lawful exercise of which he may select "a newspaper that he conceives best for the purpose of "giving the greatest publicity to the notice, even although "it may not be the one nearest the land, and especially "would this be true if the one nearest the land, in his opin- "ion, did not meet the requirements as to permanency "and general circulation as defined above."[1]

In some respects this decision nullifies the declaration of the regulation, that the register has *no discretion*. It is, however, the last expression of opinion on the subject by the department within whose control it rests exclusively.

The maximum fees for publication are fixed by departmental regulations.[2] A newspaper exacting extortionate fees is not considered reputable, and orders for publication of notices therein will not be issued.[3] The commissioner is given the power under the law in such cases to designate any paper published in the land district.[4]

While the notice is issued by and published under the direction of the register, neither he nor the government have any concern with the payment of the charges therefor. Therefore the regulations of the department require that before issuing the order for publication the claimant must furnish an agreement signed by the publisher, to hold the applicant for patent alone responsible for the charges of publication.[5] As heretofore indicated, this agreement usually accompanies the application for patent, the register having theretofore informally designated to the claimant the newspaper in which the publication is required to be made.

§ 686. **Proof of annual labor.**—In construing the provisions of section twenty-three hundred and twenty-five of the Revised Statutes, requiring the claimant on applying

[1] Bretell v. Swift, on review, 17 L. D. 558.
[2] Rev. Stats., § 2334; Gen. Min. Reg., par. 97.
[3] *In re* Steele, 3 L. D. 115.
[4] Rev. Stats., § 2324.
[5] Gen. Min. Reg., par. 34.

for a patent to show his compliance with the mining laws, the department holds, that as a condition for the making of such application the applicant must make a preliminary showing of work or expenditure upon each location, sufficient for the maintenance of possession under section twenty-three hundred and twenty-four, either by showing the full amount for the pending year, or if there has been failure, it should be shown that work has been resumed so as to prevent relocation by adverse parties.[1]

This construction has itself been construed to mean that the claimant must furnish proof that a sufficient amount of work has been performed to make the claim a valid and subsisting one at the date of the filing of the application for patent.[2]

To illustrate: An application is filed in July, 1897. The applicant must furnish proof that during the year 1896 he performed assessment work on the claim to the amount required by law, or having failed in that duty must show that he resumed work prior to the application for patent in the year 1897, and atoned for his previous delinquency in the manner required by law. We have heretofore explained our views as to what constitutes such a valid resumption of work[3] as will prevent a relocation. In our judgment the claimant in the case instanced should be compelled to show that he had performed within the year 1897 the full amount he should have performed in the year 1896, before being permitted to proceed with his patent application.

If he has performed the work for the year 1896, he is not called upon to perform it for 1897 until December of that year, and consequently, when the application is made, as we have supposed, in June, 1897, he is not called upon, at that time at least, to make proof of any work for the year 1897.

[1] *In re* Good Return M. Co., 4 L. D. 221, 224; Circ. Instructions, Dec. 14, 1885, *Id.* 374; Circ. Instructions, Mch. 24, 1887, 8 L. D. 505.

[2] *In re* Kinkaid, 5 L. D. 25; Circ. Instructions, Mch. 24, 1887, 8 L. D. 505.

[3] See, *ante*, § 652.

This proof of annual work should be specific, and state its character and value. We have fully explained in a previous section our understanding of what constitutes work upon a mining claim within the meaning of the law.[1] As heretofore explained, the proof of such labor may be embodied in the application for patent, although it is customary to furnish a separate affidavit, verified by the claimant.

**§ 687. The abstract of title—Certified copies of location notices.**—Where the applicant is an original locator, the regulations simply require him to file a full, true, and correct copy of his location notices or certificates, original and amended, if any, as they appear upon the mining records, such copies to be attested by the seal of the recorder, if he has a seal, otherwise by the oath of the custodian of the records; but where the applicant claims by mesne conveyances from the original locator, he is required to present, in addition to the authenticated copies of the notices or certificates, an abstract of title from the proper recorder, under seal, or oath if the officer has no seal, brought down as near as practicable to the date of filing the application, tracing the right of possession by a continuous chain of conveyances from the original locators to the applicant, also certifying that no conveyances affecting the title to the claim in question appear of record in his office, other than those set forth in the accompanying abstract.[2] The purpose of this abstract is to assure the government that the applicant is lawfully entitled to the possession of the claim.[3]

It is customary to present an abstract of title in all cases, whether the applicant is the original locator or not. In the case of an original locator, it furnishes evidence that he has not transferred the claim, a negative fact, of which the department is entitled to information from the records.

[1] See, *ante*, §§ 629-631.

[2] Gen. Min. Reg., par. 32.

[3] *In re* Cameron, 4 L. D. 515.

Where the records are lost or destroyed, secondary evidence of their contents may be shown, the proper foundation being laid therefor, and the claimant may make proof of possessory title. This proof may consist of the affidavit of the claimant, supported by those of any other parties cognizant of the facts relative to his location, occupancy, possession, and improvements.[1]

**§ 688. Proof of title by possession, without location under section twenty-three hundred and thirty-two of the Revised Statutes.**—Section twenty-three hundred and thirty-two of the Revised Statutes provides, that where a person or association of persons and their grantors have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the state or territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent in the absence of any adverse claim. This is but a re-enactment of section thirteen of the placer law of July 9, 1870.

It recognizes the doctrine, that as against every one, save the United States, the title to a mining claim may be acquired by possession, user, and enjoyment for a period equal to the time prescribed by the statute of limitations.

As was said by the late Judge Sawyer:—

"It was the intention of congress to give the right of "purchase of a mining claim . . . to the person or "association of persons who, in pursuance of the laws "of the state or territory and the local mining customs, "rules, and regulations of the place where located, recog- "nized by the laws and enforced by the courts, is the "owner, and entitled to the possession as against everybody "except the government of the United States. . . . The "party who at the time can maintain his right to the "claim in the courts of the country as against any person "but the United States, under the local laws, customs, and "regulations, is the party upon whom congress intended to

[1] Gen. Min. Reg., par. 33.

"confer the right to purchase, no matter how that right "originated, if under such laws, customs, and decisions of "the courts he has the present right."[1]

One may therefore enter upon public land without location, and if the extent of his possession is defined, his holding adverse against all the world save the government, and his working of the claim such for the required period as will indicate a continuous possession and user, he may apply for a patent, basing his right upon such possession and user.

Or one may enter under a deed describing the boundaries of the claim, his grantor being without title. Such entry will be under color of title, and his possession will, in time, ripen into such a right as will authorize the government to issue its patent, although no location was ever made.[2]

Or one may enter under a location which is insufficient under the mining statutes, and the possession so taken may, if openly and notoriously held and the claims worked for a sufficient period, clothe the possessor with a right which will be recognized by the government;[3] but such possession, in order to vest a title under the statute of limitations, must be open, notorious, exclusive, and continuous, and not loose, uncertain, scrambling, and mixed.[4] The acts of mining should not be merely occasional, fugitive, and desultory, but as continuous as the nature of the business and customs of the country permit and require.[5]

It has been contended that section twenty-three hundred

[1] 420 M. Co. *v.* Bullion M. Co., 3 Saw. 634, 645. See, also, Stewart *v.* Rees, 21 L. D. 446; Armstrong *v.* Lower, 6 Colo. 581; Kinney *v.* Cons. Virginia M. Co., 4 Saw. 382.

[2] Harris *v.* Equator M. & S. Co., 8 Fed. 863; Lebanon M. Co. *v.* Cons. Rep. M. Co., 6 Colo. 371, 381.

[3] Jones *v.* Prospect T. Co., 21 Nev. 339. But see, McCowan *v.* McLay, 16 Mont. 234.

[4] Hamilton *v.* Southern Nevada G. & S. M. Co., 13 Saw. 113, 116.

[5] Stephenson *v.* Wilson, 37 Wis. 482, 13 Morr. Min. Rep. 408. See, also, Wilson *v.* Henry, 35 Wis. 241, 1 Morr. Min. Rep. 152; Moore *v.* Thompson, 69 N. C. 120, 1 Morr. Min. Rep. 221; Colvin *v.* McCune, 39 Iowa, 502, 1 Morr. Min. Rep. 223.

and thirty-two of the Revised Statutes only applies where the applicant is not adversed in the land office, and that in the presence of an adverse claimant who has made a location over the occupancy of the applicant, the possession without location, howsoever long continued, must yield to the one properly locating, and the doctrine seems to be favored by the supreme court of Montana;[1] but the supreme court of the United States has said, that if a claimant actually holds possession and works the claim for the requisite period of time under the local statute of limitations, his right to patent is complete.[2] Such possession and working is the equivalent of a valid location.[3] And the supreme court of California in a recent case[4] has reannounced the doctrine.

In a previous article we have announced the rule, that naked occupancy of the public mineral lands confers no title,[5] and that such occupancy must yield to one who in good faith and without force or violence enters upon the ground and perfects a valid location.[6] This doctrine is, however, subject to the qualification, that the possession and user has not by operation of the statute of limitations ripened into a title, which is the equivalent of a location.

The land department has said, that the statutory expenditure of five hundred dollars as a prerequisite to the issuance of a patent is not required where the claimant bases his right upon section twenty-three hundred and thirty-two of the Revised Statutes;[7] but we are not prepared to concede that this doctrine is the correct one.

To enable an applicant to avail himself of the privileges conferred by the section of the Revised Statutes under consideration, the land department has established rules for

[1] McCowan *v.* McClay, 16 Mont. 234.
[2] Belk *v.* Meagher, 104 U. S. 279, 287.
[3] *Id.*
[4] Altoona Q. M. Co. *v.* Integral Q. M. Co., 114 Cal. 100, 105.
[5] See, *ante*, § 216.
[6] See, *ante*, § 218.
[7] *In re* Sears, 8 Copp's L. O. 152. See, also, Stewart *v.* Rees, 21 L. D. 446.

his guidance, which dispense with the necessity of producing evidence of location, copies of conveyances, or abstracts of title. He is required, in lieu thereof, to furnish a certified copy of the statute of limitations affecting mining claims (real estate) for the state or territory,[1] together with his sworn statement giving a clear and succinct narration of the facts as to the origin of his title and the continuation of his possession of the mining ground covered by his possession, stating the area thereof and the nature and extent of the mining that has been done thereon; whether there has been any opposition to his possession, or litigation with regard to his claim, and if so when the same ceased; whether such cessation was caused by compromise or by judicial decree, and any additional facts having a direct bearing upon his possession and good faith which he may desire to submit in support of his claim.[2]

The facts narrated by the claimant relative to his possession, occupancy, and improvements must be supported by corroborative affidavits of disinterested persons of credibility, who may be cognizant of the facts in the case and are capable of testifying understandingly in the premises.[3]

The claimant is also required to file a certificate under the seal of the court having jurisdiction within the judicial district or county wherein the claim is situated, showing that no suit or action of any character whatever involving the right of possession to any portion of the claim applied for is pending, and that there has been no litigation before said court affecting the title to said claim or any part thereof for a period equal to the time fixed by the statute of limitations for mining claims in the state or

[1] We do not clearly see why the department should not take judicial cognizance of the statutes of a state or territory wherein the claim applied for is situated. On writ of error issued out of the supreme court of the United States to the highest court of a state, the former tribunal takes judicial notice of all state legislation of a public character, and we do not see why an analagous rule should not apply to the land department in the administration of the public land laws within a particular state.

[2] Gen. Min. Reg., par. 71.

[3] *Id.*, par. 73.

territory other than that which has been finally decided in favor of the claimant.[1]

As a matter of course a survey must be made of the claim the same as in other cases. The application for an order of survey, instead of being based upon a recorded location, would necessarily present substantially the same facts as are required to be proved before the register. A narrative of facts which would be sufficient to give the register jurisdiction to pass the application to final entry would certainly suffice as the basis for an official survey.

One basing his right to a patent on the ground that he has held the claim for a period which satisfies the statute of limitations of his state or territory must proceed to obtain his patent the same as if his right rested on location, with the exception of the manner by which he proves his title.[2]

§ 689. **Proof of mineral character of the land.**— It is a rule of the land department, that the only tracts of public land which will be withheld from entry under the agricultural land laws are those which have been returned by the surveyor-general as mineral.[3]

We have heretofore observed that the return of the surveyor-general determines the *prima facie* character of the land. If the lands are not returned as mineral, the presumption obtains that they are agricultural in character and cannot be entered under the mining laws until the return is contradicted.[4] Therefore, where a claimant applies for a tract of land under the mining laws which is borne upon the official records as agricultural, proof should be furnished of its mineral character sufficient to overcome the force of the surveyor-general's return.

It has been said, that when a valid mineral location has been made, the slight presumption in favor of the surveyor-general's return is negatived, and that the burden

[1] Gen. Min. Reg., par. 72.
[2] *In re* Smith Brothers, 7 Copp's L. O. 4.
[3] Gen. Min. Reg., par. 109.
[4] See, *ante*, § 106.

of proof thereupon shifts to the party attacking the mineral claim; but as no valid location can be made, except upon a discovery, the fact of such discovery should be established, and such statements verified by the oath of the claimant should be presented, from which the legal inference necessarily flows that the lands are of the character claimed. A mere location certificate will not be sufficient.[1]

We have heretofore fully defined the character of lands which fall within the designation of mineral.[2] If the tract applied for is claimed in good faith to be mineral in character, and subject to entry under the mining laws, there should be no difficulty in succinctly stating the facts suggested in the rule laid down in section ninety-eight of this treatise. This proof, in the absence of a protest interposed by an agricultural claimant, will be sufficient to enable the officers of the land department to pass the entry.

In the presence of a protest, however, its function is limited to shifting the burden of proof to the protestant. Such protest necessitates a hearing, which is conducted under the departmental regulations.[3]

Where the lands are returned and borne upon the tract books as mineral, the burden is fixed by law upon the agricultural claimant, and the preliminary proof on behalf of the mineral claimant herein suggested is not so essential. Nevertheless, as heretofore indicated,[4] the application should show affirmatively the right of the claimant to enter the tract applied for. It is customary and advisable to fortify the proof of claimant with corroborative affidavits of disinterested parties.

**§ 690. Publication of the notice, and proof thereof.**— Upon the filing of the application with the accompanying preliminary proofs, the register is required to publish a notice, for the period of sixty days,[5] in the newspaper designated by him. This notice should be a counterpart

[1] See, *ante*, § 106.
[2] See, *ante*, § 98.
[3] Gen. Min. Reg., par. 108-118.
[4] See, *ante*, § 680.
[5] Rev. Stats., § 2325.

of the one posted on the claim. Its requisites and contents have been fully outlined in a previous section[1] and it is unnecessary to repeat what was there said. In the language of the regulation, it must embrace all the *data* given in the notice posted upon the claim.[2] This regulation also contains the admonition, that "too much care cannot be "exercised in the preparation of these notices, inasmuch "as upon their accuracy and completeness will depend in "great measure the regularity and validity of the whole "proceeding."[3]

This notice must be signed by the register, and the department holds him responsible for its proper publication.[4] Where errors are discovered and a new publication is for that reason ordered, he is required to pay the cost thereof.[5]

The register, however, has no control over the notice posted by the claimant on the claim. This is usually prepared by the attorney for the applicant, who also prepares and submits to the register its counterpart for publication. In such cases the claimant takes the risk and assumes the responsibility.

When the notice is published in a *weekly* newspaper, ten consecutive insertions are necessary, covering a period of sixty-three days, the first insertion being excluded from the computation.[6]

When in a *daily*, the notice must appear in each issue for sixty-one consecutive issues, the first day of issue being excluded in estimating the period of sixty days.[7] It must

[1] See, *ante*, § 677.

[2] Gen. Min. Reg., par. 35.

[3] *Id.*, par. 36. See, also, Sulphur Springs Q. M. Co., 22 L. D. 715.

[4] Becker *v.* Sears, 1 L. D. 575; *In re* Mimbres M. Co., 8 L. D. 457.

[5] *In re* Payne, 15 Copp's L. O. 97.

[6] Gen. Min. Reg., par. 34; Miner *v.* Mariott, 2 L. D. 709; *In re* Great Western Lode, 5 L. D. 510; Waterhouse *v.* Scott, 13 L. D. 718; Bonesell *v.* McNider, *Id.* 286; *In re* Oro Placer, 11 L. D. 457.

[7] Gen. Min. Reg., par. 34; Eureka M. Co. *v.* Jenny Lind M. Co., Copp's Min. Dec. 169, 170; Jefferson M. Co. *v.* Pennsylvania M. Co., 1 Copp's L. O. 66.

appear in every copy of the paper of each issue published during the period.[1]

As to what is meant by the "period of publication" within which adverse claims must be filed under section twenty-three hundred and twenty-six of the Revised Statutes, will be considered when we reach the subject of adverse claims.

A substantial defect in the notice as published will not only necessitate a republication, but also a new posting on the claim and in the register's office.[2]

When the period of publication has expired, proof of such publication in the form of a sworn statement by the printer or publisher of the newspaper must be filed with the register. This statement should show that the notice was published for the statutory period, giving the first and last day of such publication.[3]

§ 691. **The posting of the notice in the register's office, and proof thereof.**— In addition to the notice of application for patent required to be posted on the claim and published, a third notice must be posted in the register's office.[4] This notice must be in all respects similar to the one posted on the claim and published, thus making three concurrent or complementary methods of publication. One is just as necessary as the other, and all must cover the full period of publication, to wit, the sixty days.[5]

Where, during any part of this period, the register's office is closed, the time it remains closed must be deducted, and the time of publication and posting on the ground must be prolonged to compensate for it, or publication and posting must be commenced *de novo*.[6]

Where there is a change in the boundaries of the land district during the period, so that the office wherein the

[1] *In re* American Flag Lode, 6 L. D. 329.
[2] *Id.*
[3] Gen. Min. Reg., par. 41.
[4] Rev. Stats., § 2325; Gen. Min. Reg., par. 34.
[5] Tilden *v.* Intervenor M. Co., 1 L. D. 572.
[6] *Id.*

notice was originally posted ceases to have jurisdiction over the land, such jurisdiction being transferred to another office, the posting must be continued and completed in the latter, otherwise republication and reposting will be required.[1]

Where the land sought to be entered lies in two land districts, we understand that the department requires posting in the register's office in both districts,[2] the application for patent being filed in the district where the principal workings are.[3]

The register is required, in transmitting the papers to the commissioner of the general land office, to certify that the notice was posted in his office for the full period of publication, such certificate to state distinctly when such posting was done and how long continued.[4] Should he fail to do so, the applicant may procure other satisfactory evidence of the register's compliance with the law.[5]

**§ 692. Proof that the plat and notice of application for patent remained posted on the claim during the period of publication.**—At the expiration of the sixty days of publication the claimant is required to file his affidavit, showing that the plat and notice have remained posted in a conspicuous place on the claim during such period of publication, giving the dates.[6] This affidavit should refer to the one on file in the register's office, showing when and where the notice was posted originally,[7] so that the two taken together will show continuous posting between the dates mentioned, covering the period of publication, and that the notice remained during that period where it was originally placed.

The affidavit of continuous posting may be properly

[1] *In re* Williams, on review, 17 L. D. 282.
[2] Clark, Heltman, and Consaul's Min. Land Digest, p. 173, par. 23.
[3] *Id.*
[4] Gen. Min. Reg., par. 43.
[5] *In re* Mimbres M. Co., 8 L. D. 457, 460.
[6] Rev. Stats., § 2325; Gen. Min. Reg., par. 41.
[7] See, *ante*, § 683. See, also, *In re* Prince of Wales Lode, 2 Copp's L. O. 2.

made by a claimant whose knowledge of the fact is derived from personal observation, at various times, of the plat and notice as posted, and from such information with respect thereto as would be accepted by a reasonably cautious man.[1]

§ 693. **Statement of fees and charges.**— In order that the department may exercise a wholesome supervision over the subject of fees charged by the various persons whose services are necessarily required in the conduct of patent proceedings, the claimant is called upon, before making final entry, to file with the register a sworn statement of all charges and fees paid by the applicant for publication and surveys, together with all fees and money paid the register and receiver of the land office, which statement is transmitted with the other papers in the case to the commissioner of the general land office.[2]

§ 694. **Application to purchase.**— All the antecedent proceedings having been regular, the proofs of compliance with the law satisfactory, and neither adverse claim nor protest having been filed, the applicant is permitted to make final entry. To accomplish this he is required to present to the register and receiver a formal application to purchase, describing the premises by name, survey number, or the number of the lot within the township by which the survey is designated by the surveyor-general, accompanied by the purchase price of the land at the rate of five dollars per acre. Upon receipt of the purchase price, the receiver issues a duplicate receipt therefor, and the entire record in the case is forwarded to the commissioner of the land office for his inspection and approval.

§ 695. **Resume.**— In ordinary cases the steps required to be taken by an applicant for mineral patent, and the instruments required to be filed with the register of the

[1] Bright v. Elkhorn M. Co., 9 L. D. 503, 507; Tangerman v. Aurora Hill M. Co., 9 L. D. 538.

[2] Rev. Stats., § 2334; Gen. Min. Reg., par. 102.

land office in the course of patent proceedings subsequent to the completion and approval of the survey, may be divided into two classes, preliminary and final, and may be thus scheduled:—

*Preliminary:*—

(1) The applicant is required to post upon the claim a copy of the plat and a notice of application for patent.

There must then be presented to the register of the land office the following instruments:—

(2) Application for patent with approved field notes attached;

(3) Certified copies of notices or certificates of location, original and amended (if any);

(4) Copy of the official plat;

(5) Proof of posting notice and plat on claim;

(6) Proof of citizenship;[1]

(7) Proof of annual labor;[2]

(8) Form of notice of application for patent to be signed by the register and posted in his office;

(9) Form of notice of application for patent to be signed by the register and published;

(10) Agreement of publisher;

(11) Proof of mineral character of land;

(12) Abstract of title.

*Final:*—

(13) Proof that notice and plat remained posted on the claim during the period of publication;

(14) Proof of publication;

(15) Statement of fees and charges;

(16) Application to purchase.[3]

[1] This may be embodied in the application for patent. See, *ante*, § 680, p. 859.

[2] *Id.*

[3] Suggested forms of the foregoing instruments will be found in the appendix.

ARTICLE II. PLACER CLAIMS—LODES WITHIN PLACERS.

§ 699. Proceedings to obtain patent to lode claims generally applicable to placers.
§ 700. Description of placer claims upon surveyed lands.
§ 701. Proof of the five hundred dollars' expenditure.
§ 702. Proof of mineral character of the land.
§ 703. Proof that no known lodes exist within limits of placer claim.
§ 704. Lodes within placers—How applied for.

**§ 699. Proceedings to obtain patent to lode claims generally applicable to placers.**—The proceedings to obtain title to that class of mineral lands falling within the designation of placers, that is, forms of deposit not in place, as defined in a previous chapter,[1] are similar to proceedings prescribed for obtaining patents for vein or lode claims.[2]

In the language of the departmental regulations:—

"The proceedings for obtaining patents for veins, or "lodes, having already been fully given, it will not be "necessary to repeat them here, it being thought that "careful attention thereto by applicants and the local offi- "cers will enable them to act understandingly in the mat- "ter and make such slight modifications in the notice or "otherwise as may be necessary, in view of the different "nature of the two classes of claims."[3]

There are a few matters, however, to which attention should be invited, taking the patent proceedings as heretofore outlined in cases of lode claims as a basis, and supplementing or modifying them in the particulars hereinafter suggested.

**§ 700. Description of placer claims upon surveyed lands.**—We have heretofore observed, that where placer claims are upon surveyed lands and conform to legal subdivisions, no survey or plat is required.[4]

It will be noted, that the smallest legal subdivision of

[1] See, *ante*, §§ 419–428.
[2] Gen. Min. Reg., par. 52.
[3] Gen. Min. Reg., par. 53.
[4] See, *ante*, § 672.

the government surveys recognized by the department is a tract of ten acres.[1] Where the location or aggregation of contiguous locations forms a compact body susceptible of description by fractions of a quarter section or by lots, where the area of such lots has been accurately determined, it will be sufficient to so describe the claim in the patent application and in all proceedings before the land department.

Frequently, by segregation of mineral surveys, irregularly-shaped fragments result. These are designated by the surveyor-general by a lot number, are dealt with as distinct entities, and may be applied for without survey, simply designating the lot number within the given section.

§ 701. **Proof of the five hundred dollars' expenditure.**—In cases where the claim conforms to the legal subdivisions of the public surveys, as the surveyor-general has no office to perform,[2] it is necessary for the applicant to furnish proofs, consisting of his own and corroborative affidavits, showing clearly the character, extent, and value of the improvements upon the premises.[3] Such proofs should be specific, and establish all the facts which are required to be shown by the deputy mineral surveyor, and certified to by the surveyor-general, where proceedings for patent are based upon mineral survey, as pointed out in previous sections.[4]

§ 702. **Proof of mineral character of the land.**—What we have heretofore said[5] with reference to proof of the mineral character of the land sought to be entered under the laws applicable to lode claims, applies with equal force to placers; and where the tract is applied for by government subdivisions, the facts in this behalf required to be fully set forth in the descriptive report[6] of the surveyor, when

[1] Gen. Min. Reg., pars. 55-57.
[2] See, *ante*, § 672.
[3] Gen. Min. Reg., par. 57.
[4] See, *ante*, § 673.
[5] See, *ante*, § 689.
[6] See, *ante*, § 672.

the application is based upon a survey, should be fully presented in the form of the affidavit of the claimant, corroborated by disinterested and credible witnesses. Such proofs take the place and perform the functions of descriptive reports required of surveyors.

The practice is sanctioned by the department, where applications are made to enter placer ground by legal subdivisions, permitting the applicant to apply to the surveyor-general for a descriptive report without survey. Such descriptive report, although not in terms provided for, would certainly rank as a deposition, and in doubtful cases would probably have controlling weight.

**§ 703. Proof that no known lodes exist within limits of placer claim.**—The land department requires, in all cases of applications for placer patents, that proof, consisting of the affidavits of two or more witnesses, should be filed, showing that there are no known lodes, or veins, within the tract applied for.[1]

Considering that a placer patent is not of itself conclusive evidence of the fact that no known lode existed within the limits of the placer claim at the date of the application, and that the department now maintains the right to patent such a lode within the limits of a prior patented placer,[2] it would seem that the investigation as to "known lodes" in the proceedings to obtain placer patent is superfluous. It is not a fact necessarily to be determined in such proceeding. If such a lode existed, although not located at the time of the filing of the application for placer patent, it is reserved by operation of law, notwithstanding any adjudication made by the land department in the placer proceeding.

The regulation may be upheld, however, upon the theory, that the land department has a right to be specifically informed of the precise nature of the deposit sought to be entered.

[1] Gen. Min. Reg., par. 58.

[2] *Ante*, § 413.

As to whether the owner of a located lode within the limits of a placer claim is compelled to adverse the placer application, is a subject reserved for discussion when we deal with adverse claims in the succeeding chapter. What constitutes a known lode, which as such is reserved out of a placer patent, will be considered when we discuss the nature and effect of placer patents.

It is sufficient to note that the land department requires proof that no known lodes exist within the limits of the placer claim. The regulation is not unreasonable, and must be followed. The course to be pursued where the proofs show the existence of a known lode is pointed out in the next section.

**§ 704. Lodes within placers—How applied for.**—If a lode is located within the limits of a placer prior to the filing of the placer application, and is held by persons other than the placer claimant, it may be applied for by the owners the same as if the placer claim did not exist. Where the existence of the lode was known at the time of the placer application, but was not located until after the placer patent was issued, the land department will, upon a satisfactory showing as to the prior known existence of the lode and its subsequent location, permit the lode claimant to proceed to patent.[1] In such cases the lode claimant proceeds in the same manner as in other cases, ignoring the existence of the placer patent.

When an applicant for a placer patent is also in possession of a known vein, or lode, included therein, he must, if he desires to secure title thereto, state in his application that the placer includes such vein, or lode. The published and posted notices must also include such statement. If veins, or lodes, lying within a placer location are owned by other parties, the fact should be so stated in the application for patent. In all cases, whether the lode is claimed or excluded, it must be surveyed and marked upon the plat,

[1] *Ante*, § 413.

the field notes and plat giving the area of the lode claim or claims and the area of the placer separately.[1]

Where such lode exists, an application for placer patent which does not include an application for the vein, or lode, claim shall be construed as a conclusive declaration that the claimant has no right to the possession of the vein, or lode, claim.[2]

A placer applicant will not be allowed to amend his application for patent, so as to embrace therein veins, or lodes, discovered by others after the location of the placer claim, but prior to the application therefor and not included in the application as originally submitted.[3]

## Article III. Millsites.

§ 708. Manner of acquiring patents to millsites.

**§ 708. Manner of acquiring patents to millsites.**— We have heretofore noted, that the mining laws provide for the appropriation of two classes of millsites:—

(1) Such as are used and occupied by the proprietor of a vein, or lode, for mining or milling purposes;

(2) Such as have thereon quartz mills or reduction works, the ownership of which is disconnected with the ownership of a lode, or vein.[4]

In cases of the first class, the claimant desiring to obtain a patent for his millsite must embody in his application for an order of survey a description of the site claimed and a certified copy of the location notice under which he asserts his claim.

The deputy surveyor surveys the millsite, giving it the same number as the claim, but designating it by a different

[1] Gen. Min. Reg., par. 58.
[2] Rev. Stats., § 2333. See, *ante*, § 413, p. 525 and note 3.
[3] Aurora Lode *v.* Bulger Hill & Nugget Gulch Placer, 23 L. D. 95.
[4] *Ante*, § 520.

letter. For example: The survey of the claim is designated as "Sur. No. 37-A," and the millsite as "Sur. No. "37-B," or whatever may be its appropriate number. In the published and posted notices of the application for patent, the millsite must be as carefully described as the lode claim, and the course and distance from a corner of the millsite to a corner of the lode claim must invariably be given, and a copy of the plat must be posted on the millsite.[1]

A claimant owning an unpatented millsite actually used for mining or milling purposes in connection with a patented lode, may apply for a patent for the millsite separately, in which case he is required to proceed precisely the same as in cases of applications for mining claims.[2] The same method must be pursued when a patent is sought for a millsite claimed independent of any lode ownership.[3]

Proof of the non-mineral character of the land sought to be entered as a millsite must in all cases be furnished. This proof consists of the sworn statement of two or more persons capable, from acquaintance with the land, of testifying understandingly.[4]

The character of the land embraced within a claimed millsite is just as much the subject of contest as the character of land in other classes of mineral or agricultural entries, and hearings are ordered and the controversy heard and determined in the same manner as other cases where the character of the land is in issue.[5]

It is not necessary to show any particular amount of expenditures upon a millsite as a prerequisite to a patent. If claimed in connection with a lode, it will be sufficient to show that it is used for mining or milling purposes.[6]

Where the right to patent is asserted under the second clause of section twenty-three hundred and thirty-seven of the Revised Statutes, the right to make the entry depends

[1] Gen. Min. Reg., par. 66.
[2] Eclipse Millsite, 22 L. D. 496.
[3] Gen. Min. Reg., par. 67.
[4] *Id.* See, *ante*, § 521.
[5] *In re* Becker, 5 Copp's L. O. 51.
[6] Alta Millsite, 8 L. D. 195.

upon the existence thereon of a quartz mill or reduction works.[1]

We have fully discussed in previous sections the nature of the use required to perfect a valid appropriation of a millsite. The rules there enunciated will not be repeated.[2]

[1] *In re* Lennig, 5 L. D. 190; Cyprus Millsite, 6 L. D. 706; Two Sisters Lode and Millsite, 7 L. D. 557; La Neve Millsite, 9 L. D. 460; Hecla Cons. M. Co., 12 L. D. 75.

In the "Mineral Law Digest" of Messrs. Clark, Heltman, and Consaul (p. 359, par. 55) are noted some unpublished decisions which require the applicant to furnish the surveyor-general's certificate showing that five hundred dollars has been expended on the millsite. It would be difficult to conceive of a quartz mill or reduction works which would not exceed in value the sum named, but we are not aware of any law which authorizes the department to place millsites on the footing with mining claims, with reference to the value of the expenditures.

[2] *Ante*, §§ 523, 524.

# CHAPTER IV.

## THE ADVERSE CLAIM.

ARTICLE I. INTRODUCTORY.

II. WHAT IS AND WHAT IS NOT THE SUBJECT OF AN ADVERSE CLAIM.

III. HOW, WHEN, AND WHERE ADVERSE CLAIM MUST BE ASSERTED.

### ARTICLE I. INTRODUCTORY.

§ 712. Distinction between adverse claim and protest.

§ 713. Patent proceedings are essentially *in rem*.

**§ 712. Distinction between adverse claim and protest.**—The patent proceeding in the land office may be interrupted and its consummation delayed by the filing of an adverse claim or by the presentation of a protest. There is a marked difference between the two. An adverse claim is based upon the assertion of an adverse right to the tract applied for, or some part of it. A protest is not necessarily based upon any asserted right. Often a protestant is a mere volunteer, an *amicus curiæ*, who calls the attention of the department to an alleged non-compliance with the law on the part of the applicant, which otherwise might be overlooked, or raises the issue as to the character of the land, in the ultimate determination of which issue the protestant may or may not have an interest proximate or remote.

As explained in succeeding sections, where an adverse claim is filed, its determination upon the merits is relegated to the courts, and the functions of the land department are, for the time being, suspended. In cases of protest, the

department retains jurisdiction, and investigates and determines the issues raised without resort to the courts. We are now specially concerned with the adverse claim.

**§ 713. Patent proceedings are essentially in rem — Adverse claims must be presented.**— The proceedings by which the patent for a mining claim is obtained are essentially *in rem*, and are binding upon all the world so far as any unpresented adverse claim is concerned.[1]

They are judicial. The publication and posting of notice of the application for patent is a *process* which brings all adverse claimants into court — a summons to all persons whose interests may be affected by the issuance of a patent to the tract applied for, to appear and file their adverse claims.[2]

"True, no adverse claimant or supposed claimant may "be named in the notice; no process may be served per- "sonally upon him, but that does not avoid the notice "or weaken its sufficiency to bring such party into court. "This is not the only case known to the law in which "parties not named in a notice are by it brought into court "and their rights adjudicated. Unknown heirs are often "thus brought in by a published notice. Tax proceedings, "condemnation of rights of way, admiralty cases, and "many others, present similar illustrations."[3]

If parties holding such claims, in hostility to the applicant, as are the proper subject of adverse proceedings, stand by and allow the statutory time for filing their adverse claims to elapse, their rights, so far as the same might have been determined in such proceedings, in the absence of fraud or mistake, are forever lost.[4]

The law provides, that if no adverse claim is filed within the time specified, it shall be assumed that the applicant is

[1] Hamilton *v.* Southern Nev. G. & S. M. Co., 13 Saw. 113.

[2] Wight *v.* Dubois, 21 Fed. 693, 695; Wolfley *v.* Lebanon M. Co., 4 Colo. 112, 117; Hunt *v.* Eureka Gulch M. Co., 14 Colo. 451, 455; People *ex. rel.* Darby *v.* District Court, 19 Colo. 343, 347; Com'rs' Letter, Copp's Min. Dec. 75; Kannaugh *v.* Quartette M. Co., 16 Colo. 341.

[3] Wight *v.* Dubois, 21 Fed. 693, 695.

[4] Kannaugh *v.* Quartette M. Co., 16 Colo. 341.

entitled to a patent, and thereafter no objection from third parties to the issuance of the patent shall be heard, except it be shown that the applicant has failed to comply with the law,[1] which failure may be brought to the attention of the department by protest only, as indicated in the preceding section.

It is therefore necessary for us to determine,—

(1) What is and what is not the proper subject of an adverse claim;

(2) How, when, and where must it be asserted; and,

(3) The effect of failure to assert it.

## Article II. What is and What is Not the Subject of an Adverse Claim.

§ 717. Character of land — Agricultural claimants.
§ 718. Prior patentees and prior patent applicants.
§ 719. Mortgages — Lienholders — Owners of equitable interests.
§ 720. Lode claimant *v.* placer applicant.
§ 721. Placer claimant *v.* lode applicant.
§ 722. Mineral claimant *v.* townsite applicant.
§ 723. Townsite claimant *v.* mineral applicant.
§ 724. Millsite claimant *v.* mineral applicant.
§ 725. Tunnel proprietor *v.* lode applicant.
§ 726. Owners of lodes located prior to May 10, 1872.
§ 727. Cross lodes.
§ 728. Co-owners.
§ 729. Easements.
§ 730. Underground conflicts.

**§ 717. Character of land—Agricultural claimants.**— Section twenty-three hundred and twenty-five of the Revised Statutes only contemplates adverse proceedings as between rival mineral claimants to the land, and does not have in view a settlement of the character of the land as between mineral and agricultural claimants.

As was said by the supreme court of the United States,—

"The purpose of the statute seems to be, that where

[1] Rev. Stats., § 2325.

"there are two claimants to the same mine, neither of "whom has yet acquired title from the government, they "shall bring their respective claims to the same property, "in the manner prescribed by the statute, before some "judicial tribunal located in the neighborhood where the "property is, and that the result of this judicial investiga- "tion shall govern the action of the land department in "determining which of these *claimants* shall have the "patent—the final evidence of title from the govern- "ment."[1]

The department having jurisdiction over all public land until patent issues, may at any time, either on its own motion, or on an application made by others, order a hearing for the purpose of determining its character. There is no other tribunal provided by law for that purpose whose judgment would necessarily be binding upon the department.[2]

An agricultural claimant can only raise the issue by way of protest, demanding a hearing for the purpose of establishing the non-mineral character of the tract, and this he may do at any time prior to patent. The distinction between the adverse claim and protest has been outlined in a previous section.[3]

Controversies over the character of the land are not subjects of adverse claims under the sections of the Revised Statutes under consideration.

There are some rulings of the department which seem to negative this conclusion:[4] but they are opposed to what we understand to be the true rule.

The department is a tribunal specially charged under the law with the determination of this fact, and in this determination the courts perform no auxiliary functions.

**§ 718. Prior patentees and prior patent applicants.**—The term "adverse claim," as used in section twenty-three

[1] Iron S. M. Co. *v.* Campbell, 135 U. S. 286, 299.

[2] Powell *v.* Ferguson, 23 L. D. 173; Snyder *v.* Waller, 24 L. D. 7; Alice Placer, 4 L. D. 314.

[3] *Ante*, § 712.

[4] Anderson *v.* Amador & Sacramento Canal, 10 L. D. 572.

hundred and twenty-six of the Revised Statutes, implies a right asserted in hostility to the patent applicant. The proceeding based upon the adverse claim is essentially one to determine the right of possession to the whole or a part of the surface area described in the published and posted notice of application for patent. It is necessarily based upon the assumption, that the paramount title to the tract applied for resides in the general government, whose patent when regularly issued would operate as a judgment conclusive upon those who failed to assert their adverse rights. Where a patent has once been issued, purporting to convey a given tract in its entirety, the functions of the land department are exhausted, and the patentee need no longer concern himself with any subsequent application embracing any portion of the same area.[1]

We have heretofore noted, that where an application for patent is once made, if prosecuted with reasonable diligence, no second application covering the same tract will be received by the land officers, so long as the first application remains pending.[2]

It logically follows, that a prior applicant for patent whose application is pending and undetermined is not called upon to adverse any subsequent conflicting application.[3]

§ 719. **Mortgages — Lienholders — Owners of equitable interests.**— One holding a mortgage executed by the applicant upon the tract applied for, does not antagonize such applicant's title. The mortgagor of a mining claim would not be permitted to abandon a claim and secure a title adverse to the mortgagee by a relocation;[4] nor will the

[1] Iron S. M. Co. *v.* Campbell, 135 U. S. 286, 299; Bennett *v.* Harkrader, 158 U. S. 441, 447; Equator M. & S. Co., 2 Copp's L. O. 114; *In re* Ramage, 2 Copp's L. O. 115.

[2] *Ante*, § 679.

[3] Steel *v.* Gold Lead G. & S. M. Co., 18 Nev. 80, 87.

The land department has held, that under certain circumstances the second application may be treated as an adverse claim (Hall *v.* Street, 3 L. D. 40); but the case wherein the rule is announced is of doubtful value as a precedent.

[4] Alexander *v.* Sherman (Ariz.), 16 Pac. 45. See, *ante*, § 407.

law permit him to do any act which would impair the mortgage security. The equities of the mortgagee rest upon the applicant's title, and the patent when issued would inure to the benefit of the mortgage. The same may be said of all classes of incumbrances and liens voluntarily imposed by the applicant. This seems to be fully provided for by the last clause of section twenty-three hundred and thirty-two of the Revised Statutes, which provides that,—

"Nothing in this chapter shall be deemed to impair "any lien which may have attached in any way whatever "to any mining claim or property thereto attached prior "to the issuance of the patent."[1]

So with a contract of purchase, a lease, or any other instrument which by act of the parties creates an equitable right based upon the applicant's title.

Holders of this class of interests are not called upon to adverse the patent application.[2]

This doctrine, however, will not apply to rights asserted arising out of judicial proceedings which are in their nature *in invitum*, such as tax and execution sales which operate only upon the title as it stands at the time the sale takes place. A tax or sheriff's deed can, at best, only have the operation of a quitclaim deed in its strictest sense. This class of deeds cannot pass an interest which the owner did not have before the sale, but which he subsequently acquires.[3]

We think there can be no doubt but that a patent or certificate of purchase issued as the result of the patent proceeding, is a subsequently acquired title. Whenever such title will, when acquired, inure to the benefit of an encumbrancer, lienholder, or other person claiming an equitable interest under the applicant, no adverse claim need be filed. Equity will control the patent title in favor of the party holding the equitable title. When, however,

[1] Copp's Min. Dec. 45.

[2] Shoo Fly and Magnolia Lode *v.* Gisborn, 1 Copp's L. O. 135, 138; Harriet M. Co. *v.* Phœnix M. Co., 9 Copp's L. O. 165.

[3] Hamilton *v.* Southern Nev. G. & S. M. Co., 13 Saw. 113, 117.

such subsequently acquired title will not inure to the benefit of a party asserting an interest, he must protect his rights by filing an adverse claim.

**§ 720. Lode claimant v. placer applicant.**— Where the existence of a lode within the limits of a placer is known prior to the application for placer patent, and such lode is included in the placer application, all others claiming an interest in the lode in hostility to the applicant must necessarily adverse the applicant, as the placer patent when issued would embrace the lode. Where the existence of the lode is known, and the placer applicant fails to assert his right to it by including it within his application, such failure is a conclusive declaration that he has no right to the possession of the vein, or lode.[1]

There would be nothing in such an application which would call for any contest on the part of a lode claimant. The owner of the known lode, if it were a located one, could not be considered as asserting anything adverse to the placer claimant. We think it well settled, that such lode claimant need not under such circumstances institute adverse proceedings against the placer application.[2]

In the case of Dahl *v.* Raunheim,[3] an action between a placer and lode claimant, the supreme court of the United States comments upon the failure of a lode claimant to adverse a placer application, and announces the rule, that having so failed the lode claimant is precluded from calling in question the location of the claim "*or its character* "*as placer* ground." From the facts recited in this opinion, it appeared that the lode location was initiated *subsequent* to the filing of the placer application.[4]

[1] Rev. Stats., § 2333; Reynolds *v.* Iron S. M. Co., 116 U. S. 687; Iron S. M. Co. *v.* Reynolds, 124 U. S. 374; Noyes *v.* Mantle, 127 U. S. 348.

[2] Mantle *v.* Noyes, 5 Mont. 274; Noyes *v.* Mantle, 127 U. S. 348.

[3] 132 U. S. 260.

[4] The facts recited in the opinion of the supreme court of Montana show that the lode location was junior in point of time to the placer, but that it was made prior to the filing of the placer application for patent. (Raunheim *v.* Dahl, 6 Mont. 167.) We are advised that the record in the case sustains the recitals found in the opinion of the supreme court of Montana.

That the court did not intend to decide that a lode claimant must adverse a placer application or be precluded from showing subsequently that the lode was known to exist at the time the placer application was filed, is manifest from its language in another portion of the opinion. "The only position upon which the defendant (the lode "claimant) can resist the pretensions of the plaintiff is, "that the placer ground, for a patent of which he applied, "does not embrace the lode claim." That is, that the lode was known to exist within the limits of the placer ground prior to the filing of the placer application, and therefore did not pass by the placer patent. This view harmonizes with the later decisions of the same court.

Where a lode is known to exist at the time of the placer application, which is not claimed by either the placer applicant or anyone else, it will nevertheless be excepted out of the placer patent, and may be located and acquired even after the issuance of the placer patent.[1]

A claimant to a known lode within a placer may, as a matter of expediency, protest against the issuance of the placer patent, and secure a segregation of his lode claim; but a failure to do so will not prevent him from showing at any time that the lode was known to exist at the time the placer application was filed, and that under the law such lode never passed by the placer patent.

We have heretofore discussed the location and patenting of lodes within placers, and noted the attitude of the land department upon this subject.[2]

The department has held, that where a lode claimant has failed to adverse a placer application, he will not be permitted to acquire more than twenty-five feet of surface on each side of the lode,[3] or will be limited to so much surface as is reasonably necessary for his use in connection with the located lode, where he adverses and is defeated in the suit upon the adverse claim.[4]

[1] Iron S. M. Co. *v.* Mike & Starr G. & S. M. Co., 143 U. S. 394, 407.
[2] *Ante*, §§ 703, 704.
[3] Shonbar Lode, 1 L. D. 551, 3 L. D. 388.
[4] Aurora Lode *v.* Bulger Hill and Nugget Placer, 23 L. D. 95, 348.

We have, however, endeavored in a preceding section [1] to show the fallacy of this rule. As the law does not require the lode claimant to adverse where the lode is not included in the placer application, he loses no rights by failing to do so.

Controversies between these two classes of claimants involve the character of the land, and the department retains jurisdiction to investigate this question, even after the placer patent has been issued.[2]

The force and effect of a placer patent will be further considered when dealing generally with the subject of patents.[3]

§ 721. **Placer claimant v. lode applicant.**—Where an application for a patent for a lode within the limits of a placer is made by a lode claimant, if the placer claimant asserts any right to the lode, he is necessarily called upon to adverse. Where his claim, however, is placer, pure and simple, under which claim he cannot lawfully assert a right to the lode, he has nothing upon which to base an adverse claim. If he disputes the existence of a lode within the limits of his placer, the assertion involves the character of the land — a question to be passed upon preliminarily by the land department, and ultimately by the courts, where the issue may be raised in any appropriate action other than those brought to determine adverse claims, under section twenty-three hundred and twenty-six of the Revised Statutes. These deductions logically follow from the principles announced in the preceding section.

There are several cases noted in the books where adverse proceedings have been instituted by the lode or placer claimant, and have been carried to judgment, where it seems to have been assumed that this procedure was proper. Among them we note the case of Bennett *v.* Harkrader.[4] We do not understand that there is anything in

[1] *Ante*, § 415.

[2] *Ante*, § 413; South Star Lode (on review), 20 L. D. 204; Butte & Boston M. Co., 21 L. D. 125.

[3] *Post*, § 781.

[4] 158 U. S. 441.

the opinion of the court militating against the views hereinbefore expressed. The effect of the judgment was not under consideration, and the land department treated it as not being conclusive against the right of the lode applicant to his lode, with some part of the surface.[1]

Where the placer claimant adverses the lode applicant, and institutes a suit thereon, the department has ruled that it will not proceed with the patent application until the action is dismissed or determined.[2] This doctrine may be upheld upon the theory that there may be matters involved in the suit other than the sole question as to the character of the land.

To say that a claimant of a placer location, who does not assert a right to the lode applied for, is not a proper adverse claimant, which we think is the correct rule,[3] yet, at the same time, to concede that a suit brought in support of such a claim ousts the jurisdiction of the department, is to involve us in apparent inconsistencies. The courts and the land department are not altogether harmonious in their views upon the necessity for a placer claimant to adverse the lode applicant, or *vice versa;* but as the courts have no power to compel the department to proceed to patent, the ruling of the latter as to the suspension of jurisdiction in the case cited gives to such a proceeding the full force accorded to a proper adverse claim. In this aspect of the case the department seems to be in full control of the situation. The courts must bide their time until the patent has been issued, when they alone have the power to determine its effect.

§ 722. **Mineral claimant v. townsite applicant.**— With the exception of townsites applied for by incorporated cities or towns under the act of March 3, 1891,[4] mineral lands cannot be entered under the townsite laws. A townsite

[1] Aurora Lode *v.* Bulger Hill & Nugget Placer, 23 L. D. 95, 348.

[2] *In re* Clipper M. Co., 22 L. D. 527; Iron S. M. Co. *v.* Mike & Starr G. & S. M. Co., 6 L. D. 533.

[3] *Ante*, § 721.

[4] *Ante*, §§ 171, 174.

patent when issued would exclude from its operation all valid known mines and mining claims.[1] Therefore, the owner of such mines or claims is not called upon to adverse the townsite application.[2]

This class of cases bears a striking analogy to cases of claimants of known lodes within placers discussed in another section,[3] and the principles there announced apply with equal force to mining claims within townsites.

With reference to townsite applications by incorporated cities or towns under the act of March 3, 1891, for the reasons set forth in the next section, we think it the duty of a lode claimant to adverse the townsite application in order that the question of prior occupancy, if any, and its limits may be defined and determined, to the end that proper reservations may be inserted in the townsite patent.[4]

§ 723. **Townsite claimant v. mineral applicant.**— Following an opinion of the assistant attorney-general, the secretary of the interior held, that persons in possession of the surface of a mining claim, occupying it for residence or business purposes, were adverse claimants within the meaning of the act of July 26, 1866;[5] and a like rule was announced by the department in construing the provisions of the Revised Statutes.[6]

The supreme court of Montana seems to have entertained the same opinion.[7]

This rule was undoubtedly based upon the theory, that there were correlative rights to be protected by reservation clauses in the mineral patent — a rule which the courts decline to follow.[8]

[1] *Ante*, § 177.

[2] Silver Bow M. & M. Co. *v.* Clark, 5 Mont. 378, 415; Butte City Smokehouse Lode Cases, 6 Mont. 397, 404.

[3] *Ante*, § 720.

[4] See, also, *ante*, § 175.

[5] Becker *v.* Citizens of Central City, 2 Copp's L. O. 98.

[6] Papina *v.* Alderson, 10 Copp's L. O. 52; Rico Townsite, 1 L. D. 556; Ester *v.* Townsite of Cooke, 4 L. D. 212; Smokehouse Lode Cases, 4 L. D. 555; *In re* Starr, 2 L. D. 759.

[7] Talbot *v.* King, 6 Mont. 76, 109.

[8] *Ante*, § 171.

It seems to us that if the premises applied for by the mineral claimant are unquestionably mineral in character, they could not (except in the absence of a location within incorporated towns under the act of March 3, 1891) be acquired under the townsite laws. The prior occupation for residence and business purposes could not prevent the appropriation of such lands under the mining laws.[1] There could be no "horizontal partition" between the mineral and townsite claimant.[2] A townsite occupant could have no legal right of possession to lands whose mineral character was known or discovered prior to the townsite entry; consequently he could have no adverse claim, in contemplation of the law, to the title of the mineral applicant. The relative position of the parties is parallel to the case of a known lode embraced within a placer, which is unclaimed by the placer owner — a subject discussed in a previous section.[3]

We have heretofore intimated that, in cases of incorporated cities and towns under the act of March 3, 1891, granting certain surface privileges to prior occupants of the surface of lode claims, such prior occupants are given the *status* of adverse claimants, and that to protect their rights to the surface they must file their adverse claims and pursue their remedy in the courts.[4] This upon the theory, that under this law a prior surface possession of mineral land for trade or business purposes within incorporated cities is lawful, and establishes a right in hostility to the mineral claimant. This rule, however, applies only to lode claims within incorporated cities or towns. As to placers, the entire surface is necessary to the successful working of the mine. There can be no correlative rights between townsite occupants and placer claimants.

Where a townsite entry has been perfected, and patent issued, or the purchase price has been paid, we cannot see upon what principle the holder of the townsite title should

[1] *Ante*, § 170.
[2] *Ante*, § 171.
[3] *Ante*, § 721.
[4] *Ante*, § 175.

be required to adverse a subsequent mineral application, assuming, for the moment, that a townsite occupant is, in contemplation of law, an adverse claimant under any circumstances. A prior placer patentee is not called upon to adverse a subsequent lode application.[1]

If a townsite patent embraces a mine whose existence was known at the date of the entry, it does not pass by the patent;[2] consequently nothing could be gained by adverse proceedings instituted by the holder of the townsite title. If, on the other hand, the existence was not known, the townsite patentee has a right to "repose quietly upon "the sufficiency and validity of his patent."[3] His patent would cover it. The question as to whether such mine was or was not known to exist, may be litigated in any form of action in which title to real estate may be tried.

§ 724. **Millsite claimant v. mineral applicant.**— The mining laws recognize the appropriation of nonmineral public lands for millsite purposes.[4]

Such an appropriation, when completed by the user for mining or mill purposes as contemplated by law, would prevent a subsequent lode locator extending his surface boundaries within the limits of the millsite, unless the lode on its course penetrated it.

To the extent that a conflict thus arising involves only nonmineral lands, the claim to the millsite would be adverse to the surface claim of the locator, and the millsite claimant would be called upon to adverse the lode applicant.[5]

As between a prior millsite claimant and a placer applicant, the only question involved would be the character of the land. As we have heretofore observed, this is not the subject of an adverse claim, but of protest.[6]

[1] *Ante*, § 718.
[2] *Ante*, § 177.
[3] Iron S. M. Co. *v.* Campbell, 135 U. S. 286, 299.
[4] *Ante*, §§ 519-524.
[5] Warren Millsite *v.* Copper Prince, 1 L. D. 555.
[6] *Ante*, § 717.

The supreme court of Montana has announced a contrary rule,[1] basing its ruling, to some extent at least, upon the opinion of the assistant attorney-general in the case of a townsite occupant against a mineral claimant[2]— a subject fully discussed in another section.[3]

For the reasons there set forth, we do not think the opinion referred to is based upon the correct view of the law. The character of the land is a question to be determined by the land department, and not the courts.[4]

§ 725. **Tunnel proprietor v. lode applicant.**— The rights of tunnel locators and the unique position this class of locations occupy in the mining law have given rise to numerous conflicting decisions in the courts of the mining regions.

Commissioner McFarland held, that a tunnel location was a mining claim, and to protect his rights against a lode applicant the tunnel proprietor was required to file his adverse claim and prosecute his suit thereon in the courts.[5]

This view was upheld by Secretary Kirkwood,[6] and practically accepted by the supreme court of Idaho.[7]

The supreme court of Montana announced its view, that the applicant for patent ought to be restrained from prosecuting his proceedings while the tunnel proprietor is prosecuting his tunnel as required by law, and until it should be demonstrated that the vein would not be discovered in the tunnel, or until the tunnel rights were abandoned, thus practically giving the tunnel claimant the *status* of an adverse claimant.[8]

The supreme court of Colorado denied the right of a tunnel proprietor to intervene in the patent proceeding

[1] Shafer *v.* Constans, 3 Mont. 369.
[2] Becker *v.* Central City Townsite, 2 Copp's L. O. 98.
[3] *Ante*, § 723.
[4] *Ante*, § 717.
[5] Tioga Cons. M. Co., 8 Copp's L. O. 88.
[6] Bodie Tunnel *v.* Bechtel Cons. M. Co., 1 L. D. 584.
[7] Back *v.* Sierra Nev. Cons. M. Co., 2 Idaho, 396.
[8] Hope M. Co. *v.* Brown, 11 Mont. 370.

where the lode applied for had not been discovered in the tunnel, and the lode location was not on the line (width of the bore) of the tunnel;[1] but where a prior discovery had been made in the tunnel, the right of the tunnel locator to adverse a junior location of the same vein, based upon a subsequent discovery from the surface, was recognized by that court.[2]

The circuit court of appeals for the eighth circuit announced its view, that as to blind and undiscovered veins which may be ultimately discovered in the tunnel, and also found within the limits of a mining claim located subsequent to the inception of the tunnel right, such mining location being based, however, on the discovery of another vein, the tunnel proprietor will not be deprived of his right to such blind vein when discovered in his tunnel, by reason of his failure to adverse the junior locator.[3]

This doctrine has received the sanction of the supreme court of the United States. Said that court:—

"The obvious contemplation of the law in respect to "these adverse proceedings is, that there shall be a present "tangible and certain right, and not a mere possibility."[4]

In the light of this decision and the one which it affirms, the rule may be thus formulated: Where a lode claimant applies for a patent to a location embracing a lode which has previously been discovered in the tunnel, the tunnel claimant will be compelled to adverse to protect his rights. A right in the particular lode inures to the tunnel

[1] Corning T. Co. *v.* Pell, 4 Colo. 507.

[2] Ellet *v.* Campbell, 18 Colo. 510.

[3] Enterprise M. Co. *v.* Rico Aspen Cons. M. Co., 66 Fed. 200.

[4] Enterprise M. Co. *v.* Rico Aspen Cons. M. Co., U. S. Sup. Ct., May 10, 1897.

This decision was announced some time after the chapter on tunnel claims (see, *ante*, ch. iv, tit. v, §§ 467–491) had been printed.

In many respects the decision does not support the theories of the author argumentatively presented in § 491: but it is impossible to reprint the work or modify the text, if we had the inclination so to do. In the appendix in connection with the annotations to section twenty three hundred and twenty-three of the Revised Statutes will be found a reference to the opinion and the extent to which it modifies the conclusions reached in the chapter referred to.

proprietor immediately upon its discovery in the tunnel, which right is essentially adverse to the lode applicant; but where there has been no discovery in the tunnel, and it cannot be demonstrated that the lode will be cut by the tunnel bore, there is no necessity for an adverse claim. Should a discovery of the vein be subsequently made in the tunnel, the surface locator's rights will be subordinated to the rights of the tunnel proprietor, assuming, of course, that the inception of the tunnel right antedated the discovery by the surface discoverer.[1]

**§ 726. Owners of lodes located prior to May 10, 1872.** —Section sixteen of the act of May 10, 1872, substantially preserved in section twenty-three hundred and forty-four of the Revised Statutes, contained a proviso, "that nothing "contained in this act shall be construed to impair, in any "way, rights or interests in mining property acquired under "existing laws."

The supreme court of California has held, construing this provision, that where an application for patent was made subsequent to the passage of the act of 1872, based upon a location made prior to its passage, the claimant of another vein found within the surface limits of the ground sought to be patented, whose rights accrued under the act of 1866, was not called upon to adverse the patent application. His rights were preserved by the act under which patent proceedings were instituted.[2]

A similar rule had been previously announced by the supreme court of Utah.[3]

The supreme court of Arizona has expressed the opinion, that the prior locator was required to adverse in order to protect his rights;[4] and the supreme court of Colorado gives its sanction to this doctrine so far as determining the owner-

[1] See, also, Hope M. Co. *v.* Brown, 7 Mont. 550.

[2] Eclipse G. & S. M. Co. *v.* Spring, 59 Cal. 304.

[3] Black *v.* Butte S. M. Co., 2 Utah, 55—Chief Justice Schaeffer dissenting.

[4] Watervale *v.* Leach (Ariz.), 33 Pac. 418, 420.

ship of ore at spaces of intersection, should the veins be cross veins.[1]

Locations made prior to 1872 have, for the most part, either been patented, or, if not abandoned, been readjusted to conform to existing laws. The question is relatively unimportant.

§ 727. **Cross lodes.**— We have fully discussed the subject of cross lodes in a preceding chapter,[2] and have there noted, that in Colorado and Montana a junior locator of a cross vein is held to possess the right to follow his vein on its strike through the premises of a senior locator, the latter taking the ore at the space of intersection. Assuming that this is the correct doctrine, which we are not prepared to admit, the rule in Colorado requires the holder of the senior location to adverse the junior applicant in order to preserve his rights to the surface in conflict and to the ore at the space of intersection:[3] but in other respects, in cases of two cross lodes, neither junior nor senior locator is deprived of the right to pass through the other's ground by reason of failure to adverse the patent application, upon the theory, that the cross vein is excepted out of the grant and that the owner of such vein has a right of way of necessity.[4]

The rule in Arizona and California is opposed to this doctrine.[5]

§ 728. **Co-owners.**— The land department has, by a uniform line of decisions, held, that where one of several colocators or co-owners applies for a patent in his own name to the manifest exclusion of his associates, the excluded owners are called upon to adverse the claim of the applicant,[6] and that this rule applies to a co-owner whose interest is claimed in the patent proceedings to have

[1] Lee *v.* Stahl, 9 Colo. 208, 13 Col. 174.
[2] *Ante*, §§ 557–560.
[3] Lee *v.* Stahl, 9 Colo. 208, 13 Colo. 174.
[4] Branagan *v.* Dulaney, 8 Colo. 408, 413.
[5] *Ante*, § 560.
[6] Mono M. Co. *v.* Magnolia E. & W. Co., 2 Copp's L. O. 68.

been forfeited for failure to contribute his proportion of the assessment work after demand and notice, although, as a matter of fact, the co-owner was not delinquent, and his interest was not subject to forfeiture.

Such pretermitted co-owner, according to departmental ruling, waives his rights by failure to adverse;[1] and it has been held by the supreme court of Montana, that the patent proceeding will not be interrupted by a suit brought by such a co-owner, which is not based upon an adverse claim regularly filed;[2] but the regulations of the land department do not oust the jurisdiction of the courts of justice, or prevent them from controlling the legal title for the benefit of those who are entitled to it in equity and good conscience.[3]

As we have heretofore observed,[4] the courts generally concede the rule to be, that where one of several co-owners in a mining claim applies for a patent in his own name, the excluded cotenants are not adverse claimants within the meaning of the law requiring the filing and prosecution of adverse claims.[5]

They *may* assert their equities in the patent title and have the patentee declared a trustee for the benefit of such co-owners as were wrongfully ignored in the patent proceeding.

In a preceding section[6] we have commented upon the subject of forfeiture to co-owners under section twenty-three hundred and twenty-four of the Revised Statutes, and have there intimated, following the suggestions made by Judge Elliott in his concurring opinion in Tabor *v.* Sullivan,[7] that under certain circumstances, where the

[1] *In re* Peck, 10 Copp's L. O. 119; *In re* Cunningham, *Id.* 206; Grampian Lode, 1 L. D. 544; Hussey Lode, 5 L. D. 93; Monitor Lode, 18 L. D. 358.

[2] Mattingby *v.* Lewisohn, 8 Mont. 259, 263.

[3] Turner *v.* Sawyer, 150 U. S. 578.

[4] *Ante*, § 406.

[5] *Ante*, § 406; Brundy *v.* Mayfield, 15 Mont. 201; Sussenbach *v.* First Nat. Bank, 5 Dak. 477, 501; Doherty *v.* Morris, 11 Colo. 12; Hunt *v.* Patchin, 13 Saw. 304, 309.

[6] *Ante*, § 646.

[7] 12 Colo. 136, 151.

claim is held by one co-owner in open hostility to the others, and there is a well recognized repudiation of title brought to the notice of the excluded cotenants, their rights may be lost by failure to adverse.

If, prior to the institution of the patent proceedings, there had been such an ouster of a cotenant as would set the statute of limitations in motion, such a notorious and unequivocal denial of a cotenant's rights brought to his notice as to impose upon such cotenant the necessity of protecting his interest[1]—such conduct by the co-owner in possession which in law creates an adverse holding—under these conditions we think the courts would compel the ousted cotenant to assert his rights in the patent proceedings.

What acts are necessary to constitute such an ouster and change the possession of one co-owner into an adverse holding against another, must be determined by the general law of cotenancy. It is not within the legitimate scope of this treatise to determine such collateral questions.

§ 729. **Easements.**—Patents when issued are issued subject to accrued water rights, or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under, or recognized by, the laws of congress. Such rights furnish no ground for an adverse claim. They are fully protected by the provisions of the federal law.[2]

The parties are not rival mining claimants, to whom the law on the subject of adverse claims only applies.[3]

The same may be said of public highways. The right of all parties to use the highway will be as secure under the law as if title had remained in the government.[4]

§ 730. **Underground conflicts.**—An application for patent invites only such contests as affect the surface area.

[1] Freeman on Cotenancy, § 229.

[2] Rev. Stats., §§ 2339, 2340; Rockwell *v.* Graham, 9 Colo. 36.

[3] *Ante*, § 717.

[4] Copp's Min. Dec. 76; Rev. Stats., § 2477; on subjects of easements generally, see *ante*, § 530.

A possible union of veins underneath the surface cannot be foreshadowed at the time the application is made. When such a condition arises, it is adjusted by reference to surface apex ownership and priority of location not involving any surface conflict.[1]

The rule is well settled, that conflicting adverse rights set up to defeat an application for patent cannot be recognized in the absence of an alleged surface conflict.[2] Prospective underground conflicts are not the subject of adverse claims.

## Article III. How, When, and Where Adverse Claim Must be Asserted.

§ 734. Adverse claim — How asserted — Contents of the claim — Amendments.
§ 735. Survey of the adverse claim.
§ 736. Verification of the claim.
§ 737. Sufficiency of adverse claims to be determined by land department.
§ 738. When adverse claim must be filed — Time how computed.
§ 739. Where adverse claim must be filed.
§ 740. But one adverse claim need be filed.
§ 741. Filing of adverse claim suspends the powers of the land department.
§ 742. Effect of failure to file an adverse claim.

**§ 734. Adverse claim — How asserted — Contents of the claim — Amendments.**— The law requires that the instrument by which the adverse claim is asserted shall show the nature, boundaries, and extent of such claim.[3] This is supplemented by the following regulation of the department. The adverse notice must fully set forth,—

"The nature and extent of the interference or conflict; "whether the adverse party claims as a purchaser for

[1] Champion M. Co. *v.* Cons. Wyoming M. Co., 75 Cal. 78, 82.

[2] New York Hill Co. *v.* Rocky Bar Co., 6 L. D. 318; Smuggler M. Co. *v.* Trueworthy Lode Claim, 19 L. D. 356; Chollar Potosi and Bullion M. Co. *v.* Julia G. & S. M. Co., Copp's Min. Lands, 93, Copp's Min. Dec. 101; Julia G. & S. M. Co., Copp's Min. Dec. 96; Saratoga Lode *v.* Bulldozer Lode, Sickles Min. Dec. 252; *In re* Mt. Joy Lode, Copp's Min. Dec. 27; Eureka M. Co. *v.* Pioneer Cons. M. Co., 8 Copp's L. O. 106.

[3] Rev. Stats., § 2326.

" valuable consideration or as a locator; if the former, a " certified copy of the original location, the original con- " veyance, a duly certified copy thereof, or an abstract " of title from the office of the proper recorder should be " furnished; or if the transaction was merely a verbal one, " he will narrate the circumstances attending the purchase, " the date thereof, and the amount paid, which facts should " be supported by the affidavit of one or more witnesses, " if any were present at the time, and if he claims as a " locator he must file a duly certified copy of the location " from the office of the proper recorder."[1]

The object to be accomplished, as was said by Assistant Attorney-general Smith,[2] is to fairly advise the applicant of the nature, boundaries, and extent of the adverse claim, so that he may prepare himself to establish, on the trial before the courts, his own rights, and defeat the adverse claim.

The instrument should show the qualification of the claimant and such facts from which, assuming them to be true, the inference may be clearly deduced that the party asserting the adverse claim has the right of possession to a valid subsisting mining claim, a portion at least of which conflicts with the tract embraced within the pending application. The sufficiency of the adverse claim as filed should be tested by the ordinary rules of pleading, where a general demurrer is interposed to a complaint.[3]

If such adverse claimant asserts a right to a patent, he must set forth in his claim all the facts necessary to establish such right. For example, the expenditure of five hundred dollars in betterments or improvements, while it is not a prerequisite to the filing of an adverse claim, is a condition precedent to the issuance of a patent. Therefore, when such adverse claimant seeks a patent as the result of a successful prosecution of his claim, he should aver compliance with the law in this behalf.

While the land department may be satisfied with a less complete statement of the adverse claim than that

[1] Gen. Min. Reg., par. 85.

[2] Sickles Min. Dec. 232.

[3] Robinson *v.* Mayger, 9 Copp's L. O. 5; City Rock & Utah *v.* Pitts, 1 Copp's L. O. 146.

herein suggested, the general principle herein announced is unquestionably the correct one, and should be followed.

When an adverse claim has once been filed, it cannot be amended after the period of publication has elapsed, so as to embrace a larger portion of the premises applied for than that described in the original adverse claim;[1] but during the period of publication, there is no reason why the adverse claimant should not be permitted to correct inaccuracies and errors in the original by filing an amended claim.

**§ 735. Survey of the adverse claim.**—In order that the "boundaries" and "extent" of the claim may be shown, the regulations of the department[2] require the adverse claimant to file a plat showing his entire claim, its relative situation or position with the one against which he claims, and the extent of the conflict. This plat must be made from an actual survey by a United States deputy mineral surveyor, who must officially certify to its correctness.[3]

When the adverse claimant asserts an adverse right to the whole of the tract applied for by the identical metes and bounds of the patent survey, such, for instance, as an excluded co-owner, whom the department recognizes as an adverse claimant,[4] or a purchaser at a tax or execution sale, claiming to have succeeded to the entire title of the applicant by an instrument which would not carry the subsequently acquired patent title, no survey would be required. There would be no surface conflict requiring delineation.

So, also, where an application for patent describes the claim by legal subdivisions, as in ordinary cases of placers upon surveyed lands,[5] the adverse claimant, if also claiming

[1] Copp's Min. Dec. 156.

[2] Gen. Min. Reg., par. 86.

[3] Judge Beatty, sitting as circuit judge for the district of Idaho, has held this regulation to be unreasonable, and void so far as it prevents the survey from being made by any surveyor other than a United States deputy (Anchor *v.* Howe, 50 Fed. 366).

[4] *Ante*, § 728.

[5] *Ante*, §§ 672, 700.

by legal subdivisions, may describe his adverse claim in the same manner without further survey or plat.[1]

In some instances, where a survey of the adverse claim is impossible by reason of climatic conditions or the depth of snow during the time within which the adverse right must be asserted,[2] or where the patent applicant obstructs the adverse claimant and prevents the making of a proper survey,[3] the rule requiring an actual survey is relaxed, and the adverse claimant may make such showing as the circumstances of the case will permit, setting forth fully in his claim as filed the reasons why the rule is not complied with. In other words, he must plead the facts showing that noncompliance with the rule is excused.

Ordinarily, however, an actual survey is required. Merely coloring on a copy of the applicant's plat the portion alleged to be in conflict will not suffice.[4]

The survey of the adverse claim is not made under the supervision of the surveyor-general, nor is the work of the deputy mineral surveyor platted in the surveyor-general's office. Nevertheless, the survey should be made and platted with the same care, and the field notes should be as full, as in cases of patent surveys. Otherwise, in case the adverse claimants prevail in their suit, and succeed in establishing their right to the conflict area, the land officers will not be able from the data furnished to so describe the conflict area as to except it from the patent to the applicant. The applicant would be compelled to go into the field and resurvey the conflict. Ordinarily he is required by the department to do this; but the necessity for this, it seems to us, might be obviated if the adverse claim is properly surveyed, platted, and described in the first instance.

[1] Gen. Min. Reg., par. 86; Dieckman *v.* Good Return M. Co., 14 Copp's L. O. 237.

[2] Hoffman *v.* Beecher, 12 Mont. 489; Philadelphia M. Co. *v.* Finley, 10 Copp's L. O. 340; *In re* Wallace, 1 L. D. 582.

[3] *In re* Jenny Lind M. Co., Sickles Min. Dec. 223, 227. See, also, unreported cases cited in Clark, Heltman, and Consaul's Min. Land Digest, p. 263, par. 134.

[4] Bates *v.* Chambers, Sickles Min. Dec. 265, 267.

The regulations of the department also require, that there be attached to the plat of adverse survey a certificate or sworn statement of the surveyor as to the approximate value of the labor performed or improvements made upon the claim by the adverse party or his predecessors in interest, and the plat must indicate the position of any shafts, tunnels, or other improvements, if any such exist, upon the claim of the party opposing the application, and by which party the improvements were made.

This, however, will not dispense with the necessity of obtaining a plat and field notes of survey properly made and approved by the surveyor-general, together with the latter's certificate of five hundred dollars' worth of improvements, in the event the adverse claimant is successful and wishes to proceed to patent.[1]

Whether or no the successful adverse claimant may proceed to patent, after the termination of judicial proceedings, without the publication and posting required in the case of original applications, will be considered in a subsequent section.[2]

§ 736. **Verification of the claim.**—The adverse claim may be verified by the person or persons making the same,[3] or by the oath of any duly authorized agent or attorney in fact of the adverse claimant cognizant of the facts stated.[4] The oath must be taken in the land district,[5] excepting where the adverse claimant is a nonresident, or is absent from the limits of the district wherein the claim is situated, in which case he may make oath to the adverse claim before the clerk of any court of record of the United States, or of the state or territory where the claimant may then be, or before any notary public of such state or territory.[6]

[1] *In re* Harsh, 2 L. D. 706.
[2] *Post*, § 764.
[3] Rev. Stats., § 2326.
[4] Act of April 26, 1882, 22 Stats. at Large, 49.
[5] Gen. Min. Reg., par. 84; Rev. Stats., § 2335.
[6] Act of April 26, 1882, 22 Stats. at Large, 49; Circ. Instructions, 1 L. D. 685.

Where the verification is made by an agent or attorney in fact, he must distinctly swear that he is such agent or attorney, and accompany his affidavit by proof thereof.[1]

This necessarily implies the production of a written instrument or certified copy thereof, showing the designation and appointment of the agent.

In cases of corporations, the verification may be made by any of its officers selected, or an agent specially designated for that purpose. The authority to act for the corporation must be shown,[2] and is usually evidenced by a copy of the resolution of the board of directors, or other governing body, duly certified by the secretary under the corporate seal.

An adverse claim filed by, or on behalf of, a number of persons claiming an interest as cotenants, may be verified by one in behalf of all.[3]

In this respect the rules announced with regard to patent applications[4] by co-owners apply with equal force to adverse claims asserted by them.

**§ 737. Sufficiency of adverse claim to be determined by land department.**—The objection to the sufficiency of the adverse claim is one that is to be raised before and determined by the land department.[5]

Matters of form are decided by the department. The merits are to be tried by the courts.[6]

Ordinarily, however, after suit has been commenced in support of the adverse claim, the land department is disinclined to entertain an attack upon the sufficiency of

[1] Gen. Min. Reg., par. 83.

[2] Hawley Cons. M. Co. *v.* Memnon M. Co., Sickles Min. Dec. 235.

[3] Jenny Lind M. Co. *v.* Eureka M. Co., Sickles Min. Dec. 223; Copp's Min. Dec. 19, 175.

[4] *Ante*, § 681.

[5] Rose *v.* Richmond M. Co., 17 Nev. 25, 55; affirmed, 114 U. S. 576; Hoffman *v.* Beecher, 12 Mont. 489, 497; Quigley *v.* Gillett, 101 Cal. 462; Tilden *v.* Intervenor M. Co., 1 L. D. 572; War Eagle Mine, Copp's Min. Dec. 195.

[6] Chambers *v.* Pitts, 3 Copp's L. O. 162; City Rock & Utah *v.* Pitts, 1 Copp's L. O. 146.

the claim as filed, relegating all the questions to the courts.[1]

If, upon objection taken to the sufficiency of the adverse claim, it is rejected by the local officers, the adverse claimant has a right of appeal.

If the objection is not sustained, the applicant for patent may prosecute an appeal to the commissioner.[2]

Whether or no, pending such appeals, the time to commence the action runs, has been decided both ways by the department. In one case, upon an appeal from a decision rejecting the adverse claim, where the decision was reversed and the claim ordered filed, the adverse claimant was allowed thirty days after notice of the decision on appeal within which to commence suit, thus practically suspending the operation of the statute pending the appeal.[3]

In a later case, however, Secretary Smith ruled, that delay by the adverse claimant beyond the date which marked the close of the thirty days allowed him by statute was at his peril. The dismissal of his adverse claim for any cause by the local officers could not excuse the delay.[4]

The practice on the subject is involved in some obscurity. The department insists that it has the abstract right to determine the sufficiency of the adverse claim, and the courts not only concede this, but hold that the department has the exclusive privilege. After a suit has been commenced, the department relegates this question to the courts, who hold that they have no power to determine it.

It is not difficult to outline the safest course. Where an adverse claim is filed, it is incumbent upon the claimant to commence his action within the statutory period, whether the sufficiency of the claim is assailed before the department or not. Where the suit has been commenced, the department should, as it generally does, suspend further proceedings; otherwise the patent when issued may be

[1] McMaster's Appeal, 2 L. D. 706, 707; Reed v. Hoyt, 1 L. D. 663; Brown v. Bond, 11 L. D. 150, 154.

[2] Overman v. Dardanelles M. Co., Copp's Min. Dec. 181.

[3] Hawkeye Placer v. Gray Eagle Placer, 15 L. D. 45, 47.

[4] Scott v. Maloney, 22 L. D. 274.

treated as void for want of jurisdiction,[1] unless, as has been suggested, the adverse claimant in the meanwhile dismisses his suit.[2]

**§ 738. When adverse claim must be filed—Time how computed.**—All adverse claims to be effectual for the purposes contemplated by law must be filed prior to the expiration of the sixty-day period of publication of the application notice.

As we have heretofore noted,[3] when a publication is ordered in a weekly newspaper, ten consecutive insertions are necessary, covering a period of sixty-three days, the first insertion being excluded from the computation. The adverse claim, however, must be filed within the *sixty* days. Such a claim filed on the sixty-second day has been held to be too late.[4]

The department at one time held, that a filing on or before the sixty-third day was within the time.[5]

This requirement as to time is mandatory and jurisdictional.[6]

It is a short statute of limitations, and there is no authority, either judicial or executive, to extend or abridge the period;[7] nor is it subject to extension by act of the parties. It is wholly beyond their control.[8]

In computing the sixty-day period, the date of the first publication is excluded.[9]

[1] Richmond *v.* Rose, 114 U. S. 576.

[2] Deno *v.* Griffin, 20 Nev. 249.

[3] *Ante*, § 690.

[4] Hunt *v.* Eureka Gulch M. Co., 14 Colo. 451; Miner *v.* Mariott, 2 L. D. 709; Ground Hog Lode *v.* Parole & Morning Star Lodes, 8 L. D. 430; Nettie Lode *v.* Texas Lode, 14 L. D. 180; Ledger Lode, 16 L. D. 101; Bonesell *v.* McNider, 13 L. D. 286; Great Western Lode, 5 L. D. 510.

[5] Acting Com'rs' Letter, 2 Copp's L. O. 164; Miner *v.* Mariott, *supra*.

[6] Tierman *v.* Salt Lake M. Co., 1 Copp's L. O. 25; Equator M. & S. Co., 2 Copp's L. O. 114.

[7] Tilden *v.* Intervenor M. Co., 1 L. D. 572.

[8] Hunt *v.* Eureka Gulch M. Co., 14 Colo. 451; *In re* Hagland, 1 L. D. 591; Morrison *v.* Lincoln M. Co., 6 Copp's L. O. 105, Sickles' Min. Dec. 208; *In re* Independence Lode, 9 L. D. 571.

[9] Gen. Min. Reg., par. 34; Waterhouse *v.* Scott, 13 L. D. 718; Miner *v.* Mariott, 2 L. D. 709; Bonesell *v.* McNider, 13 L. D. 286.

If the sixtieth day falls upon Sunday, or upon a day set apart by the laws of the State as a legal holiday, the adverse claimant would have all the next business day within which to file his claim.[1]

As noted in a preceding section,[2] there are three complementary and concurrent methods of giving notice to adverse claimants, viz. posting on the ground, posting in the register's office, and publication in the newspaper. As we have heretofore outlined in the patent proceeding,[3] the posting on the ground precedes the filing of the patent application. Posting in the register's office usually either precedes or is contemporaneous with the first publication, but this is not always the case. Where there is a failure to post the notice, either on the ground or in the local land office, the period of publication does not commence to run until such posting is effected.

The rule is thus stated by Acting Secretary Muldrow:—

"When notice is required to be given by different forms "and modes, to cover the same continuous period of time, "notice by either of the different modes will not run "against an adverse claimant until notice has been given "by each and every mode and form required. An adverse "claimant does not take notice by publication until notice "is posted in the local office, as required by law, although "publication may have commenced prior to the filing of "notice in the local office. The sixty days within which "adverse claims may be filed will be computed from the "time when notice has been given by all the modes "required."[4]

If, after posting in the land office, and during the period of publication, the land office should be closed, the period during which it remains closed is permitted by the department to be deducted in computing the period of publication. The time would again commence to run upon reopening the office, or, in case the office is removed to another

[1] Waterhouse *v.* Scott, 13 L. D. 718; Ground Hog Lode *v.* Parole & Morning Star Lodes, 8 L. D. 430.

[2] *Ante*, § 691.

[3] *Ante*, §§ 677-695.

[4] Great Western Lode Claim, 5 L. D. 510.

locality, upon posting in the new office when opened for the transaction of business.[1]

When, during the vacancy in the office of register, a notice is published under the direction of the receiver acting as register under instructions from the land department, it has been held, that as the receiver is a *de facto* officer, the publication will be held valid, although the instructions of the department were not authorized by law.[2]

When, by reason of substantial defects in either posting or publishing the notice, a new notice is required to be given, adverse claimants will have sixty days from the first publication of the new notice in which to file their adverse claims.[3]

The time when an adverse right originates, is a matter of no moment.[4]

An adverse claim filed after the period of publication may be treated by the department as a protest, the merits of which are to be determined exclusively by the land department, without reference to the courts.[5]

**§ 739. Where adverse claim must be filed.**—An adverse mining claim must be filed with the register and receiver of the land office where the application for patent was filed, or with the register and receiver of the land office in which the land is situated at the time of filing the adverse claim.[6]

A delivery to either of the land officers outside of business hours and on a Sunday, and at a place other than the land office itself, has been held to be sufficient when the officers received it and it was acted upon.[7]

[1] Tilden *v.* Intervenor M. Co., 1 L. D. 572.

[2] Jeffords *v.* Hine (Ariz.), 11 Pac. 352.

[3] *In re* American Flag Lode, 6 L. D. 329; Wheeler *v.* Smith, 23 L. D. 395.

[4] Ovens *v.* Stephens, 2 L. D. 699.

[5] Nettie Lode *v.* Texas Lode, 14 L. D. 189; Bodie Tunnel *v.* Bechtel Cons. M. Co., 1 L. D. 584; McGarrahan *v.* New Idria M. Co., 3 L. D. 422.

[6] Gen. Min. Reg., par. 82.

[7] Sayer *v.* Hoosac Cons. G. & S. M. Co., 6 Copp's L. O. 73; *In re* Jenny Lind M. Co., Sickles' Min. Dec. 224.

Such officers are not expected to transact business out of office hours, nor on Sundays, and a tender to them of an adverse claim and their refusal to accept under such circumstances would not be considered equivalent to a filing.

The adverse claimant must pay the fees of the land officers for filing the claim, if such fees are demanded. Until such fees are paid or tendered, the instrument will not be considered as filed.[1]

§ 740. **But one adverse claim need be filed.**— A party, after applying for a patent, cannot, after a contest is raised and while it is pending, make a second application, and thus compel the adverse claimant to protest in the latter proceeding. Having done all that the law required of him to do, the adverse claimant is entitled to have the questions at issue determined in the first proceeding. If, in disregard of this right, the department entertains a second application, and, in the absence of the assertion of an adverse claim, issues a patent, such instrument will be void for want of jurisdiction.[2]

§ 741. **Filing of adverse claim suspends the powers of the land department.**— When an adverse claim is filed within the time required by law, all proceedings upon the application in the land office, except in reference to the publication and proof of notice, are stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived.[3]

Proceedings taken by the department prior to such determination or waiver are void for want of jurisdiction.[4] What constitutes such a waiver as will remove the suspension and permit the applicant to proceed to patent will be discussed in a succeeding section.[5]

[1] Omaha G. M. Co., 3 Copp's L. O. 36.

[2] Rose *v.* Richmond M. Co., 17 Nev. 25, 67; Richmond M. Co. *v.* Rose, 114 U. S. 576.

[3] Rev. Stats., § 2326; Gwillim *v.* Donnellan, 115 U. S. 45, 49; Richmond M. Co. *v.* Rose, 114 U. S. 576.

[4] *Id.*

[5] *Post*, § 766.

**§ 742. Effect of failure to file an adverse claim.**—It is so well established as to be axiomatic, that a failure to file an adverse claim within the time fixed by law operates as a waiver of all rights which were the proper subject of such a claim.[1]

The issue of a patent to the applicant is equivalent to a determination by the United States in an adversary proceeding, to which the owner of the adverse right is in contemplation of law a party, that the applicant's and patentee's rights were superior, and those which might have been asserted by the holder of the adverse title were valueless.[2] In other words, all matters which might have been tried under the adverse proceedings are treated as adjudicated in favor of the applicants, and all controversies touching the same are to be held as fully settled and disposed of, as though judgment had been regularly rendered in their favor.[3]

A failure to assert adverse rights, however, will not estop an adverse claimant from protesting and bringing to the notice of the department such facts as tend to show noncompliance by the applicant with the requirements of the law.[4]

[1] Richmond M. Co. *v.* Rose, 114 U. S. 576, 585; Dahl *v.* Raunheim, 132 U. S. 260; Eureka Case, 4 Saw. 302; Marshall *v.* Kirtley, 12 Colo. 410; Raunheim *v.* Dahl, 6 Mont. 167; Lee *v.* Stahl, 9 Colo. 208, 13 Colo. 174; Hamilton *v.* Southern Nev. G. & S. M. Co., 13 Saw. 113; Champion M. Co. *v.* Cons. Wyoming M. Co., 75 Cal. 78, 82; Hunt *v.* Eureka Gulch M. Co., 14 Colo. 451; Wight *v.* Dubois, 21 Fed. 603; Seymour *v.* Fisher, 16 Colo. 188; Kannaugh *v.* Quartette M. Co., *Id.* 341; Girard *v.* Carson, 22 Colo. 345; Warren Millsite *v.* Copper Prince M. Co., 1 L. D. 555; Bodie Tunnel *v.* Bechtel Cons. M. Co., 1 L. D. 584; *In re* Gold Blossom, 2 L. D. 767; Branagan *v.* Dulaney, *Id.* 744; Manhattan M. Co. *v.* San Juan M. Co., *Id.* 698; Wight *v.* Tabor, *Id.* 738; Southwestern M. Co. *v.* Gettysburg Lode, 4 L. D. 271; Whitman *v.* Haltenhoff, 19 L. D. 245; Gowdy *v.* Kismet G. M. Co., 22 L. D. 624.

[2] Gwillim *v.* Donnellan, 115 U. S. 45, 51.

[3] Snowflake Lode, 4 L. D. 30; Petit *v.* Buffalo G. & S. M. Co., 9 L. D. 563.

[4] Nevada Lode, 16 L. D. 532; Waterloo M. Co. *v.* Doe, 17 L. D. 111.

# CHAPTER V.

## ACTIONS TO DETERMINE ADVERSE CLAIMS, AND THE EFFECT OF JUDGMENT THEREON.


ARTICLE I. INTRODUCTORY — TRIBUNALS HAVING JURISDICTION.

II. CHARACTER OF THE ACTION — PLEADINGS AND PRACTICE — FUNCTIONS OF THE LAND DEPARTMENT PENDING THE ACTION.

III. THE JUDGMENT AND ITS EFFECT.


## ARTICLE I. INTRODUCTORY — TRIBUNALS HAVING JURISDICTION.


§ 746. Introductory — What courts are courts of competent jurisdiction.

§ 747. The federal courts.

§ 748. The questions involved in the adverse suit necessarily arise under the laws of the United States, and are essentially federal in their nature.

§ 749. The federal courts are the only ones upon which congress can confer jurisdiction, or over whose procedure it may exercise legislative control.

§ 750. The state courts.


**§ 746. Introductory — What courts are courts of competent jurisdiction.**— Section twenty-three hundred and twenty-six of the Revised Statutes provides as follows:—

"It shall be the duty of the adverse claimant, within "thirty days after filing his claim, to commence proceed- "ings in a court of competent jurisdiction, to determine "the question of the right of possession, and prosecute the "same with reasonable diligence to final judgment; and "a failure to do so shall be a waiver of his adverse "claim. . . ."

This was supplemented by the act of congress of March 3, 1881,[1] which provided that,—

[1] 21 Stats. at Large, 505.

"If, in any action brought pursuant to section twenty-three "hundred and twenty-six of the Revised Statutes, title to the "ground in controversy shall not be established by either "party, the jury shall so find, and judgment shall be entered "according to the verdict. In such case, costs shall not "be allowed to either party, and the claimant shall not "proceed in the land office or be entitled to a patent for "the ground in controversy until he shall have perfected "his title."

We have already observed, that upon the filing of the adverse claim the powers of the land department, except for certain limited purposes, are suspended until such time as the merits of the claim are litigated and determined in the courts, or the adverse claim is waived.[1]

The law does not specifically designate the particular court whose jurisdiction is to be invoked. It simply requires that the adverse claimant commence proceedings within a specified period in a court of *competent* jurisdiction.

The question as to what courts are *competent* may be considered in two aspects:—

(1) Upon what courts has congress the power to confer jurisdiction, and to which it may lawfully relegate the trial of questions involving the right to purchase its public lands;

(2) What is the character of the action required to be prosecuted, and the nature of the relief sought, as upon these elements the question of jurisdiction frequently depends.

It is not difficult to arrive at the manifest intention of congress in enacting these laws. In the early period of mining in the west, the possessory title to mineral lands of the public domain was governed by the local rules and customs of the vicinage, which, while possessing the same general characteristics, varied in some respects in different localities. In later periods permissive state legislation superseded, to a great degree, the primitive system, the

[1] *Ante*, § 742.

local regulation, however, still performing some function. These two elements, although somewhat incongruous, when not in conflict with the federal law become a part of it, to such an extent that the congressional law could not be fully administered without giving them due consideration. The local courts of general jurisdiction first recognized the local customs, determined their force and validity, and their decisions ripened into rules of property[1] which the government, as the paramount proprietor, acquiesced in, first, by passive noninterference, and then by judicial and legislative recognition.[2]

When congress passed the lode law of 1866, which was but a crystallization of the local rules, it embodied in it a provision of the same general import, with reference to adverse claims, as that now embodied in section twenty-three hundred and twenty-six of the Revised Statutes. Under the act of 1866 adverse claims were to be adjudicated by courts of *competent* jurisdiction.[3]

In giving legislative recognition and sanction to this system of local regulation, congress undoubtedly intended that the tribunals which had, since the discovery of gold in California, determined the conflicting rights of miners upon the public mineral lands by reference to these local rules, should continue to perform that office. In other words, it was practically a part of the system which the government recognized.

The government, in effect, said to the miners: "We "recognize your right to explore the public mineral lands, "and in acquiring possessory rights we permit you to be gov- "erned by such rules as you may voluntarily adopt, provided "they are not in conflict with the congressional law, and are "recognized and enforced by the decisions of your local "courts. If controversies arise, settle them in these courts, "and when an adjudication is had before them, we will "recognize it as establishing the right of the successful "party to purchase the land."

[1] *Ante*, § 44.
[2] *Ante*, § 45, 56.
[3] Act of July 26, 1866, § 6. See appendix.

No critical inspection of the law from a constitutional standpoint was thought of.

In recent years, however, some questions have arisen to perplex the courts. Questions of pleading and practice, the exact relationship between the courts and the land department in administering the mining laws, as well as questions of jurisdiction, which, while lost sight of or practically ignored in the early periods, are now forcing themselves upon the attention of the profession. In order to reach a solution of such of these questions as are solvable on consistent lines, we will divide the courts into the two divisions naturally suggested when the construction of an act of congress is called in question, viz. federal and state, and consider each class separately.

§ 747. **The federal courts.**—There can be no question but that, under certain circumstances, at least the circuit court of the United States for the district in which the mining claim is situated would be a court of competent jurisdiction to determine the issues arising out of an adverse claim. The action contemplated involves the right of possession to real property. As the federal judicial system is at present constituted, the circuit court is the only court, except in the territories, upon which congress could be presumed to confer jurisdiction in the absence of an act creating or specially designating some other tribunal. Where there is a diversity of citizenship, and the value of the property in controversy is sufficient, there can be no question but what this court would be competent to try and determine the issue. This would be the case in any ordinary controversy arising between citizens of different states, such as an action of trespass or ejectment concerning a mining claim wholly disconnected with any patent proceedings. But in the absence of this diversity of citizenship, is the circuit court a court of competent jurisdiction in all cases to try and determine all suits brought under the requirements of section twenty-three hundred and twenty-six of the Revised Statutes? In other words, when the

applicant and adverse claimant are both residents of the same state, may the adverse claimant institute his suit in the United States circuit court, the jurisdictional value being present? We think that he may, for two reasons:—

(1) The questions involved necessarily arise under the laws of the United States, and are essentially federal in their nature;

(2) The tribunal is one of the only class of courts upon whom congress has the power to confer jurisdiction.

A third reason is also suggested, viz. The United States is, necessarily, a *quasi* party to the action.

We will consider these questions in the order named.

**§ 748. The questions involved in the adverse suit necessarily arise under the laws of the United States, and are essentially federal in their nature.**—There is no necessity for either asserting or attempting to prove that the mere construction of an act of congress involves a federal question, in order to maintain that suits upon adverse claims necessarily arise under the laws of the United States, and, in a legal sense, involve their construction. In most actions concerning mining claims, the parties agree as to the proper rule of construction to be applied to the mining laws, and the controversies are usually limited to questions of fact relating to the compliance with these laws. In such cases the federal courts have no original jurisdiction, unless there is a diversity of citizenship;[1] but in cases arising under section twenty-three hundred and twenty-six of the Revised Statutes, the *authority* for the action is found in the legislation of congress. Without this authority the action for the purposes avowed by the statute could not be maintained

As was said by Justice Miller, sitting as circuit justice:—

"It is impossible that such an action as this can be determined without reference to, and involving a construction

[1] Trafton *v.* Nougues, 4 Saw. 178; Wise *v.* Nixon, 76 Fed. 3, and cases distinguished.

" of, the mining laws of congress. The question involved " necessarily arises under the laws of the United States, " and hence this court has original jurisdiction of the " subject-matter of the action."[1]

The late Judge Sawyer, in the case of Burke *v.* Bunker Hill & Sullivan M. Co.,[2] reached a similar conclusion. Said that judge:—

"It is claimed on one side, and denied on the other, " that the suit having been brought to determine the title " to a mining claim, in pursuance to the requirements of " section twenty-three hundred and twenty-six of the " Revised Statutes as amended in March, 1881, is for that " reason a suit arising under the laws of the United States " within the meaning of the statute giving jurisdiction on " that ground, irrespective of the character of the ques- " tions involved in the litigation. It seems to us that all " the authorities as they now stand have determined the " question in favor of the affirmative of this proposition. " . . . We therefore hold, upon these authorities, that " the record shows a case for national jurisdiction, as aris- " ing under the laws of the United States, for the reason, " that it was brought in pursuance of the requirements " of section twenty-three hundred and twenty-six as " amended, and, therefore, it is not within the decisions of " Trafton *v.* Nouges, 4 Saw. 178, and Water Co. *v.* Keyes, " 96 U. S. 199, and cases following those decisions."

This ruling was followed by Judge J. H. Beatty, sitting as circuit judge, district of Idaho.[3]

Judge Knowles, in the Montana circuit, had previously reached the same conclusions and practically on the same line of reasoning as that employed by Judge Sawyer.[4]

That Judge Hawley entertains similar views is manifest from a perusal of his opinion in the case of Wise *v.* Nixon.[5]

When we consult the decisions of the supreme court of the United States, we find nothing which militates against this doctrine.

[1] Frank G. & S. M. Co. *v.* Larimer, 8 Fed. 724.
[2] 46 Fed. 644.
[3] Rutter *v.* Shoshone M. Co., 75 Fed. 37.
[4] Strasburger *v.* Beecher, 44 Fed. 213.
[5] 76 Fed. 3.

In the case of Rutter *v.* Shoshone M. Co., *supra*, it was contended by counsel that the case of Bushnell *v.* Crooke M. & S. Co.,[1] negatived it, but, as clearly pointed out by Judge Beatty, no such question was involved. It did not appear upon the face of the record, and was raised for the first time by a petition for rehearing, after the state court of last resort had passed upon the merits of the appeal upon the record as presented and errors assigned.

Jackson *v.* Roby[2] was a case which came before the supreme court of the United States on writ of error to the circuit court for the district of Colorado. The action was in support of an adverse claim. As the appellate court determined the case upon its merits, it is fair to presume that it entertained no doubt of its jurisdiction.

In Chambers *v.* Harrington,[3] a case on appeal from the supreme court of Utah, Justice Miller said:—

"It is apparent that the statute requires a judicial pro-
"ceeding in a competent court. What is a competent
"court is not specifically stated, but it undoubtedly means
"a court of general jurisdiction, whether it be a state
"court or a federal court, and as . . . the rights are
"dependent upon the laws of the United States, we see
"no reason why, if the amount in controversy is sufficient
"in a case tried in a court of the United States, . . . the
"judgment may not be brought to this court for review."

With this array of authorities, it would seem unnecessary to cite additional reasons for the rule; but there are others which we think equally potent.

**§ 749. The federal courts are the only ones upon which congress can confer jurisdiction, or over whose procedure it may exercise legislative control.**—Congress cannot confer jurisdiction upon courts, but such as exist under the constitution and laws of the United States.[4] As was said by Justice Story in Martin *v.* Hunter's Lessee:[5]—

[1] 148 U. S. 682.
[2] 109 U. S. 440.
[3] 111 U. S. 350.
[4] Houston *v.* Moore, 5 Wheaton, 1.
[5] 1 Wheaton, 304. 331.

"Congress cannot vest any portion of the judicial power "of the United States, except in courts ordained and estab- "lished by itself. . . . It would therefore seem to follow "that congress is bound to create some inferior courts, in "which to vest all that jurisdiction which, under the consti- "tution, is exclusively vested in the United States, and of "which the supreme court cannot take original cognizance. "They might establish one or more inferior courts; they "might parcel out the jurisdiction among such courts, from "time to time, at their own pleasure; but the whole judicial "power of the United States should be at all times vested, "either in an original or appellate form, in some courts "created under its authority."

As an abstract proposition of law, this cannot be controverted. How does it aid us in the solution of the question under consideration?

When we consider that the act of congress is part of the system devised for the disposal of public lands, the administration of which system is for the most part confided to a special branch of the executive department; that the action required by section twenty-three hundred and twenty-six of the Revised Statutes is merely in aid of that department;[1] that the form of judgment required by the act of March 3, 1881, is so required for the purpose of advising the government as to whether or no it has been divested of its possessory right to the tract involved,[2] it is difficult to understand upon what principle the doors of the federal courts should be closed to the determination of these issues, and the parties be compelled to seek a tribunal which is in no sense under the control of congress, upon which congress cannot confer jurisdiction, and whose procedure congress is powerless to regulate.

Stating it broadly, what constitutional right has congress to say to ordinary state tribunals: "You alone must try "and determine the question as to which of these contest- "ing claimants has the exclusive right of possession to "this mining claim. When you have tried the issues,

[1] Perego *v.* Dodge, 163 U. S. 160.
[2] Strasburger *v.* Beecher, 44 Fed. 209, 214.

"you must enter a judgment, which will advise the "government which, if either, of the two parties has "complied with the federal mining laws. If neither has "so complied, your judgment must so state. Until your "judgment is rendered, the functions of the land depart- "ment shall stand suspended."

We do not contend that the state courts should decline jurisdiction or refuse to assist the government in the administration of the mining laws. The attitude of the states on this subject will be fully dealt with in a succeeding section; but what we object to is, the suggestion which has sometimes been urged that the federal courts may, under the circumstances, deny jurisdiction when a suit required by an act of congress to be brought in aid of the administration of federal laws is presented to them for their determination, assuming, of course, that the property involved is of the value requisite to confer jurisdiction.

One of the reasons assigned by the circuit courts for upholding federal jurisdiction in this class of actions is, that under the amendment of March 3, 1881, congress intended to refer not only the question of the rights of the parties as between themselves, but also without making the United States formally a party, to transfer the whole matter, as between the United States and the successful party, to the courts, thereby making the United States substantially, though not formally, party to the suit; and on that ground the United States is entitled to have its rights determined in the national courts:[1] but the United States is not a party to the proceedings in any sense.[2]

It is not in any sense bound by the judgment to issue the patent to the successful litigant. As was said by the circuit court of appeals, ninth circuit, speaking through Judge Knowles:—

[1] Judge Sawyer, in Burke *v.* Bunker Hill & Sullivan M. Co., 46 Fed. 644; Judge Knowles, in Strasburger *v.* Beecher, 44 Fed. 209, 214.

[2] Perego *v.* Dodge, 163 U. S. 160, 168; Last Chance M. Co. *v.* Tyler M. Co., 157 U. S. 683.

"The United States is not named as a party. No "authority is given by the statute to sue the United States "in such a matter. The application for a patent for mineral "lands is made to the land department of the United States. "Ultimately that department must determine the right "to the patent. The trial of the right to possession of a "given tract of land is a proceeding in aid of that depart- "ment. It was not intended that, when this issue was "presented to a court, it should operate as a transfer of the "whole case made by the application, and thereafter the "land department would have nothing to do but carry "into effect the judgment of the court."[1]

Whatever may be the correct doctrine in this regard, it is not necessary, in order to uphold the jurisdiction of the federal courts, to maintain that the United States is a *quasi* party to the action. If such were the true reason, it would necessarily follow that the federal courts would have exclusive jurisdiction.

It has been sufficiently demonstrated, that these courts acquire jurisdiction because the action arises under the laws of the United States, involves the interpretation of such laws, and such courts are the only ones over which congress may lawfully exercise legislative control.

§ 750. **The state courts.**— It logically follows from what has been said in the preceding article, that congress cannot compel state courts to entertain jurisdiction in any case: they are not "inferior courts" in the sense of the federal constitution: they are not ordained by congress. State courts are left to consult their duty from their own state authority and organization.[2]

"There are numerous acts of congress in which duties "have been imposed on state magistrates and courts, and "by which they have been invested with jurisdiction in "civil suits, . . . and it seems to be pretty generally "admitted that the state courts are not bound to exercise "jurisdiction, although given; but it was optional with

[1] Doe *v.* Waterloo M. Co., 70 Fed. 455, 462.

[2] Judge Thompson, in Stearns *v.* United States, 2 Paine, 300; 22 Fed. Cases, 1188.

" them to do it or not; and in some instances the state " courts have acted in those cases, and in some have " declined jurisdiction."[1]

In an early case decided by the supreme court of California, involving the naturalization of citizens by the state courts, it was urged that, although congress could not confer jurisdiction on a state so as to compel its exercise, yet it would be legitimate if the court was willing to accept it. Concerning this contention, the court, speaking through Judge Heydenfeldt, said:—

" This is to me a solecism. A court is a creation of the " constitution and laws under which it exists. To exercise " any power not derived from such constitution and laws " would necessarily be a usurpation. It is curious to say " congress has no authority to give this power to the court, " yet the court exercises this power by virtue of the author- " ity of congress."[2]

But ever since the first mining law of congress was passed, the state courts have been hearing and determining these cases, and assisting the land department in the administration of the mining laws. There never has been any question but what the ordinary state tribunals had jurisdiction to try actions involving the right of possession to mining claims, but whence this jurisdiction arises in cases connected with the patent proceedings has been the subject of discussion in controversies involving the nature of the pleading required and the character of the action.

It may be accepted as the established doctrine, that the act of congress under consideration does not confer any additional jurisdiction upon the state courts. The action to determine an adverse claim to unpatented mining claims is an action concerning real property. Such a mining claim is real estate,[3] and the jurisdiction to try controversies arising out of conflicting claims to real estate is

[1] Judge Thompson, in Stearns *v.* United States, 2 Paine, 300; 22 Fed. Cases, 1188.

[2] *Ex parte* Knowles, 5 Cal. 301, 302.

[3] *Ante*, § 539.

vested in the state courts by virtue of the state constitution.[1]

While, in discussing the nature and character of the action, the forms of pleadings, and questions of practice, many cases decided by the state courts may be encountered which would seem to refer to the act of congress as indicating the measure of the duty of the state tribunals, yet the principles above announced are, in the abstract, unquestionable.

There is no doubt but that the adverse claimant may select either forum, state or federal, provided that where the jurisdiction of the latter is invoked, the property in controversy exceeds in value the sum of two thousand dollars. Where the proceeding is instituted in the state court, the element of value existing, the defendant may cause its removal to the federal courts, under the removal acts of congress, *provided* it appears upon the face of the complaint that the action is one contemplated and required by the provisions of section twenty-three hundred and twenty-six of the Revised Statutes.[2]

## Article II. Character of the Action — Pleadings and Practice — Functions of the Land Department Pending the Action.

§ 754. Character of the action — At law or in equity — Pleadings.
§ 755. General rules of pleading.
§ 756. Time within which action must be commenced.
§ 757. Action when deemed commenced.
§ 758. Parties to the action.
§ 759. Functions of the land department, pending the action.

[1] 420 M. & M. Co. *v.* Bullion M. Co., 9 Nev. 240-248; Golden Fleece M. Co. *v.* Cable Cons. M. Co., 12 Nev. 312, 321; Iba *v.* Central Association, 42 Pac. (Wyo.) 20; Altoona Q. M. Co. *v.* Integral M. Co., 114 Cal. 100; Quigley *v.* Gillett, 101 Cal. 462.

[2] Tennessee *v.* Union & P. Bank, 152 U. S. 454; Chappell *v.* Waterworth, 155 U. S. 102; Postal Telegraph C. Co. *v.* Alabama, 155 U. S. 482; East Lake Land Co. *v.* Brown, 155 U. S. 488; Wabash R. Co. *v.* Barbour, 73 Fed. 513; State of Florida *v.* Charlotte Harbor Phosphate Co., 74 Fed. 578; Wise *v.* Nixon, 76 Fed. 3.

§ 754. **Character of the action—At law or in equity—Pleadings.**—The supreme court of the United States characterizes the action as one brought under a special statute of the United States in support of an adverse claim.[1]

The proceedings in the case are commenced in the land office by the assertion of the defendant's claim to have a patent issue to him for the land in controversy. The next step is the filing of the adverse claim by the plaintiff in that office, and the suit is but a *continuation* of those proceedings.[2]

In the language of Judge Ross:—

"The proceedings here in question are purely statutory, "and they had their inception not in the court in which "the suits were commenced, but in the land office."[3]

The object of the action is not to determine the title to real estate, because the fee resides in the government. The true question for decision is, which of the contending parties has complied with the requirements of the law and is prior in time.[4]

The object of the proceeding is not only to settle the controversy as between the claimants, but is also for the information of the officers of the land department of the general government.

"It is not enough that one party should show the "better or superior title as against the other claimants, "but one party must show clearly, as against the govern-"ment, the right to a patent for the disputed ground, or "some part thereof, before either claimant can prevail in "the action."[5]

Whatever may be said of the nature of the action when presented to the state courts, in the federal courts it

[1] Bennett *v.* Harkrader, 158 U. S. 441, 447.

[2] Wolverton *v.* Nichols, 119 U. S. 485, 488.

[3] Doe *v.* Waterloo M. Co., 43 Fed. 219. See, also, Gird *v.* California Oil Co., 60 Fed. 531, 533; Rutter *v.* Shoshone M. Co., 75 Fed. 37.

[4] Funk *v.* Sterrett, 59 Cal. 613, 615.

[5] Rosenthal *v.* Ives, 2 Idaho, 241; Jackson *v.* Roby, 109 U. S. 440; Lee Doon *v.* Tesh, 68 Cal. 43; McGinnis *v.* Egbert, 8 Colo. 41; Schultz *v.* Allyn (Ariz.), 48 Pac. 960.

unquestionably is of an equitable nature. It may be classified as an action to quiet title, and as such is cognizable in equity.

"The suit is brought for special relief, and the judgment "entered is such as a court exercising jurisdiction in equity "alone could render."[1]

Where the action is brought in the federal court, and the jurisdiction is asserted on the ground that it arises under the laws of the United States, the pleading of the plaintiff must necessarily state all the facts from which the court may conclude that it is a proper case for federal cognizance. Therefore, upon the face of the pleading, the character of the action is necessarily disclosed to be one of an equitable nature.

In the state courts, however, while the usual practice is to frame a complaint with the same allegations required in the federal court, the action may assume the form of one in ejectment, or one to quiet title, as the plaintiff may be in or out of possession, and the statutes of the state may deny a right of action to quiet title to one out of possession.

As was said by the supreme court of the United States:—

"The determination of the right of possession as between "the parties, is referred to a court of competent jurisdic- "tion in aid of the land office; but the form of the action "is not provided for by the statute, and apparently an "action at law or a suit in equity will lie, as either might "appropriately be under the particular circumstances, an "action to recover possession when plaintiff is out of "possession, and a suit to quiet title when he is in pos- "session."[2]

When the action is in the form of ejectment, a jury may be demanded. When it is brought to determine the adverse claim, with no prayer for a restoration of a lost possession, the action is purely equitable, and for the

[1] Hammer *v.* Garfield M. & M. Co., 130 U. S. 291, 296; Doe *v.* Waterloo M. Co., 43 Fed. 219, 221; Rutter *v.* Shoshone M. Co., 75 Fed. 37.

[2] Perego *v.* Dodge, 163 U. S. 160, 165.

purpose of determining special issues a jury may be called in or not, in the discretion of the court.

The term "proceedings," which are required by section twenty-three hundred and twenty-six of the Revised Statutes to be commenced within thirty days, was no doubt used to enable a party to institute such proceedings under the different forms of action allowed by the state and federal courts.[1]

The attitude of the several states upon the character of the action may be gleaned from a review of their decisions upon questions of pleadings and practice, illustrating the difference between rules applied to ordinary actions and those which are confessedly brought under the provisions of section twenty-three hundred and twenty-six. To ascertain the views of each state, or such of them as have dealt with the questions of the relationship of the state courts as tribunals auxiliary to the land department in the patent proceeding, we may epitomize the decisions, dealing with each state separately.

*California.*—

In ordinary actions concerning real estate, a general allegation of ownership is all that is required.[2]

Mining claims are real estate, and the rule applies to actions concerning them.[3]

For example: In an action for trespass upon a mining claim, the plaintiff need not allege citizenship;[4] nor is it required in an action to erect a trust as to such a claim.[5]

But in actions which appear upon the face of the pleadings to be prosecuted for the purpose of determining the

[1] M. & M. Co. *v.* Bullion M. Co., 3 Saw. 634; Chambers *v.* Harrington, 111 U. S. 350; Mattingly *v.* Lewisohn, 8 Mont. 259; Cronin *v.* Bear Creek M. Co., 32 Pac. (Idaho), 204; Golden Fleece G. & S. M. Co. *v.* Cable Cons. M. Co., 12 Nev. 312; Mars *v.* Oro Fino M. Co. (S. Dak.), 65 N. W. Rep. 19.

[2] Souter *v.* Maguire, 78 Cal. 543; Rough *v.* Simmons, 65 Cal. 227; Castro *v.* Barry, 79 Cal. 443.

[3] Harris *v.* Kellogg (Cal.), 49 Pac. 708.

[4] Lee Doon *v.* Tesh, 68 Cal. 44; Thompson *v.* Spray, 72 Cal. 528; Harris *v.* Kellogg (Cal.), 49 Pac. 708.

[5] Moritz *v.* Lavelle, 77 Cal. 10.

adverse claim under section twenty-three hundred and twenty-six of the Revised Statutes, it has been held that the qualification of the applicant to receive the patent, *i. e.* his citizenship, must be averred.[1]

In the case of Anthony *v.* Jillson,[2] the supreme court, in what it styled an action to determine the right to patent to certain placer mining ground, held that in this class of actions each of the parties litigant must state in his pleadings all the facts upon which he relies as showing his right to become a purchaser, and the steps he has taken to avail himself of and secure his right to the patent.

In the later case of Altoona Q. M. Co. *v.* Integral Q. M. Co.,[3] an action was brought to determine an adverse claim, the pleading setting forth the filing of a patent application by defendant in the local land office and the proceedings had thereon and the filing of an adverse claim therein by the plaintiff. The suit was manifestly instituted in support of the adverse claim, asserted in the land office, but the appellate court styles the action as one to quiet title, specifically announcing that it was not an action brought under section twenty-three hundred and twenty-six of the Revised Statutes. We apprehend that the court intended to convey the idea, that as the state courts had no concern with the proceedings in the land office, the allegations concerning them were mere surplusage, irrelevant, and redundant matter, and that it was compelled to consider the action as an ordinary one to quiet title, to be tried and decided by the ordinary rules governing this class of cases. The court ruled that citizenship need not be averred. As to the form of the judgment, it was further held that the state courts were not concerned with the question as to whether the judgment could be made available in the land office or not.

If we correctly interpret this decision, it is manifest that all that is required in this state in actions instituted by an adverse claimant in support of his adverse claim filed in the land office is, to file his complaint alleging his

[1] Lee Doon *v.* Tesh, 68 Cal. 43.
[2] 83 Cal. 296.
[3] 114 Cal. 100.

ownership and right of possession, making no reference whatever to the antecedent proceedings in the land office. The defendant and patent applicant may answer simply by a general denial of the plaintiff's title. As to the form of judgment, the court in the Altoona case intimates that the trial judge is at liberty to order a special verdict, if that was desired by the parties, because it would be more serviceable in the contest; but this is a matter of discretion, and cannot be demanded as a right. The uniform practice for years in this state, however, has been, to set forth in the pleadings the pendency of the patent proceedings.

*Colorado.*—

In ordinary actions the general averment of ownership is sufficient,[1] and the defendant may prove title by valid prior location under a general denial of plaintiff's ownership.[2]

Actions of the character required by section twenty-three hundred and twenty-six of the Revised Statutes are purely statutory,[3] and the proceedings must be conducted in accordance with the statute which authorizes them.[4]

As the proceedings in the land office form the basis of the action, they should be alleged.[5]

The decisions of the courts in this state fully recognize that the action, while being essentially an action to quiet title, is based upon the laws of congress. The proceedings in the land office are set forth in the pleadings showing the filing of the patent application, the commencement of the period of publication, and the filing of the adverse claim within that period. The qualification of contending parties to receive a patent must also be shown.[6]

[1] McFeters *v.* Pierson, 15 Colo. 201; Jackson *v.* Dines, 13 Colo. 90; Keeler *v.* Trueman, 15 Colo. 143.

[2] See Adams *v.* Crawford, 116 Cal. 495.

[3] Keeler *v.* Trueman, 15 Colo. 143.

[4] McGinnis *v.* Egbert, 8 Colo. 41; Manning *v.* Strehlow, 11 Colo. 451.

[5] Marshall *v.* Kirtley, 12 Colo. 410, 416.

[6] Michael *v.* Mills, 22 Colo. 439; Jackson *v.* Dines, 13 Colo. 90; Keeler *v.* Trueman, 15 Colo. 145.

It seems to be generally assumed, that the courts may take cognizance of the action, as one required to be brought in the state tribunals, and the practice is molded so as to fulfill the manifest objects contemplated by the federal law.

*Idaho.*—

In ordinary actions the courts of this state seem to require the qualification, *i. e.* the citizenship of the litigants, to be pleaded,[1] as well as in the proceeding instituted upon the adverse claim filed in the land office.[2]

As to pleadings in actions brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, the supreme court, in Burke *v.* McDonald,[3] approved the rule laid down by the supreme court of California in Anthony *v.* Jillson,[4] and the Montana case of Mattingly *v.* Lewisohn.[5]

*Montana.*—

It was at one time held in this state, that in all actions concerning mining claims it was necessary to allege discovery, location, marking of boundaries, citizenship, and such other facts from which the court might deduce the right of plaintiff to maintain the action;[6] but recently the doctrine as to ordinary actions has been materially modified, and the rule announced that, unless the action be one in support of the adverse claim filed in the patent proceeding, general allegations of ownership are sufficient.[7]

The action upon the adverse claim is characterized as a statutory one, intended to be brought under section twenty-three hundred and twenty-six of the Revised Statutes. This appears, necessarily, from the allegation concerning the filing of the patent application and its pendency in the land office; otherwise these allegations are without force or meaning.

[1] Bohanon *v.* Howe, 2 Idaho, 417.
[2] Rosenthal *v.* Ives, 2 Idaho, 244.
[3] 2 Idaho, 646.
[4] 83 Cal. 296.
[5] 8 Mont. 259.
[6] Ducie *v.* Ford, 8 Mont. 233, 241.
[7] McKay *v.* McDougal (Mont.), 48 Pac. 988.

A complaint based upon such an adverse claim would be insufficient without such allegations.

"We are confirmed in this view," said the supreme court, "for the additional reason, that a contrary practice "to the one here laid down would or might lead to a con- "flict of action between the officers of the land department "and the courts in suits of this character. The law makes "it the duty of the agents of the land department to stay "proceedings on an application for a mineral patent only "when an adverse claim is filed within sixty days of the "publication of notice of application for patent; and when "this is not done, the agents of the department would "doubtless consider it their duty to issue the patent to the "applicant."[1]

*Nevada.*—

According to the decisions in Nevada, the acts of congress do not attempt to confer any jurisdiction not already possessed by the state courts, nor to prescribe a different form of action. If the parties protesting are in possession of the ground in dispute, they can bring their action to quiet title; or if they have been ousted from the possession, they could bring their action of ejectment; and in either action "the right of possession" to such claim could be finally settled and determined. When an action is brought, whatever may be its character, it must be tried by the same rules, governed by the same principles, and controlled by the same statutes that apply to such actions in our state courts, irrespective of the acts of congress.[2]

As to this state, it may be noted that in February, 1873, the legislature passed the following act:—

"In all actions brought to determine the right of pos- "session to a mining claim or metalliferous vein, or lode, "where an application has been made to the proper officers "of the government of the United States by either of the "parties to such action for a patent for said mining claim,

[1] Mattingly *v.* Lewisohn, 8 Mont. 259; doctrine approved: McKay *v.* McDougal (Mont.), 48 Pac. 988.

[2] 42) M. Co. *v.* Bullion M. Co., 9 Nev. 240, 248; Golden Fleece M. Co. *v.* Cable Cons. M. Co., 12 Nev. 312, 321.

" vein, or lode, it shall only be necessary to confer juris-
" diction on the court to try said action and render a proper
" judgment therein, that it appear that an application for
" a patent for such mining claim, vein, or lode, has been
" made, and that the parties to said action are claiming
" such mining claim, vein, or lode, or some part thereof, or
" the right of possession thereof."[1]

*South Dakota.*—

In this state the inclination of the judiciary is manifestly to mold its practice to conform to the requirements of the federal law as to the commencement and prosecution of the action.[2]

*Wyoming.*—

" Enforcing the provisions of the act of congress, they
" are adopted for the time being by our courts with the
" same force, and no more, as if they were part and parcel
" of our own statute."[3]

**§ 755. General rules of pleading.**— While it may not be possible for us to formulate a rule of pleading in actions of the character under consideration which will be acceptable to all the courts of all the states, we may, we think, approximate it. In making the attempt, " we must keep
" the main purpose of the action in view."[4]

While the doctrine of the supreme court of California announced in the case of Altoona Q. M. Co. *v.* Integral Q. M. Co.,[5] heretofore referred to, may be technically correct, the state courts have unquestioned jurisdiction to determine the principal issues which are necessarily framed in such an action. While congress may not dictate to the state courts upon questions of pleadings and practice, or insist that their judgment shall be in one form or another, these courts having jurisdiction ought, by such judgments, to afford to the parties litigant the utmost measure of relief consistent with the issues, enabling them to

[1] Comp. Laws of Nevada, § 1674.
[2] Mars M. Co. *v.* Oro Fino M. Co. (S. Dak.), 65 N. W. Rep. 19.
[3] Iba *v.* Central Assn. of Wyoming, 42 Pac. 20.
[4] Wolverton *v.* Nichols, 119 U. S. 485, 488. [5] 114 Cal. 100.

obtain an adjudication in such form as will secure to them all possible benefits.

While the action in the main may in the state courts be ejectment or to quiet title, it should in some way be earmarked, and its connection with the land department proceeding shown.

That department will not be controlled by judicial proceedings instituted outside of the sanction of section twenty-three hundred and twenty-six of the Revised Statutes, nor will a judgment rendered in an ordinary action, by which we mean one wholly disconnected with the patent proceeding, be considered as aiding the department.[1]

Strictly speaking, so far as the state courts are concerned, the action may not be deemed a continuation of the land office proceedings. Yet the recital of the facts of their commencement and pendency, in connection with the allegation of the plaintiff's qualification and performance of the requirements of the federal laws, as to discovery, location, and other facts showing a valid subsisting mining claim, would necessarily characterize the action as one involving adverse claims to real estate. One may either, in an ordinary action of ejectment or to quiet title, plead the source and history of his title, and in the latter class of actions may plead the facts constituting a cloud upon such title, without the pleadings being open to any serious objection.

It may be safely accepted as a rule, that the pleading of the adverse claimant should allege:—

(1) His qualification to receive a patent, *i. e.* citizenship;

(2) Facts showing the discovery, perfection of the location in accordance with the laws, federal and state, and performance of annual labor, from which facts the legal inference must necessarily be drawn that the claim is a valid and subsisting one;

(3) The assertion of the defendant of a hostile right and

[1] 420 M. Co. *v.* Bullion M. Co., 2 Copp's L. O. 5; Seymour *v.* Wood, 4 Copp's L. O. 2; Nichols *v.* Becker, 11 L. D. 8; Cain *v.* Addenda M. Co., 24 L. D. 18, 20.

the commencement by him of the proceedings in the land office to obtain a patent;

(4) The publication of the patent application and the date when the publication period commenced;

(5) The filing of the adverse claim in the land office by the plaintiff, showing the boundaries and extent of the conflict and the date of such filing.

On the part of the patent applicant, he would be called upon to traverse so much of his adversary's pleading as tended to establish a *prima facie* right of possession in the plaintiff. In addition to this, as the title of each party is brought in question and each party must make proof,[1] the defendant should be called upon to state the origin of his rights, the facts from which the court might infer the ownership in him of a valid and subsisting location, and his qualification to receive the patent.

From these pleadings so framed, the real questions at issue are easily determined.

This form of pleadings is unquestionably required in the federal courts. So it is in all the states, except perhaps in California, where, since the decision in the Altoona-Integral case, heretofore referred to, the question is being debated. Prior to that decision, the uniform practice in that state has been in accordance with the rule followed in other states, and in the latest case decided in California an intimation is given that the general rule applicable to this class of actions should be recognized.[2]

The reason and force of this rule as to pleadings will be readily recognized when we come to consider the form of the judgment required in the action.[3]

[1] Bay State S. M. Co. *v.* Brown, 10 Saw. 243; Manning *v.* Strehlow, 11 Colo. 451; McGinnis *v.* Egbert, 8 Colo. 41; Becker *v.* Pugh, 9 Colo. 589, 18 Colo. 243; Kendall *v.* San Juan, 9 Colo. 349; Gwillim *v.* Donnellan, 115 U. S. 45; Rosenthal *v.* Ives, 2 Idaho, 244; Golden Fleece M. Co. *v.* Cable Cons. M. Co., 12 Nev. 312; Jackson *v.* Roby, 109 U. S. 440; Anthony *v.* Jillson, 83 Cal. 226; Burke *v.* McDonald, 2 Idaho, 646; Gird *v.* California Oil Co., 60 Fed. 531; Girard *v.* Carson, 22 Colo. 345; Seymour *v.* Fisher, 16 Colo. 188; Armstrong *v.* Lower, 6 Colo. 393; Funk *v.* Sterrett, 59 Cal. 613.

[2] Harris *v.* Kellogg (Cal.), 49 Pac. 708.

[3] *Post*, § 763.

§ 756. **Time within which action must be commenced.** —The statute requires the proceeding to be commenced within thirty days after filing the adverse claim. The rule for computing the period is the same as applied to filing the adverse claim; that is, the first day is excluded, and if the last day falls on a Sunday or holiday the proceeding must be commenced on the next business day.

This time may not be extended by the act of the parties, nor can the state enlarge it by its statutes.

"There is no exception as to the claimant who may be "beyond the seas, or under disability of any kind, or who "may fail to act from inadvertence or other cause. The "suit must be brought within the time specified."[1]

The provisions of the federal statute in this regard are mandatory. The claimant must see to it that the proceedings are actually commenced within the period. If he intrusts that duty to some one else who fails, the land department cannot redress the wrong or revive the remedy.[2]

It has no authority to waive the requirement.[3]

The adverse claimant is limited to the one action.[4]

Proceedings instituted after the lapse of the thirty-day period will not be considered by the department.[5]

§ 757. **Action when deemed commenced.**—As to when the action or proceeding is deemed to be commenced, will depend entirely upon the laws governing practice in the tribunal whose jurisdiction is invoked.

Where, as in New Mexico, an action is commenced by filing a declaration, it is not necessary that process should either issue or be served within the thirty-day period.[6]

In some states the statute on the subject provides that actions shall be commenced by filing a complaint and

[1] Steves v. Carson, 42 Fed. 821.
[2] Pride of the West Mine, 4 Copp's L. O. 34.
[3] Downey v. Rogers, 2 L. D. 707.
[4] Copp's Min. Dec. 126.
[5] Nettie Lode v. Texas Lode, 14 L. D. 189; Seymour v. Wood, 4 Copp's L. O. 2; Pelican Lode, Copp's Min. Dec. 126; Wood v. Hyde, 1 Copp's L. O. 66.
[6] De Garcia v. Eaton, 22 L. D. 16.

issuance of summons. In such cases, unless process is issued within the thirty-day period, the action is not commenced.[1]

In South Dakota the statute provides that actions can only be commenced by the service of summons. An attempt to commence an action is deemed equivalent to the commencement thereof when the summons is delivered, with the intent that it shall be actually served, to the sheriff or other officer of the county in which the defendants or one of them usually or last resided; but such attempt must be followed by the first publication or actual service within sixty days. In a case where no valid service was attempted for more than a year, it was held that the proceeding was not commenced within the time required by law.[2]

**§ 758. Parties to the action.**— The only proper parties to the suit are the adverse claimant and the applicant. Only those who have filed their adverse claims with the land office have any standing in court as parties plaintiff,[3] if we accept the doctrine that the cause of action arises out of the patent proceeding, and unquestionably this is the rule prevailing in the federal courts and in practically all of the state courts.

If the primary object of the suit is to test the right of an individual to a patent, there is but one method of initiating the attack and that is, by filing the adverse claim. The only one attacked is the one who makes the application for the patent; consequently it would be improper to join in the action parties who do not assert in the land office a right to enter the land.

Third parties may appear as volunteers or protestants before the land officers, and invite attention to the failure of one or the other or both of the contending parties without having the status of adverse claimants.

A case may be instanced. The pendency of patent

[1] Harriet M. Co. *v.* Phœnix M. Co., 9 Copp's L. O. 165.
[2] Mars M. Co. *v.* Oro Fino M. Co. (S. Dak.), 65 N. W. Rep. 19.
[3] Mont Blanc Cons. G. M. Co. *v.* Debour, 61 Cal. 364.

proceedings or a suit in support of an adverse claim does not dispense with the necessity of performing the annual labor,[1] and the ground in controversy may become subject to relocation before the proceedings in court are ultimately determined. If, under such circumstances, the claim is relocated, the relocator would not be entitled to intervene in the adverse proceeding.

His remedy is limited to a protest before the department, asserting the failure of the two contending parties to comply with the law as to annual labor since the filing of the adverse claim and the commencement of the action therein. A hearing would then be ordered, both applicant and adverse claimant would be cited to appear, the merits of the protest would be tried by the land department, and if the protestant's allegations are substantiated, both the patent application and the adverse claim would be dismissed.[2]

This must be the correct rule; otherwise the patent applicant and the adverse claimant would be practically excused from perpetuating their asserted rights by annual representation, and the ground would not be subject to relocation so long as the controversy in the courts remained undetermined. When they were determined, patent might issue to the successful claimant. True, the relocator may then protest, but if a protest is available to him at that time, why may he not proceed as soon as his relocation is perfected? The decision in the adverse claimant's suit could not affect the relocator's rights favorably or unfavorably; not being a party to the action, he could not be concluded by the judgment.

Where more than one adverse claim is filed, while technically speaking each adverse claimant must institute a separate suit, the actions, if all pending in one tribunal, should be consolidated, unless the law of the forum inhibits

[1] *Ante*, § 652.

[2] Higgins *v.* John G. M. Co., 14 Copp's L. O. 28; Steel *v.* Gold Lead M. Co., 18 Nev. 80, 88; *In re* Wildman Quartz Mine, Sickles' Min. Dec. 253; Wight *v.* Dubois, 21 Fed. 685, 686.

this practice. Where one action is pending in a state and another in a federal court, all parties should be brought into one or the other of the cases. This would be necessary to enable the court to determine which, if any, of the contending parties were entitled to apply for patent. All parties are actors, and their presence is necessary to a complete determination of the issues.[1]

**§ 759. Functions of the land department pending the action.**— As heretofore noted,[2] the filing of the adverse claim suspends the powers of the land department, except for certain limited purposes. Should no action in support of the claim be commenced within the thirty-day period, it is deemed waived, and the register and receiver may proceed as if no adverse claim had ever been filed.

Formerly the adverse claimant was required to give the land officers proper notice of the commencement of the action, otherwise it was presumed that the claim was waived;[3] but the existing regulations require that, before resuming control over the proceeding, after the filing of the adverse claim, where no suit has been commenced against the applicant for patent, such applicant must present a certificate to that effect from the clerk of the state court having jurisdiction in this class of cases, and also one from the clerk of the United States circuit court for the district in which the claim is situated.[4]

This is upon the theory that the adverse claimant may select either tribunal.[5]

[1] Antelope Lode, 2 Copp's L. O. 2, 5.

[2] *Ante*, § 741.

[3] Beatty and Clements, 2 Copp's L. O. 82; Circ. Instructions, 9 Copp's L. O. 148; Halsey *v.* Hewitt, 5 Copp's L. O. 162.

[4] Gen. Min. Reg., par. 92.

[5] It is the practice in some of the land districts, if not in all, to require in all cases a certificate from the clerk of the state court that no action is pending involving the tract applied for. In the absence of the filing of an adverse claim, we cannot see the necessity for this certificate, unless the application is prosecuted under section twenty-three hundred and thirty-two of the Revised Statutes, when such certificate must be presented under paragraph 72 of the "General Mining Regulations." (*Ante*, § 688.)

The department claims the right to determine for itself the question of fact in each case as to whether or not the action has been commenced within the statutory period;[1] but when an action has been commenced, and the controversy arises in the court where the action is pending as to whether it was commenced in time or not, the determination of this fact will be left to the court, and the department will decline to proceed until the matter is there disposed of.[2]

The adverse claimant is required to prosecute his action with due diligence. As to what constitutes such diligence, must be determined by the court before whom the action is pending. The question of diligence in the prosecution of a pending suit is as much a question for the determination of the court as any other question of law or fact which may arise in the progress of the case.[3] The department will not undertake to adjudicate it. The patent applicant must apply to the court to dismiss the action for failure to prosecute it with proper diligence, and come into the land office with a judgment of dismissal.

Such a judgment is accepted as establishing an abandonment or waiver of the adverse claim.

The action once commenced, the stay of proceedings in the land office, which became effectual upon the filing of the adverse claim, is prolonged and continued in force until the controversy shall have been settled or decided by the court. Until the decision of that tribunal is obtained, the function of the land department remains suspended.[4]

Where more than one action has been commenced, based

[1] Catron *v.* Lewisohn, 23 L. D. 20.

[2] *Id.*

[3] Iowa M. Co. *v.* Bonanza M. Co., 6 Copp's L. O. 75.

[4] Last Chance M. Co. *v.* Tyler M. Co., 157 U. S. 683, 693; Richmond M. Co. *v.* Rose, 114 U. S. 576, 585; Deno *v.* Griffin, 20 Nev. 249; *In re* Clipper M. Co., 22 L. D. 527; *In re* Little Giant Lode, *Id.* 628; Jamie Lee Lode *v.* Little Forepaugh, 11 L. D. 391; Swaim *v.* Craven, 12 L. D. 294; Iowa M. Co. *v.* Bonanza, 6 Copp's L. O. 75; Robinson *v.* Mayger, 1 L. D. 538; Iola Lode Case, *Id.* 539; Ovens *v.* Stephens, 2 L. D. 669; Meyer *v.* Hyman, 7 L. D. 83.

upon separate adverse claims, the department awaits a judgment which will determine the rights of all the parties.[1]

All acts of the department performed, or attempted to be performed, while a suit is pending, are null and void.[2]

This rule is subject to one qualification: Where, pending litigation, both applicant and adverse claimant fail to comply with the law as to annual representation, a relocator may set in motion the machinery of the department and secure the dismissal of both the application and the adverse claim. We have discussed this subject in a previous section.[3]

After an adverse claim is filed and the adverse claimant institutes his proceeding in the courts, no act of the applicant can deprive his adversary of the right of prosecuting the action to a final determination. A dismissal of the patent application, or an abandonment of the proceedings by the applicant as to the area in conflict, will not authorize the land officers to resume control of the proceedings.

"The adverse claim is the claim made by the party "opposing the application, and the party to waive a claim "is the one who makes it. The obvious meaning is, that "when an adverse claim is filed, that is, a claim filed by "some one opposing the application in whole or in part, "the proceedings in the land office shall be stayed until "the determination of the dispute by the court in which "the action is brought, or the party who has presented "such adverse claim shall, in some way, have waived his "opposition to the application."[4]

## Article III. The Judgment and its Effect.

§ 763. Form of judgment.
§ 764. When judgment becomes available in the land office.
§ 765. Effect of the judgment.
§ 766. Adverse claim — How waived.

[1] Black Queen Lode *v.* Excelsior No. 1 Lode, 22 L. D. 343.

[2] Richmond M. Co. *v.* Rose, 114 U. S. 576, 585; McEvoy *v.* Hyman, 25 Fed. 539.

[3] *Ante*, § 679.

[4] Last Chance M. Co. *v.* Tyler, 157 U. S. 683, 695; Richmond M. Co. *v.* Rose, 114 U. S. 576; Jamie Lee Lode v. Little Forepaugh Lode, 11 L. D. 391, 396.

§ 763. **Form of judgment.** — The supreme court of Idaho is of the opinion, that since the act of March 3, 1881, it is necessary that the decision, whether by the court or jury, must show not only that the successful party is entitled to the possession as against his opponent, but also against all others, including the government, and by compliance with all the laws applicable.

"The government is interested in knowing, before issu-
"ing its patent to a party, that he is a citizen, that he has
"discovered a vein, that he has performed the develop-
"ment work, that he has complied with the law."[1]

The court takes the view that where the action is tried by a jury there must be a special verdict. This necessarily implies that when the case is tried by the court there must be a special finding on all facts necessary to show the qualification of the successful party and his compliance with the law.

This accords with a previous ruling by the same court[2] and with the doctrine prevailing in Colorado,[3] which is sanctioned, inferentially at least, by the supreme court of the United States.[4] As was said by that court:—

"The manifest object of the act was to provide for an
"adjudication that neither party was entitled to the prop-
"erty, so that the applicant could not go forward with the
"proceedings in the land office simply because the adverse
"claimant had failed to make out his case, if he had also
"failed."[5]

In the ordinary action of ejectment a defendant may rely upon the weakness of plaintiff's title; but in the proceeding contemplated by the Revised Statutes, in the light of the amendment of March 3, 1881, both parties are regarded as actors,[6] and some of the rules pertaining to

[1] Burke *v.* McDonald, 2 Idaho, 646.
[2] Rosenthal *v.* Ives, 2 Idaho, 244.
[3] McGinnis *v.* Egbert, 8 Colo. 41; Manning *v.* Strehlow, 11 Colo. 451, 455; Thomas *v.* Chisholm, 13 Colo. 105.
[4] Gwillim *v.* Donnellan, 115 U. S. 45, 50.
[5] Perego *v.* Dodge, 163 U. S. 160, 167.
[6] Gwillim *v.* Donnellan, 115 U. S. 45, 50; Thomas *v.* Chisholm, 13 Colo. 105; Jantzen *v.* Arizona Copper Co., 20 Pac. 93.

ordinary actions are necessarily modified in the trial of such causes.[1]

**§ 764. When judgment becomes available in the land office.**—The judgment referred to in the statutes must necessarily be a final judgment. Secretary Teller was of the opinion, that the successful litigant need not wait for the time to appeal to elapse, but that unless the defeated party perfected an appeal so as to secure a stay of proceedings in the trial court, the one in whose favor judgment was rendered might file his judgment roll in the land office, and that tribunal would thereupon resume jurisdiction for the purpose of disposing of the land involved, notwithstanding the fact that the right of appeal still existed.[2]

Strictly speaking, an action is deemed pending until the time for appeal has passed. In some states this rule is declared by statute. Where such rule prevails, the judgment during this period is not admissible in another case as evidence, even between the same parties,[3] upon the theory that the estoppel is not complete until the period for appeal elapses.

If this rule is to be strictly enforced in this class of actions, so as to prevent the judgment from being utilized in the land office during this period, it enables one against whom the judgment is entered to avoid its force for a considerable time by simply doing nothing.

In none of the states will the prevailing party be prevented from availing himself of an ordinary judgment by the issuance of final process, unless the defeated party perfects his appeal and stays proceedings by giving the necessary bond. Unless such proceedings are thus stayed, it is possible, reasoning from analogy, that the successful

[1] Becker *v.* Pugh, 9 Colo. 589, 593; Manning *v.* Strehlow, 11 Colo. 451.

[2] Noonan *v.* Caledonian G. M. Co., 10 Copp's L. O. 167. (Application for patent filed by successful adverse claimant prior to the lapse of the period allowed for appeal.)

[3] Harris *v.* Barnhart, 97 Cal. 546, 550; Naftger *v.* Gregg, 89 Cal. 83, 88; Estate of Blythe, *Id.* 472; Brown *v.* Campbell, 100 Cal. 635, 647.

litigant may be permitted to present his judgment roll to the land department and thereafter proceed to avail himself of the fruits of his litigation. When such a stay is effected according to the rules of practice governing the tribunal where the action is tried, the land department would be compelled to abide the event of the appeal. Otherwise the appellant would, for all practical purposes, be denied the right of appeal. But where no such stay is effected, the question is not free from embarrassment. So long as the right of appeal exists, the courts cannot be said to have lost jurisdiction. So long as the courts retain jurisdiction, the powers of the land department are suspended. Where a patent is issued after a judgment by the trial court and before the time for appeal has passed, its operative force may be destroyed should the judgment be ultimately reversed, even if the department did not absolutely exceed its jurisdiction. The applicant would proceed to patent at his peril. The mere statement of this proposition involves the suggestion of lack of jurisdiction. The only safe doctrine is to consider a judgment as final only after the time to appeal has passed.

§ 765. **Effect of the judgment.**— Section twenty-three hundred and twenty-six further provides:—

"After such judgment shall have been rendered, the "party entitled to the possession of the claim, or any por- "tion thereof, may, without giving further notice, file a "certified copy of the judgment roll with the register of "the land office, together with the certificate of the sur- "veyor-general that the requisite amount of labor has been "expended or improvements made thereon, and the "description required in other cases, and shall pay to "the receiver five dollars per acre for his claim, together "with the proper fees; whereupon the whole proceedings "and the judgment roll shall be certified by the register "to the commissioner of the general land office, and a "patent shall issue thereon for the claim, or such portion "thereof as the applicant shall appear, from the decision "of the court, to rightly possess. If it appears from the "decision of the court that several parties are entitled to

" separate and different portions of the claim, each party " may pay for his portion of the claim with the proper " fees, and file the certificate and description by the sur- " veyor-general; whereupon the register shall certify the " proceedings and judgment roll to the commissioner of " the general land office, as in the preceding case, and " patents shall issue to the several parties according to " their respective rights."

The trial of the action may result in one of three judgments: (*a*) in favor of plaintiff, the adverse claimant; (*b*) in favor of the defendant, the patent applicant, and (*c*) adjudging that neither party has complied with the law.

Where the judgment is, that neither party has established a right of possession, the presentation of the judgment roll to the land department effectually terminates the proceeding. It has performed its office. The land officers will not undertake to retry the issues submitted to the court; nor is the land department in any sense an appellate tribunal. It accepts the judgment as concluding the present right of both contending parties.[1] The withdrawal of the land affected by the filing of the application[2] is removed, and the tract in controversy becomes subject to new applications.

Where the judgment is in favor of the applicant for the entire area in conflict, the usual result following it is the issue of the patent in due time; but in such case the final passing of the title is not on the judgment of the court independent of that of the commissioner of the general land office, but is on the judgment of the latter pursuant to that of the former, and on certain evidence supplemental to that furnished by the judgment roll.[3]

The department does not undertake to try the merits of the adverse claim. By the judgment the adverse claimant is eliminated out of the proceeding,[4] and the land officers confine themselves to investigating the proofs presented by

[1] Newman *v.* Barnes, 23 L. D. 257.
[2] *Ante*, § 679.
[3] *In re* Alice Placer Mine, 4 L. D. 314.
[4] Evans *v.* Rendall, 3 Copp's L. O. 2; *In re* Taylor, 9 Copp's L. O. 92.

the applicant. Thenceforward the proceeding is one exclusively between the applicant and the government.

Notwithstanding the judgment of the court on the question of the right of possession, it still remains for the land department to pass upon the sufficiency of the proofs, to ascertain the character of the land,[1] and determine whether or no the conditions of the law have been complied with in good faith.[2]

The government is in no sense a party to the action. Therefore it is not concluded by a judgment determining that the applicant has a right of possession.[3]

One may have a right of possession and yet not be properly equipped to receive the patent. The judgment roll proves the right of possession only.[4]

The land department must, under the law, be the judge as to when, under what circumstances, and how the government shall part with its title.[5]

Where the judgment awards to the applicant only a part of the land in controversy, he may proceed to patent for that part, together with the area which was not involved in the conflict; provided the tract awarded to the adverse claimant does not cover the discovery and workings of the applicant. Such loss of discovery and workings destroys the right of the claimant to the remainder of his claim outside of the conflict area.[6] In case of lode claims, such a judgment may result in giving to the applicant an irregularly shaped surface, and if he proceeds to patent without rectifying his boundaries, so as to secure parallel end lines, his extralateral right may at some future time be challenged. Where such surface irregularities result, an amended survey, eliminating the conflict area and rectifying lines *within the limits of the original survey*, would be

[1] Aurora Lode *v.* Bulger Hill Placer, 23 L. D. 95.
[2] Perego *v.* Dodge, 163 U. S. 160, 168, approving Alice Placer, *supra*.
[3] *Ante*, § 749.
[4] Branagan *v.* Dulaney, 2 L. D. 744, 751.
[5] Apple Blossom Placer *v.* Cora Lee Lode, 14 L. D. 641, 642, citing Moore *v.* Robbins, 96 U. S. 530.
[6] Gwillim *v.* Donnellan, 115 U. S. 45.

more than advisable. No new territory could be included, for the simple reason that it would require reopening the whole proceeding and necessitate a reposting and republication.

The judgment being the conclusion of proceedings essentially *in rem*,[1] its operation could not be extended over land not within the boundaries described in the published and posted notices. No jurisdiction could be acquired by the land department as to such additional ground without the institution of proceedings *de novo*.

As to the certificate of five hundred dollars improvements required to be furnished, we have heretofore noted that, under section twenty-three hundred and twenty-five of the Revised Statutes, such certificate is required to be filed by the applicant, either at the time of presenting his application or within the period of publication, and that ordinarily it is appended to the field notes which are used as the basis of the patent proceedings.[2]

The certificate named in section twenty-three hundred and twenty-six undoubtedly refers to a successful adverse claimant who desires to proceed to patent for such portion of the tract as may be awarded him.

Where, by the judgment, the adverse claimant is awarded any portion of the tract in controversy, he may be permitted to enter the tract allotted to him, upon complying with the requirements of the law and the regulations of the department.

But in proceeding to entry, the successful adverse claimant is necessarily limited to that portion of the ground which is within the boundaries of the tract as described in the applicant's plat and published notices. As to such portion, all the world, except the government, is concluded by the patent proceeding and the lapse of time for presentation of adverse claims; but as to any other land, no patent can issue without presenting an application and proceeding regularly with posting and publication. Without this

[1] *Ante*, § 713 [2] *Ante*, § 673.

there is no jurisdiction in the department to grant any land outside of that embraced within the original patent application.[1]

It is seldom that the successful adverse claimant is content to limit his application for patent to so much of the claim as was awarded him within the limits of his adversary's application. He may, however, avail himself of such privilege. To do so he must cause the tract to which he was awarded the right of possession by the judgment to be surveyed and platted under the supervision of the surveyor-general, and must present the certificate of that officer establishing the fact that five hundred dollars in improvements have been expended upon or for the benefit of the tract applied for.

The department will thereupon proceed to investigate the character of the land, the proofs submitted, and the compliance by the adverse claimant with the requirements of the law. So far as the premises thus applied for are involved, the former patent applicant is eliminated from the proceeding, and thereafter the matter rests between the government and the adverse claimant.

§ 766. **Adverse claim — How waived.** — An adverse claim may be waived,—

(1) By failure to file it within the statutory period;[2]

(2) By a voluntary dismissal of it in the land office prior to the commencement of the action.[3] Secretary Lamar ruled that this might also be done after the commencement of the action, and without entertaining a discontinuance in the court;[4]

(3) By a transfer to the applicant of the interests of the adverse claimant;[5]

[1] Antelope Lode, 2 Copp's L. O. 2.
[2] *Ante*, § 742.
[3] Richmond M. Co. *v.* Rose, 114 U. S. 576, 585.
[4] St. Lawrence M. Co. *v.* Albion Cons. M. Co., 4 L. D. 117.
[5] Richmond M. Co. *v.* Rose, 114 U. S. 576, 585.

(4) By a dismissal of the action instituted in support of it.[1]

[1] Richmond M. Co. *v.* Rose, 114 U. S. 576, 585; Whitman *v.* Haltenhoff, 19 L. D. 245; Monroe Lode, 4 L. D. 273; Mono M. Co. *v.* Magnolia E. & W. Co., 2 Copp's L. O. 68. As to evidence of dismissal required by department, see Circ. Instructions, June 8, 1883, 2 L. D. 725.

## CHAPTER VI.

### THE CERTIFICATE OF PURCHASE AND TITLE CONVEYED THEREBY.


§ 770. Issuance of the certificate.
§ 771. The title conveyed by the certificate of purchase.
§ 772. Power of the land department to suspend or cancel the certificate.
§ 773. The certificate of purchase as evidence — Collateral attack.


**§ 770. Issuance of the certificate.**— If, upon the presentation of the judgment roll (where adverse suits have been brought) to the register and receiver, and the submission of such supplemental proofs as are required by departmental regulations, these officers are satisfied that the applicant for patent has fully and fairly fulfilled the requirements of the law, and that the land is mineral in character, an endorsement is made upon the application to purchase,[1] allowing the entry. Thereupon the entryman pays the purchase price of the land (five dollars per acre for lode claims and two dollars and fifty cents per acre for placers, for each acre or fraction thereof) to the receiver, who issues his receipt in duplicate, the original being forwarded, with the record in the case, to the commissioner of the general land office. The duplicate is delivered to the purchaser. In addition to this the register sometimes issues a certificate of entry, but usually in this class of cases all that the purchaser receives is the duplicate receipt, which is treated as, and performs the functions of, a certificate of purchase. It describes the tract by its name and locality and the lot number given by the surveyor-general, states the area and amount paid therefor.

[1] *Ante*, § 604.

When we speak of the certificate of purchase, we refer generally to this duplicate receipt, which must be surrendered when the patent is issued.

§ 771. **The title conveyed by the certificate of purchase.**— Strictly speaking, the certificate of purchase does not convey or purport to convey the legal title. As between the purchaser and the government, it carries the complete equitable title. It is evidence that the recipient has complied with all the terms and conditions which entitle him to a patent to the tract therein described, and that he has acquired a vested interest therein. The public faith has been pledged to him, and any subsequent grant of the same land to another party is void, unless the entry is vacated or set aside.[1]

When the price is paid, the right to a patent immediately arises. If not issued at once, it is because the magnitude of the business in the land department causes delay; but such delay, in the mere administration of affairs, does not diminish the rights flowing from the purchase, or cast any additional burdens on the purchaser, or expose him to the assaults of third parties.[2]

A right to a patent once vested is treated by the government as equivalent to a patent, so far as it may be necessary to cut off intervening claimants.[3]

After the issuance of the certificate, the government holds the legal title in trust for the holder of the certificate.[4]

§ 772. **Power of the land department to suspend or cancel the certificate.**— As we have heretofore noted, the

[1] Wirth *v.* Branson, 98 U. S. 118.

[2] Benson M. Co. *v.* Alta M. Co., 145 U. S. 428, 431 (approving American Hill Q. M., Sickles' Min. Dec. 377, 385); Aurora M. Co. *v.* 85 M. Co., 34 Fed. 515; Deno *v.* Griffin, 20 Nev. 249.

[3] Stark *v.* Starrs, 6 Wall. 402, 418.

[4] Deffebach *v.* Hawke, 115 U. S. 392; Witherspoon *v.* Duncan, 4 Wall. 210, 218; Benson M. & S. Co. *v.* Alta M. & S. Co., 145 U. S. 428, 434; Cornelius *v.* Kessel, 128 U. S. 456, 460; Hamilton *v.* Sierra Nev. G. & S. M. Co., 13 Saw. 113; Amador-Medean G. M. Co. *v.* South Spring Hill, 13 Saw. 523.

commissioner of the general land office has authority in proper cases to cancel or suspend the entry evidenced by the certificate,[1] and that in turn the secretary of the interior exercises a supervisory control over the decisions, rulings, and acts of the commissioner.[2]

The judgment of the register and receiver in allowing the entry and issuing the certificate of purchase or duplicate receipt, is not necessarily final as between the entryman and the government. The exercise of this supervisory power is necessary to the due administration of the law by the land department;[3] yet the power may not be arbitrarily exercised nor exercised without notice to the entryman.[4]

The line of demarcation between what is the lawful exercise of this power and what is an arbitrary and unlawful use of it, is not clearly defined.

Where upon the face of the record it appears that the entry was illegally allowed, and that in issuing the certificate the local officers exceeded their authority, there can be no question but that it is not only the right but the duty of the commissioner to either suspend it, if the irregularities or defects are of such a nature that they may be remedied by supplemental proceedings, or to cancel it when the objection is jurisdictional and incurable.

So, where fraud is apparent or is brought to the notice of the commissioner, he is not bound to sit quietly and allow a proceeding to be consummated which it would be immediately his duty to take steps to annul.[5]

Some of the federal trial courts have been disposed to hold, that where fraud is perpetrated and the issuance of the certificate is procured by resort to fraudulent methods,

[1] *Ante*, § 662.

[2] *Ante*, § 663.

[3] Cornelius *v.* Kissel, 128 U. S. 456, 461; Hosmer *v.* Wallace, 47 Cal. 461 (cited in Orchard *v.* Alexander, 157 U. S. 372, 380); Swigart *v.* Walker (Kan.), 30 Pac. 162; Vance *v.* Kohlberg, 50 Cal. 346; Jones *v.* Meyers, 2 Idaho, 794; Vantongeren *v.* Heffernan, 5 Dak. 180, 226.

[4] Orchard *v.* Alexander, 157 U. S. 372, 383; Parsons *v.* Venzke, 164 U. S. 89; Risdon *v.* Davenport, 4 S. Dak. 555; Young *v.* Hanson (Iowa), 64 N. W. Rep. 654.

[5] Caldwell *v.* Bush (Wyo.), 45 Pac. 488.

the remedy of the government is by suit in equity to secure its cancellation;[1] but in Orchard *v.* Alexander,[2] the supreme court of the United States, after reviewing all of its previous rulings on the subject, clearly indicated that until the patent issues the commissioner of the general land office and the secretary of the interior are clothed with plenary power over the acts of the subordinate officers of the land department, and nothing less than a gross abuse of this power will justify the courts in reviewing and annuling their acts.[3]

The mere suspension of an entry for the purpose of requiring compliance with departmental regulations, supplying supplemental proofs, or curing apparent defects, will not destroy the force of the certificate or enable third parties to attack its validity;[4] but if canceled, and such cancellation result from the rightful exercise of authority, the force and power of the certificate is destroyed.[5]

As to whether such cancellation is in the rightful exercise of such power, is a matter concerning which the courts may inquire.[6]

Such cancellation would not of itself render the ground subject to relocation. The applicant would simply be relegated to such possessory rights as he had prior to the initiation of patent proceedings and such as he may have subsequently acquired.[7]

An order directing that an entry be "held for cancella-
"tion," is as effectual as an order canceling it.[8] Such an order takes effect as of the date made, without regard to

[1] Smith *v.* Ewing, 11 Saw. 56; Wilson *v.* Fine, 14 Saw. 224; Stimson *v.* Clarke, 45 Fed. 760; American Mortg. Co. *v.* Hopper, 48 Fed. 47.

[2] 157 U. S. 372.

[3] See, also, Parsons *v.* Venzke, 164 U. S. 89; Caldwell *v.* Bush (Wyo.), 45 Pac. 488; United States *v.* Steenerson, 50 Fed. 504.

[4] Last Chance M. Co. *v.* Tyler M. Co., 61 Fed. 557, 561.

[5] Murray *v.* Polglase, 17 Mont. 455.

[6] Orchard *v.* Alexander, *supra* (citing Johnson *v.* Towsley, 13 Wall. 72; Parsons *v.* Venzke, 164 U. S. 89).

[7] McGowan *v.* Alps Cons. M. Co., 23 L. D. 113; *In re* Magruder, 1 L. D. 526.

[8] Murray *v.* Polglase, 17 Mont. 455.

the time when it is noted of record in the local office,[1] or, it seems from the rulings of the land office, without waiting for the expiration of the time allowed for appeal.[2]

The order of the secretary reversing such a judgment by the commissioner, would, of course, reinstate the entry.

One who purchases from the holder of such certificate, takes his title subject to the right of the department to cancel the entry for sufficient reasons.[3] He is entitled to no equitable consideration by reason of such purchase.[4] He has no greater or different right than the one from whom he purchased,[5] and is charged with notice of all defects in the title.[6]

**§ 773. The certificate of purchase as evidence — Collateral attack.**— Before the duplicate receipt or certificate may be introduced in evidence for any purpose, it is necessary to prove the genuineness of the signature of the land officer issuing it.[7]

The doctrine that courts take judicial notice of the genuineness of the signatures of executive officers, only applies to the heads of departments and principal officers. We are aware of no case where the doctrine has been extended to any subordinate official connected with the administration of the land laws below that of an acting commissioner.[8]

For what purpose may the certificate be admitted in evidence? If it is equivalent to a patent, it should be accepted as evidence of title, in actions brought by or prosecuted against third parties.

It has frequently been held by the supreme court of the

[1] Anderson *v.* N. P. R. R., 7 L. D. 163; Perrott *v.* Connick, 13 L. D. 598; Oettel *v.* Dufur, 22 L. D. 77.

[2] *In re* Reed, 6 L. D. 563; Barclay *v.* State of Cal., 6 L. D. 699.

[3] Swigart *v.* Walker (Kan.), 30 Pac. 162.

[4] United States *v.* Miller, 14 L. D. 617.

[5] Murphy *v.* Sanford, 11 L. D. 123.

[6] *In re* Kibling, 7 L. D. 327.

[7] Jackson *v.* McMurray, 4 Colo. 76 (citing Fail *v.* Goodtitle, Breese (Ill.) 291).

[8] York Railway Co. *v.* Winans, 17 How. 31.

United States, that in the federal courts certificates of final entry issued by the officers of the land department are not sufficient to authorize a recovery in an action of ejectment, as the legal effect of such certificates is to convey only the equitable title,[1] and that this rule applies, notwithstanding the fact that the state wherein the action is brought has provided by its laws that recovery may be had in ejectment when the party claims by virtue of such a certificate;[2] but the controversies in which these principles were announced arose out of entries for agricultural land, and not under the mining laws. The essential difference in the nature of the estate held by the owner of a perfected mining location and those held by agricultural claimants, has been fully explained in a preceding section.[3]

Under the mining laws, the tenure by which the estate of the miner is held possesses the attributes of a fee, as against every one save the government. Ejectment may be maintained upon an unpatented mining title. When perfected under the law, a mining location is held under a legal title as against every one save the paramount proprietor.[4]

The certificate of purchase is evidence of the perfection of the right. It is evidence that all adverse claims which might have been asserted against the right of the purchaser have been waived or adjudicated in his favor. Adverse claimants have had their day in court.

In addition to this, section nine hundred and ten of the Revised Statutes provides, that,—

"No possessory action between persons in any court of "the United States for the recovery of any mining title or "for damages to any such title shall be affected by the fact "that the paramount title to the land in which such mines "lie is in the United States."

Certificates of purchase issued to mining claimants are

[1] Langdon *v.* Sherwood, 124 U. S. 74; Fenn *v.* Holme, 21 How. 481, 483.
[2] Hooper *v.* Scheimer, 23 How. 235; Langdon *v.* Sherwood, 124 U. S. 74.
[3] *Ante*, § 542.
[4] *Ante*, §§ 535, 539.

accepted by the federal courts as evidence of the legal title.[1]

So far as the state courts are concerned, this rule is accepted on principle,[2] although in most, if not all, of the states there is affirmative legislation, making the certificate primary evidence that the holder or his assignee is the owner of the land.

The force of the certificate may be overcome by showing that in issuing it the land officers exceeded their jurisdiction. It is not subject to collateral attack.[3] It may be assailed only upon the same grounds and in the same manner as a patent may be assailed—a subject to be fully presented in a succeeding section.[4]

[1] Aurora Hill Cons. M. Co. *v.* 85 M. Co., 12 Saw. 355 (referred to in Benson M. & S. Co. *v.* Alta M. & S. Co., 145 U. S. 428, 432); Hamilton *v.* Southern Nev. G. & S. M. Co., 13 Saw. 113; Cons. Wyoming G. M. Co. *v.* Champion M. Co., 63 Fed. 540, 541.

[2] Rader *v.* Allen (Oregon), 41 Pac. 154; Deno *v.* Griffin, 20 Nev. 249.

[3] Hamilton *v.* Southern Nev. G. & S. M. Co., 13 Saw. 113.

[4] *Post*, § 777.

# CHAPTER VII.

## THE PATENT.


§ 777. General rules as to conclusiveness of patents.

§ 778. Conclusiveness of patent as to form and extent of surface boundaries.

§ 779. Character of the land established by the patent.

§ 780. What is conveyed by a lode patent.

§ 781. What is conveyed by a placer patent — Reservation of lodes "known to "exist."

§ 782. Exceptions in junior patents of conflicting area held under senior title.

§ 783. Title conveyed by patent relates to inception of right — When evidence admissible to prove date of location.

§ 784. Patent how vacated—Within what time suit must be brought.


§ 777. **General rules as to conclusiveness of patents.**— In presenting in the preceding chapters some of the questions arising out of the various phases of the federal mining laws, the force and effect of a land patent when issued has been necessarily, although incidentally, involved. We have there had occasion to enunciate some of the elementary principles which have guided the courts in determining the legal value of this instrument.

With the issuance of the patent the functions of the land department terminate.[1] It is the culmination of the proceeding *in rem*[2]—the final judgment of the tribunal specially charged with passing the government title.

To the extent that we have already covered the field, it is unnecessary to do more than recapitulate the results heretofore reached as to the force and effect of this judgment.

[1] Steel *v.* St. Louis Smelting Co., 106 U. S. 447, 454.
[2] *Ante*, § 713.

(1) A patent for land is the highest evidence of title, and is conclusive against the government and all claiming under junior patents or titles until set aside or annulled.

(2) The land department is a tribunal appointed by congress to decide certain questions relating to the public lands, and its decision upon matters of fact cognizable by it, in the absence of fraud or imposition, is conclusive everywhere else.

(3) The government having issued a patent cannot, by the authority of its own officers, invalidate it by the issuing of a second one for the same property.

(4) A patent may be collaterally impeached in any action, and its operation as a conveyance defeated by showing that the department had no jurisdiction to dispose of the lands; that is, that the law did not provide for selling them, or that they had been reserved from sale, or dedicated to special purposes, or had been previously transferred to others;[1]

(5) A patent is conclusive evidence that all antecedent steps necessary to its issuance have been properly and legally taken;[2]

(6) It is conclusive evidence of the citizenship and qualification of the patentee;[3] and,

(7) In cases of mining patents, that all matters which might have been the subject of an adverse claim have been conclusively adjudicated in favor of the patentee.[4]

Embraced within these general propositions we encounter certain subordinate or complementary rules, referable to one or the other of the general ones, where attention is directed to a particular fact, or series of facts, necessary to

[1] *Ante*, § 175.

[2] Davis *v.* Weibbold, 139 U. S. 507; United States *v.* Iron S. M. Co., 128 U. S. 673; Iron S. M. Co. *v.* Campbell, 29 Pac. 513; Kahn *v.* Old Tel. Co., 2 Utah, 174; Chambers *v.* Jones, 42 Pac. 758; Poire *v.* Wells, 6 Colo. 406; Justice M. Co. *v.* Lee, 40 Pac. 444; Montana Cent. Ry. *v.* Migeon, 68 Fed. 811; Harkrader *v.* Carroll, 76 Fed. 474.

[3] *Ante*, § 227.

[4] *Ante*, § 742; Champion M. Co. *v.* Cons. Wyoming M. Co., 75 Cal. 78, 82.

be passed upon in the patent proceeding, or which may be presumed to have been passed upon. We are not particularly interested in the investigation of any class of patents, save those issued in pursuance of the mining laws, and are not called upon to examine the special force and effect of such instruments as conveying the government title to lands agricultural in character, except in so far as clauses of reservation are lawfully inserted therein, excluding from their operation mines and mining claims.

These complementary rules may be considered in succeeding sections as we examine individual classes of patents falling within the purview of this treatise.

**§ 778. Conclusiveness of patent as to form and extent of surface boundaries.**—We have heretofore discussed the superficial extent which may be lawfully embraced in mining locations, both lode[1] and placer,[2] and have noted that, while the law limits the area which an individual may embrace in a single location, there is no limitation to the number of locations he may purchase.[3] A patent may, therefore, embrace a greater area than that included in a single location, as the owner may include in his patent application as many contiguous locations as he may own.[4] It may thus appear upon the face of the patent that the area is greater than is allowed for an individual location. This does not render the patent void, nor cast upon the patentee the affirmative duty of showing that the patented surface is a composite of several locations. This fact will necessarily be presumed in support of the patent. As was said by the supreme court of the United States, in speaking of the functions of the land department:—

"Indeed, the doctrine as to the regularity and validity "of its acts goes so far that, if under any circumstances "under the existing law a patent will be held valid, it will "be presumed that such circumstances existed."[5]

[1] *Ante*, § 361.
[2] *Ante*, § 447.
[3] *Ante*, § 327.
[4] *Ante*, §§ 670, 672.
[5] St. Louis Smelting Co. *v.* Kemp, 104 U. S. 636.

This doctrine was applied to a placer patent embracing an area in excess of that allowed to an association of individuals,[1] and was followed by the circuit court of the ninth circuit and applied to a lode patent.[2]

In the case of Lakin *v.* Dolly[3] and Lakin *v.* Roberts,[4] the circuit court and the circuit court of appeals had under consideration a lode patent for an irregularly shaped surface, delineated on the accompanying diagram (figure 56),

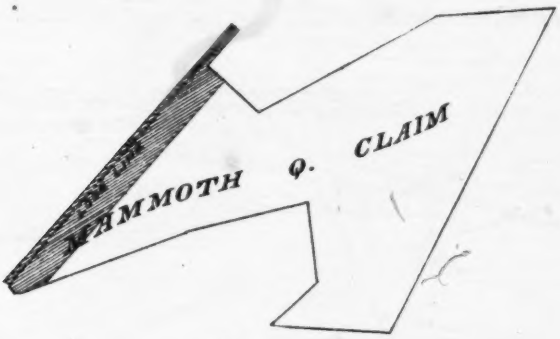



FIGURE 56.

containing an aggregate area of two hundred and fifty-three acres, including forty-one hundred linear feet of a vein. The patent was based upon locations made under the act of 1866.

The cases having been originally tried and a judgment entered, they were resubmitted upon an agreed statement of facts.

From this agreed statement it appeared, that when the claims were originally located, the miners in that locality actually occupied such portion of public land as they chose, for the purpose of working their mines, the extent of such

[1] See, also, Tucker *v.* Masser, 113 U. S. 203.
[2] Carson City G. & S. M. Co. *v.* North Star M. Co., 73 Fed. 597.
[3] 53 Fed. 333.
[4] 54 Fed. 461.

occupation not being a matter of defined custom, but of actual possession; that there was *never any actual possession* of that portion of the surface in controversy in the action which embraced the town of Johnsville. Patent was applied for in 1867 and issued in 1877.

It thus appears that the parties stipulated and agreed to facts which showed a want of jurisdiction in the department to issue the patent to the extent described. If the question were to be considered solely upon the face of the patent, without the presence of the stipulated facts, would not the court have been compelled to accept that instrument as conclusively establishing the fact that the claimants had been in the actual possession of the tract; that the extent of the possession was a matter which the land department was called upon to determine; that such possession was under the sanction of local rules in force at the time the location was made; that the land department was the exclusive judge of what local rules were in force;[1] that the act of 1872 did not purport to deprive anyone of rights which they lawfully held under the pre-existing laws, which left the matter of surface exclusively to local regulations, but, on the contrary, expressly preserved such rights,[2] and that, if necessary to support the validity of the patent, it would have been conclusively presumed that there was a sufficient number of locations contiguous and owned by the patentee which, when united in one composite or group, authorized the issuance of the patent to the extent and in the form therein expressed?

It seems to us that this is the logical result of the decisions of the supreme court of the United States.

The circuit court, in the face of an admission of facts which established a want of power in the land department to issue a patent to the extent shown on the diagram, reached what may be considered a proper conclusion, by leaving the patentee the lode and that portion shown on

[1] Parley's Park M. Co. v. Kerr, 130 U. S. 256, 261.
[2] *Ante*, § 604. Carson City G. & S. M. Co., 73 Fed. 597, 599.

the diagram marked with black lines, and declaring the patent void as to the unshaded area.

But to say that where a patent is presented, exhibiting an area in excess of the statutory limit of a single location, evidence may be admitted to impeach its operative effect by showing that there was not a sufficient number of locations to support it, is to practically deny the force of the doctrine announced by the supreme court of the United States in St. Louis Smelting Co. *v.* Kemp, heretofore quoted.

It may be announced as a general rule, that a patent is conclusive evidence as to the limits of a location, and that it cannot be assailed by showing that its actual boundaries were different from those described in the patent.[1]

This rule is, of course, subject to the qualification that, where there is a variance between the calls of the patent for courses and distance and the monuments specified therein, the monuments control.[2]

**§ 779. Character of the land established by the patent.**—It has been frequently determined that the patent is conclusive evidence of the character of the land. If the instrument was issued pursuant to the laws governing agricultural lands, the land embraced therein will be conclusively presumed to be agricultural, and if under the mining laws, that the land was mineral.[3]

This rule, when invoked in certain classes of cases, seems to have lost some of its force, if it is not altogether ignored. Take, for example, the case of a patent for a placer claim within the limits of which it is asserted that a lode exists, whose existence was known at the time the placer patent was applied for, and which was not embraced within the placer application.

The courts hold in such instances, that the patent is not so conclusive that the land is placer in character as to

[1] Waterloo M. Co. *v.* Doe, 56 Fed. 685, 687.

[2] Los Angeles Farming and Milling Co. *v.* Thompson (Cal.), 49 Pac. 714.

[3] See authorities cited under § 161. Klauber *v.* Higgins (Cal.), 49 Pac. 466.

prevent the owner of the known lode from defeating the operative force of such patent in an action at law, by showing the facts as to the existence of such lode and the knowledge thereof by the placer claimant.[1]

So with a townsite patent. Where, at the time of perfecting a townsite entry, a mine or valid mining claim exists within the limits of the townsite which presumptively, except in the case of incorporated cities or towns, embrace only nonmineral lands, the owner of the mine or mining claim may, in an action at law, defend against the patent by showing the existence of such mine or mining claim at the date of the entry.[2]

This is permitted on the ground that the known lode, mine, or mining claim is reserved out of the patent; but when a railroad patent has been issued, which cannot lawfully include lands known to be mineral at the date of its issuance, it would seem that the only method of attacking it is by bill in equity to vacate and set it aside.

One owning a mining claim in a section of land which, if nonmineral in character, would inure to a railroad company under a congressional grant, cannot at law attack a patent issued to such company by showing that the land embraced within the mining claim was mineral in character at the date of the railroad patent. The aid of the government must be invoked to vacate such a patent, and until it is vacated it is a conclusive adjudication that the lands are nonmineral.[3]

A similar rule applies to agricultural patents. The owner of a "known mine" within premises patented as agricultural cannot defend in an action at law against such a patent.[4] The method of obtaining relief is the same as in the case of railroad patents — a suit brought by the United States to set the patent aside.[5]

[1] *Ante*, §§ 720, 721.
[2] *Ante*, §§ 177, 723.
[3] *Ante*, § 161.
[4] *Ante*, § 161, and notes. As to what constitutes "known mines," see § 209.
[5] For instances where this remedy was sought, see cases cited in note 1, p. 188.

We do not clearly understand the reason for invoking a different rule in cases of railroad and agricultural patents from that applied to townsite and placer patents; but that there must be some valid reason for the distinction between the different classes of patents and their operative force, is manifest from the fact that both rules are clearly recognized by the courts of last resort.

As we understand the authorities, in the case of a townsite or placer patent, an assertion by a mining claimant of his rights is not a collateral attack upon the patent. In cases of agricultural or railroad grants it is such an attack.

**§ 780. What is conveyed by a lode patent.**— A lode patent conveys:—

(1) The exclusive right of possession and enjoyment of all the surface included within the limits of the location,[1] as described in the patent, subject only to pre-existing easements;[2]

(2) All veins, lodes, and ledges throughout their entire depth, the tops, or apices, of which lie within the boundaries,[3] the right to pursue the vein in depth outside of such boundaries being limited, however, to cases where the lines of the location and the physical conditions with respect to the lode are such as are outlined in the chapter on extra-lateral rights.[4]

(3) *Prima facie*, such a patent confers the right to everything found within vertical planes drawn through the surface boundaries; but these boundaries may be invaded by an outside lode locator holding the apex of a vein under a regular valid location, in the pursuit of his vein on its downward course underneath the patented surface. How the *prima facie* presumption may be overcome and on whom

[1] Rev. Stats., § 2322.

[2] *Ante*, § 729.

[3] This is upon the hypothesis that the Arizona-California doctrine on the subject of cross lodes is the correct one.

[4] *Ante*, §§ 581-594.

rests the burden of proof, will be discussed when dealing with the action of trespass and the rules of evidence applicable to such action.

In the patent proceeding the applicant is compelled to state in his published and posted notices the length of the located lode which he claims. The surveyor surveys a lode line, describes it in his field notes, and frequently delineates it on his plat, and the patent grants the surface ground as surveyed, and so many linear feet of the vein.

As under the existing law, the appropriation of the vein is accomplished by locating a surface including it, the locator can obtain no more in length than is included within the limits of the surface boundaries, and the mere call in the survey and patent for so many feet of the lode is of no moment. If a patentee is granted fifteen hundred linear feet on a vein, he will obtain that much, if so much is found within his surface boundaries. If there is less, if the vein does not traverse the full length of his claim but departs out of a side line, the patentee may not follow it outside of these boundaries on the strike. There is no reason for perpetuating the early theories followed by the land department as to lode patents under the act of 1866.[1] There is no necessity for inserting in the patent the number of linear feet granted. The patent is certainly not conclusive evidence of the physical existence of a lode to any continuous extent. The issuance of a lode patent conclusively presumes the existence within its boundaries of an apex,[2] as this is a fact necessary to support its validity, but it will not be presumed that this apex takes any particular direction or extends for any definite length. The course of the lode as indicated by the hypothetical lode line exhibited by the surveyor, concludes no one.[3]

The patent will only convey so much of the lode as has its apex within the boundaries, and the call for length in the patent is useless.

[1] *Ante*, § 59.
[2] Iron S. M. Co *v.* Campbell, 17 Colo. 267, 272.
[3] Cons. Wyoming M. Co. *v.* Champion M. Co., 63 Fed. 540.

**§ 781. What is conveyed by a placer patent—Reservation of lodes "known to exist."**—In discussing the proceedings by which a placer patent may be obtained, we had occasion to refer to the law which excepted from the operation of such patent all lodes whose existence was know at the time the placer application was filed and which were not claimed by the placer applicant.[1]

The form of placer patent now issued by the department contains the following clauses:—

"*First*—That the grant hereby made is restricted in its "exterior limits to the boundaries of the said mining "premises, and to any veins, or lodes, of quartz or other "rock in place bearing gold, silver, cinnabar, lead, tin, "copper, or other valuable deposits, which may have been "discovered within said limits subsequent to and which "were not known to exist on the ——— (date of filing of "the placer patent).[2]

"*Second*—That should any vein, or lode, of quartz or "other rock in place bearing gold, silver, cinnabar, lead, "tin, copper, or other valuable deposits, *be claimed*, or "known to exist within the above-described premises at "said last-named date, the same is expressly excepted and "excluded from these presents.

"That the premises hereby conveyed may be entered "by the proprietor of any vein, or lode, of quartz or other "rock in place bearing gold, silver, cinnabar, lead, tin, "copper, or other valuable deposits, for the purpose of "extracting and removing the ore from such vein, or "lode, should the same, or any part thereof, be found to

[1] *Ante*, § 413.

[2] Formerly the following clauses were inserted:—

"*First*—That the grant is restricted in its exterior limits to the "boundaries of the tract described and to any veins, or lodes, of quartz "or other rock in place bearing gold, silver, cinnabar, tin, copper, or "other valuable deposits, which may hereafter be discovered within "said limits and which are not *claimed* or known to exist at the date "thereof (*i. e.* the date of the patent)."

The supreme court of the United States expressed the view that this clause gave expression to the intent of the statute (Reynolds *v.* Iron S. M. Co., 116 U. S. 687, 697); but subsequently held that the terms were broader than the language of the statute. The insertion of the word *claimed* was unauthorized. (Iron S. M. Co. *v.* Reynolds, 124 U. S. 374, 382; United States *v.* Iron S. M. Co., 128 U. S. 673, 680.)

The restriction was unauthorized in another particular: It fixed the period as the date of the patent, instead of the date of filing the application. (Iron S. M. Co. *v.* Mike & Starr G. & S. M. Co., 143 U. S. 394, 402.)

"penetrate, intersect, pass through, or dip into the mining "ground or premises hereby granted."

By eliminating from the second clause the words "claimed or," which are unauthorized,[1] the restrictions fairly express the intent of the law.

When is a lode "known to exist" within the meaning of the statute, so as to be excepted from the operation of the placer patent?

To whom must its existence be known? The supreme court of the United States has enabled us to answer these questions without serious difficulty.

Where a location of a vein, or lode, has been made under the law, and its boundaries have been specifically marked on the surface so as to be readily traced, and notice of the location is recorded in the usual books of record within the district, it may be safely said that the vein, or lode, is known to exist, although personal knowledge of the fact may not be possessed by the applicant for a patent to a placer claim. The information which the law requires the locator to give to the public must be deemed sufficient to acquaint the applicant with the existence of the vein, or lode;[2] but a valid lode location can only be predicated on a discovery of a vein of quartz or other rock in place carrying valuable deposits sufficient to justify the expenditure of time and money for its development,[3] and such discovery must be shown before the location notice or its record will possess any force as against a placer patent.[4]

While the land department has jurisdiction to issue a patent for a lode previously known to exist within the limits of a tract patented as a placer, the knowledge of the existence of such lode is not presumed from the mere production of a recorded location notice antedating the location of the placer.[5]

[1] See note 2 on page 969.

[2] Noyes v. Mantle, 127 U. S. 348, 354.

[3] *Ante*, § 336.

[4] Migeon v. Montana Cent. Ry., 77 Fed. 249.

[5] Wilson Creek Cons. M. & M. Co. v. Montgomery, 23 L. D. 476; Valley Lode, 22 L. D. 317; S. C. on review, *Id.* 713.

Even where a patent has been issued for a lode claim within the limits of a prior patented placer, it will not be presumed from the mere production of the lode patent that the lode was known to exist at the time of filing the application for placer patent.[1]

As the prior placer patentee is not called upon to adverse the lode application, he is not concluded by the lode patent, and the question of priority must be determined by reference to the antecedent facts. The question will be decided according to the doctrine of relation discussed in a subsequent section.[2]

Where the lode was located subsequent to the filing of the placer application, based upon an assertion that its existence was known at the time of such filing, the party seeking to establish that it is within the exception of the placer patent must bring himself clearly within the rule enunciated by the supreme court of the United States; that in order to meet the designation of "known vein," such vein, or lode, must have been, at the date of the placer application, clearly ascertained and known to be of such extent as to render the land more valuable on that account, and justify its exploitation;[3] and its existence and quality must have been known to the applicant for the placer patent or known to the community generally, from which knowledge by the applicant might be inferred, or else disclosed by workings, and obvious to anyone making a reasonable and fair inspection of the premises for the purpose of obtaining title from the government.[4]

Evidence for the purpose of establishing these facts may be admitted, not as an impeachment of the placer patent,

[1] Iron S. M. Co. *v.* Campbell, 135 U. S. 286.

[2] *Post*, § 783.

[3] Iron S. M. Co. *v.* Reynolds, 124 U. S. 374; Iron S. M. Co. *v.* Mike & Starr G. & S. M. Co., 143 U. S. 394; Sullivan *v.* Iron S. M. Co., 143 U. S. 431; Montana Cent. Ry. *v.* Migeon, 68 Fed. 811; S. C. on appeal, 77 Fed. 249; Brownfield *v.* Bier, 15 Mont. 403; Casey *v.* Thieviege (Mont.), 48 Pac. 394.

[4] Iron S. M. Co. *v.* Mike & Starr G. & S. M. Co., 143 U. S. 394, 402.

but to establish that the lode was reserved and did not pass by such patent.[1]

No particular stress is laid upon the mere form in which these exceptions are stated in the patent. Unless they are within the sanction of the law, they are void.[2] The reservations would be implied in the absence of these excepting clauses.

As to the rights of the owners of lodes having their apices outside of the limits of the placer patent to pursue their veins underneath the surface of the placer claims, a reservation intended to be expressed in the third clause, we have fully discussed this subject in a preceding section, and need not repeat what is there stated.[3]

We may conclude, that a placer patent conveys to the patentee everything within vertical planes drawn downward through the surface boundaries, except (1) such lodes, or veins, whose tops, or apices, are within the placer limits, whose existence was known prior to the filing of the application for placer patent, and were not included in the placer application; (2) such segments of veins having their tops, or apices, elsewhere, as may underlie the placer surface, and which may lawfully be taken by the apex lode locator under a regular valid lode location, pursuing his vein on its downward course. In the last class of cases the question of priority of location is wholly unimportant.[4]

**§ 782. Exceptions in junior patents of conflicting area held under senior title.**— It is the practice of the land department, in cases of a conflict arising between two mineral surveys, or locations, to describe the land to be patented to the junior applicant by inserting in the patent the complete field notes of the survey of the location on which the proceedings are based, and embodying in the

[1] Iron S. M. Co. v. Mike & Starr G. & S. M. Co., 143 U. S. 394, 402. For general discussion of the location of lodes within placers, consult §§ 413, 415.

[2] *Ante*, § 171.

[3] *Ante*, § 611.

[4] *Ante*, § 611.

instrument of conveyance a clause excepting and reserving therefrom the surface area in conflict with the prior title—a method frequently followed in private conveyances.

The employment of this method in issuing mineral patents is, at times, productive of peculiar results. It not infrequently divides the tract held under the junior patent into two distinct noncontiguous tracts. The method is adopted by the department in cases of alleged cross lodes, where, according to the rule in Colorado[1] followed by the land department,[2] the junior locator has a right to so much of his *vein* as lies within the senior claim, except at the space of lode intersection. We may illustrate this by use of a diagram (figure 57).

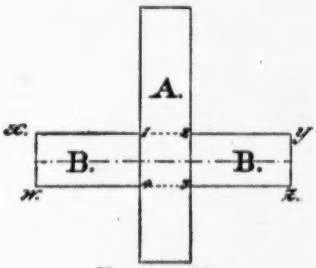



FIGURE 57.

*A* represents the patented surface of a senior location; *B*, a junior patent based upon a junior location. B's patent describes the tract by the boundaries *w x y z*, excepting and reserving therefrom the surface *1 2 3 4*, which conflicts with *A*.

This gives to B. two noncontiguous tracts, connected theoretically by a "string," in the shape of a lode, ofttimes purely hypothetical, crossing A's side lines. Whether there is a cross lode or not, is a matter that cannot be determined as against A. in the proceedings by which B. obtains patent. Whether any such cross lode exists or not, is a fact which may not be satisfactorily determined, except after the lapse of considerable time and the expenditure of considerable money. A. is supposed to have a prior grant of his surface, together with all veins, lodes, and ledges, the tops, or apices, of which lie inside such surface lines; but the invasion of his territory is apparently sanctioned by the patent to B., on the suggestion that B's lode is a cross lode.

[1] *Ante*, § 558.

[2] *In re* Belford, 2 Copp's L. O. 178; Patten Extension Lode, 15 L. D. 133.

If B. were to apply in one proceeding for his segregated tracts *B B*, without extending his surface lines across the prior patent, his application would be rejected, as such practice is not permitted;[1] but by extending the dotted lines *1 2, 3 4* across A's surface, the department permits him to proceed to patent, and then deducts the surface bounded by the lines *1 2, 3 4*. In other words, he is permitted to do indirectly what the law says shall not be done directly.

The department does not undertake to determine the precise position of B's vein within A's surface. It does not undertake to investigate underground conditions. It deals only with surface conditions. B's patent, with the implied right to follow a cross vein into A's ground, is based upon the assumption of a fact which may or may not exist and which the land department does not attempt to determine so as to conclude anybody. It is not the subject of an adverse claim,[2] and if it were, the prior patentee could not be compelled to adverse.[3]

The construction of the law adopted by the department in issuing these junior conflicting patents does not give to A. all the veins which have their tops, or apices, within his boundaries, but only such as are parallel to his original located lode, and inferentially permits that department to curtail the rights granted upon the face of the prior patent by means of clauses of surface reservation in a junior patent.

As has been said by Mr. Morrison in his "Mining "Rights"[4]:—

"A glance at the plat of any late patent in a well-devel- "oped district will introduce the subject to the reader. "Three or four surveys partly crossing, partly parallel, and "intersecting at all angles, are frequently seen, so that, "unless the plat be colored, the eye can scarcely distinguish "one from another; only the rigid application of the rule "of preference to prior patents can ever relieve this matter "from difficulty, for while the words of a patent always

[1] *Ante*, § 669, p. 840.
[2] *Ante*, § 727.
[3] *Ante*, § 718.
[4] 9th ed., p. 109.

" except the *surface* and *claim* of previous surveys, they still " proceed upon the fallible supposition that each survey " indicates a separate vein." [1]

If the rule adopted by the Colorado courts, which has been fully discussed in a preceding article,[2] is the correct one, the right of a junior locator to pursue a cross vein into the ground of a prior locator exists independent of a patent, and the question as to the existence or nonexistence of such cross vein is one upon which the courts can alone finally pass, as it is not the subject of adverse proceedings.

Therefore there is no reason for the land department pursuing a practice which has a tendency to prejudge questions of which it is not the final arbiter, or to appear to weaken the force of its prior conveyances by clauses of reservation inserted in junior patents.

**§ 783. Title conveyed by patent relates to inception of right — When evidence admissible to prove date of location.**— It is accepted as a well-established rule of law, that the title conveyed by a mining patent relates back to the inauguration of the right; that is, to the location upon which the patent proceedings are based;[3] but this doctrine cannot be applied so as to cut off the rights of a senior patentee holding a junior location, when the conflicting prior locator failed to adverse.[4]

Therefore the patent itself is conclusive evidence of priority in cases where the question either actually was, or might have been, adjudicated in the patent proceedings.

So it would seem that where an adverse claim is filed, showing surface conflict, the judgment rendered in the

[1] See figure 26, p. 664.

[2] *Ante*, §§ 557, 560.

[3] Heydenfeldt *v.* Daney G. & S. M. Co., 93 U. S. 634; St. Louis Smelting Co. *v.* Kemp, 104 U. S. 636; Deffebach *v.* Hawke, 115 U. S. 392, 405; Silver Bow M. & M. Co. *v.* Clarke, 5 Mont. 378; Talbot *v.* King, 6 Mont. 76; Smokehouse Lode Cases, 6 Mont. 397; Deno *v.* Griffin, 20 Nev. 249; Eureka Case, 4 Saw. 302; Kahn *v.* Old Tel. Co., 2 Utah, 174.

[4] Eureka Case, 4 Saw. 302.

action, upon the basis of which the patent ultimately issues, is conclusive in its effect, not only as to the surface area directly involved, but determines priority in favor of the successful litigant as to all rights flowing from the respective locations. The question of priority having been actually or presumptively adjudicated as to one part of the conflicting claims, the judgment necessarily extends to and affects the portions not included within the conflict area,[1] and a subsequent conflict of underground rights arising in such a case must be determined by the priorities actually or presumptively established in the patent proceeding.

But there are cases where the question of priority necessarily arises, where the patent itself furnishes no evidence, actual or presumptive, as to the actual time to which the title conveyed relates. The rights of parties where veins unite in depth must be settled by the rule of priority. Where there is no surface conflict, the prior locator would have no standing as an adverse claimant in patent proceedings instituted by a junior locator. An asserted intersection of veins not involving such conflict is not the subject of the adverse proceeding.[2]

In cases of this character, for the purpose of showing the date to which the patent relates, evidence is admissible to prove proceedings under which the title originated.[3]

This is not inconsistent with the doctrine as to the conclusiveness of a patent. There is no attempt to impeach that instrument.[4] It simply permits extrinsic evidence of a fact not required to be recited in the patent, for the sole purpose of showing the time to which the instrument relates.

For this purpose, and this purpose alone, a patentee may show the date of the location upon which the patent proceeding is based.

The patentee, in establishing this fact, will necessarily be

[1] Last Chance M. Co. *v.* Tyler M. Co., 157 U. S. 683.
[2] *Ante*, § 730.
[3] St. Louis Smelting Co. *v.* Kemp, 104 U. S. 636; Kahn *v.* Old Tel. Co., 2 Utah, 174.
[4] St. Louis Smelting Co. *v.* Kemp, *supra*.

limited to the location appearing in the patent record. He cannot be permitted to show the existence of any other or prior location.[1]

Therefore, the patent record duly authenticated by the commissioner of the general land office is admissible for this special purpose.

While these records are ordinarily received in the courts as evidence of the facts stated therein,[2] we are of the opinion that the original location must also be proved by evidence other than that furnished by the patent record. This seems to be the rule sanctioned by the courts.[3]

**§ 784. Patent — how vacated — Within what time suit must be brought.** — The circumstances under which the government may bring an action in equity to vacate and set aside a patent, are outlined by the supreme court of the United States in the case of United States *v.* Missouri K. & T. Railway,[4] substantially as follows:—

Where a patent has been fraudulently obtained, and such fraudulent patent, if allowed to stand, would work prejudice to the interests or rights of the United States, or would prevent the government from fulfilling an obligation incurred by it, either to the public or to an individual, which personal litigation could not remedy, there would be an occasion which would make it the duty of the government to institute judicial proceedings to vacate such patent. These principles equally apply where patents have been issued by mistake, and they are especially applicable where a multiplicity of suits, each one depending upon the same facts and the same questions of law, can be avoided, and where a comprehensive decree covering all contested rights would accomplish the substantial ends of justice.

[1] Jacob *v.* Lorenz, 98 Cal. 332, 340.

[2] Gult *v.* Galloway, 4 Pet. 332.

[3] Champion M. Co. *v.* Cons. Wyoming M. Co., 75 Cal. 78, 82; Kahn *v.* Old Tel. M. Co., 2 Utah, 174, 188; Last Chance M. Co. *v.* Tyler M. Co., 61 Fed. 557, 566.

[4] 141 U. S. 358.

This principle has, in one form or another, been enunciated by the supreme court of the United States in a long line of decisions.[1]

It is unnecessary to analyze the authorities or to note their special application to mining patents. The principles apply with equal force to all classes of patents. What constitutes such fraud in a legal sense as will warrant proceedings to vacate a patent issued under the mining laws, must be determined by resort to general rules invoked in other cases.[2]

Attacks are rarely made upon mining patents. The proceedings by which they are obtained, unlike those governing lands agricultural in character, afford an opportunity to adverse claimants to litigate in the courts asserted hostile rights, prior to the issuance of the patent. The action of the government is more frequently sought to secure the cancellation of patents issued under the agricultural land laws, upon the ground that the lands embraced therein were known to be mineral at the date of the entry upon which the patent was based. Sometimes a patent of this character is issued where there is an absence of fraud and a court of equity has intervened to vacate it on the ground that it was issued by mistake — inadvertence — under an erroneous construction of the law or without authority of law.[3]

[1] United States *v.* Minor, 114 U. S. 233; United States *v.* San Jacinto Tin Co., 125 U. S. 273; United States *v.* Beebe, 127 U. S. 338; Moore *v.* Robbins, 96 U. S. 530; United States *v.* Iron S. M. Co., 128 U. S. 673; United States *v.* Trinidad Coal & Cokeing Co., 137 U. S.160; Mullan *v.* United States, 118 U. S. 271.

[2] On this subject see generally: Moffat *v.* United States, 112 U. S. 24; United States *v.* Minor, 114 U. S. 233; United States *v.* Throckmorton, 98 U. S. 61; Steel *v.* St. Louis Smelting Co., 106 U. S. 447; Colo. Coal & Iron Co. *v.* United States, 123 U. S. 307; United States *v.* White, 17 Fed. 561; State *v.* McGraw, 12 Fed. 449; United States *v.* Iron S. M. Co., 128 U. S. 673, 16 Fed. 810; United States *v.* Hancock, 133 U. S. 193; United States *v.* Marshall S. M. Co., 129 U. S. 579.

[3] United States *v.* Mullan, 7 Saw. 466; S. C. on appeal, 118 U. S. 271; McLaughlin *v.* United States, 107 U. S. 526; Western Pac. Ry. Co. *v.* United States, 108 U. S. 510; United States *v.* Culver, 52 Fed. 81, and cases cited.

Where the patentee has been guilty of fraudulent misrepresentations as to the character of the land, the United States may vacate the patent;[1] but a bill in chancery brought by the United States to set aside a patent, is not treated as a writ of error or as a petition for rehearing in chancery, or as if it were a mere retrial of the case before the land office.[2]

The rule governing this class of cases is thus stated by the supreme court of the United States:—

"We take the general doctrine to be, that when in a "court of equity it is proposed to set aside, to annul, or to "correct a written instrument for fraud or mistake in the "execution of the instrument itself, the testimony on which "this is done must be clear, unequivocal, and convincing, "and that it cannot be done upon a bare preponderance of "evidence. . . . In this class of cases, the respect due "to a patent, the presumption that all the preceding steps "required by the law had been observed before its issue, "the immense importance and necessity of the stability of "titles dependent upon these official instruments, demand "that the effort to set them aside, to amend them, or cor-"rect mistakes in them should only be successful when the "allegations on which this is attempted are clearly stated "and fully sanctioned by the proofs."[3]

To set the machinery of the government in motion and secure the institution of such a suit, application must be made to the land department, of which application the patentee is entitled to notice.[4]

If, upon examination of the proofs submitted, the commissioner of the general land office is of the opinion that the showing is, *prima facie*, sufficient as the basis for an order for a hearing, he refers the matter to the secretary of the interior, recommending that such a hearing be had. If the secretary concurs in the recommendation, a hearing is ordered.[5]

[1] United States v. Iron S. M. Co., 128 U. S. 673.
[2] United States v. Marshall S. M. Co., 129 U. S. 579.
[3] Maxwell Land Grant Case, 121 U. S. 325, 381, and cases cited.
[4] *In re* Little Nell Lode, 16 L. D. 104.
[5] *In re* Butte and Boston M. Co., 21 L. D. 125.

If, upon the hearing, the proofs are "clear, unequivocal, "and convincing," the secretary of the interior presents the matter to the attorney-general, with the request that the suit be instituted in the name of the United States,[1] which request is usually complied with, although such course is not necessarily taken. The matter ultimately rests with the department of justice, of which the attorney-general is the head.

By act of congress, approved March 3, 1891,[2] it was enacted that suits by the United States to vacate and annul any patent theretofore issued should only be brought within five years from the passage of this act, and that suits to vacate and annul patents thereafter issued shall only be brought within six years after the date of the issuance of the patent.

[1] *In re* Negus, 11 L. D. 32; *In re* Starr, 2 L. D. 759; Mountain Maid Lode, 5 L. D. 28; Lead City Townsite *v.* Little Nell Lode, 17 L. D. 291; *In re* Abercrombie, 6 L. D. 393; United States *v.* Rumsey, 22 L. D. 101.

[2] 26 Stats. at Large, 1093, § 8.

# TITLE VIII.

## RIGHTS AND OBLIGATIONS ARISING OUT OF OWNERSHIP IN COMMON OF MINES AND JOINT PARTICIPATION IN MINING VENTURES.

CHAPTER

I. TENANTS IN COMMON.

II. MINING PARTNERSHIPS.

# CHAPTER I.

## TENANTS IN COMMON.


§ 788. Cotenancy — how created — General rules governing tenants in common applicable to ownership in common of mines.

§ 789. Right of each cotenant to occupy and use the common property.

§ 790. Remedy of excluded cotenant — Accounting between tenants in common.

§ 791. Leases, licenses, and conveyances executed by one of several cotenants.

§ 792. Partition of mining property.


**§ 788. Cotenancy — how created — General rules governing tenants in common applicable to ownership in common of mines.** — A tenancy in common of a mining claim upon the public domain arises when two or more persons participate in its location.[1]

We have heretofore had occasion to treat of the relationship thus created and the rights and duties flowing therefrom with respect to relocations,[2] forfeiture to co-owners under the federal law,[3] and the attempt of one tenant in common to secure a government patent to the exclusion of his cotenants.[4]

With the exception of the title acquired originally by a location, a tenancy in common in mines and mining property is created in the same manner as in other classes of real property. From such cotenancy, however created, flows certain rights and obligations.

These rights and obligations may be enlarged or restricted in a number of ways through contractual relations, and the co-owners may thus occupy toward each other, or toward third persons, a relationship essentially

[1] *Ante*, § 331.
[2] *Ante*, § 406.
[3] *Ante*, § 646.
[4] *Ante*, § 728.

different from that of mere cotenants. For the present we deal exclusively with cotenancy pure and simple, treating the parties in the light strictly of co-owners in mining property, eliminating from consideration all elements other than those arising out of the legal relation, and dealing only with those engagements formed "by the bare "effect of their interest in the thing that is common to "them."[1]

It is not to be inferred that these "engagements" are different, in respect to property whose principal value and utility lie in its mineral character, from those which arise where the property is valuable and useful for other purposes. It may be accepted as well settled, in the absence of some statutory rule to the contrary, that the rights, duties and obligations of cotenants in a mine or mining claim are relatively the same as if a farm were the subject of the common ownership, so long as such relationship is unaffected by contract between the parties, express or implied. It is not our purpose to enter into an exhaustive discussion of the general laws of cotenancy. We shall limit ourselves to a brief application of some of these laws to the character of property under consideration. This will enable us to contrast to a better advantage cotenancies with mining partnerships, and to apply the decisions of the courts with a greater degree of precision.

We exclude from present consideration all those elements which arise distinctively out of the federal laws, confining ourselves to what may be called the common law phase of the relationship.

**§ 789. Right of each cotenant to occupy and use the common property.**— A tenant in common of a mine may occupy it for the purpose contemplated by all, even though a portion of the soil or ore be removed. Each tenant has the right to *use* the mine.[2]

[1] Freeman on Cotenancy, § 3.

[2] McCord v. Oakland Q. M. Co., 64 Cal. 134, 141; Anaconda C. M. Co. v. Butte & B. M. Co., 17 Mont. 519.

"It is no valid objection that the use is consumption, "and it is no fault of the tenant that it is not more endur- "able."[1]

As was said by Vice-Chancellor Bacon, in Job *v.* Potton:[2]—

"How is a tenant in common to enjoy his share (if that "is the right expression) of the common property of a "coal mine, if he is not at liberty to dig and carry away "the coal?"

The taking of ore from the mine is rather the use than the destruction of the estate within the meaning of the general rule. The results of the tenant's labor and capital are in the nature of proceeds or profits, the partial exhaustion being but incidental consequence of the use.[3]

Conceding that a tenant in common may be liable to his cotenants in case he commits waste, the usual method of enjoying the land does not constitute such waste.[4]

Under the English rule, any joint tenant, tenant in common or coparcener of a mine is entitled to enter upon and work it.[5]

**§ 790. Remedy of excluded cotenant — Accounting between tenants in common.**— The right of a cotenant to use the common property is based upon the assumption, that the one so using does not deny the right of the others or exclude them from possession. When one of several co-owners takes exclusive possession of the premises under such circumstances as amount in law to an ouster, the excluded cotenant is entitled to relief in some form. The nature of the remedy may depend upon state statutes.

[1] Irwin *v.* Covode, 24 Pa. St. 162.

[2] L. R. 20 Eq. 84, 93.

[3] McCord *v.* Oakland Q. M. Co., 64 Cal. 134; Anaconda C. M. Co. *v.* Butte & B. M. Co., 17 Mont. 519.

[4] Vervalen *v.* Older, 8 N. J. Eq. 98; Capner *v.* Flemington M. Co., 3 N. J. Eq. 467; Huntley *v.* Russell, 13 Q. B. 572; Job *v.* Potton, *supra*: Angier *v.* Agnew, 98 Pa. St. 587; Russell *v.* Merchants' Bank, 47 Minn. 286; Findlay *v.* Smith, 6 Munf. 134; Sayers *v.* Hoskinson, 110 Pa. St. 473; Reed *v.* Reed, 16 N. J. Eq. 248; Hihn *v.* Peck, 18 Cal. 640.

[5] MacSwinney on Mines, p. 110; Bainbridge on Mines, 4th ed., pp. 25, 26; Rogers, 2d ed., p. 267.

While the right of redress may exist independent of state legislation,[1] the method to be pursued in securing such redress may not always be the same in all jurisdictions.

As a general rule, one tenant in common cannot have an injunction against his cotenant; but this species of preventive relief has been upheld under special circumstances, as where waste destructive to the estate and not within the usual legitimate enjoyment is alleged.[2]

Under a statute which provided that "if any person "shall assume and exercise exclusive ownership over, or "take away, destroy, lessen in value, or otherwise injure "or abuse any property held in joint tenancy, or tenancy "in common, the party aggrieved shall have his action for "the injury in the same manner as he would have if such "joint tenancy, or tenancy in common, did not exist," it was held that an excluded tenant in common, whose right was practically denied, was entitled to an injunction against the operating cotenant.[3]

It may be generally conceded, particularly in the precious-metal-bearing states where the reformed procedure has been adopted, that a cotenant in possession, who either works in so unskillful a manner as to amount to destructive waste, or being in possession under an unequivocal hostile assertion of exclusive title, seeks to appropriate the entire product to his own use, an injunction will lie at the instigation of the injured cotenant. The remedy at law by an action of trespass or trover for rents and profits, or one sounding in damages only, might be wholly inadequate.

There exists in reason no distinction between this class of cases and those where a disseizor holds lands of another and no question as to tenancy in common arises.[4]

[1] Childs *v.* Kansas City R. R. Co. (Mo.), 17 S. W. Rep. 964; Johnson *v.* Johnson, 2 Hill Eq. (S. C.), 277; Dodge *v.* Davis, 85 Iowa, 77.

[2] Johnson *v.* Johnson, *supra*; Hole *v.* Thomas, 7 Vesey Jr. 589; Twort *v.* Twort, 16 Vesey Jr. 128; Hawley *v.* Clowes, 2 Johns. Ch. 122.

[3] Anaconda C. M. Co. *v.* Butte & B. M. Co., 17 Mont. 519; Red Mountain Cons. M. Co. *v.* Essler, 18 Mont. 174.

[4] Sears *v.* Sellew, 28 Iowa, 501.

Courts of equity have gradually enlarged their jurisdiction, and now they interfere to prevent injury to land, even where the title is in dispute and the right is doubtful, if the waste or trespass will be attended with irreparable mischief, or from the irresponsibility of the defendant, or otherwise the plaintiff cannot obtain relief at law.[1]

The excluded cotenant might bring partition proceedings, and obtain the appointment of a receiver by interlocutory order.[2]

One tenant in common cannot compel his cotenants to unite with him in the working and exploitation of the common property,[3] or bind the interest of the other by contract.[4]

It is entirely immaterial whether the one in possession and desiring to mine has the larger or the smaller interest in the property, or owns or controls more than an undivided half. The rule that those holding the majority interests have a right to dictate the policy and control the management and working of the property as against nonconsenting owners of the minority interest, has no application to cotenants. This doctrine applies only in cases of mining partnerships, or where the original rights and obligations of cotenants are enlarged or restricted by virtue of some contract, express or implied, existing between them.[5]

In Idaho there is a statute which provides, that a "mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it

[1] Spear *v.* Cutter, 5 Barb. 486; Hart *v.* Mayor, 3 Paige, 214; Winship *v.* Pitts, *Id.* 259; New York P. & D. Establishment *v.* Fitch, 1 Paige, 97, 99; Hanson *v.* Gardner, 7 Vesey Jr. 305, 308; Thomas *v.* Oakley, 18 Vesey Jr. 184; Field *v.* Dumont, 1 Swanst. 204, 208; Livingston *v.* Livingston, 6 Johns. Ch. 497; Kane *v.* Vanderburgh, 1 Johns. Ch. 11, note; Obert *v.* Obert, 5 N. J. Eq. 397.

[2] MacSwinney on Mines, p. 111; Roberts *v.* Eberhardt, Kay, 148, 158, 159.

[3] Graham *v.* Pierce, 19 Grattan, 28; Morgan *v.* Morgan, 23 La. An. 502.

[4] Chase *v.* Savage, 2 Nev. 9; Rico Reduction Works *v.* Musgrave, 14 Colo. 79; Charles *v.* Eshleman, 5 Colo. 107.

[5] Dougherty *v.* Creary, 30 Cal. 291.

" and extracting the mineral therefrom actually engage in " working the same."[1]

The supreme court of that state has held, that it was not necessary that *all* the co-owners in a mining claim should engage in working a mine together or separately in order to create the partnership; that when one of several cotenants holding an undivided eighth entered into possession and commenced operations apparently on his own responsibility, but not denying the right of the owner of the seven eighths to share in the profits, that a mining partnership was created, and that the owner of the majority interest has a right to dictate the manner in which the property should be worked.[2]

In other words, any cotenant may, by his own act and under protest of his co-owners, convert a cotenancy into a mining partnership. The relief afforded by the supreme court of Idaho in the case referred to, may readily be justified upon the ground that, although the minority owner in possession protested his willingness to permit the majority to participate in the profits, as a matter of fact the only water available for the purpose of working the property was controlled by the minority owner, who was manifestly exploiting the common property for the profit derived from the use of the water, or, as the court said in the opinion on the second appeal:—[3]

" He proposes to work out the claim for what the water " will bring; the seven-eighths' interest of plaintiff being " simply appropriated to pay water rates in which he, " plaintiff, had no interest whatever."

If this did not amount in law to such an exclusion as would justify the court in granting relief, it would appear that the tenant in possession was operating the property in an improper manner equivalent to destructive waste.

A case bearing some analogy to this was considered by

[1] Rev. Stats. Idaho, § 3300.

[2] Hawkins *v.* Spokane Hydraulic M. Co., 2 Idaho, 970; S. C., second appeal (Idaho), 33 Pac. 40.

[3] 33 Pac. 41.

the supreme court of Montana, and it was then held that the circumstances surrounding the taking of the possession by one of the cotenants, and the manner in which the property was being worked, amounted to an exclusion of the other co-owner and a denial of his rights. Under such circumstances the excluded cotenant was allowed to enjoin the one working.[1]

But the Montana court declined to adopt the theory of partnership for the purpose of supporting its decision, expressing its view, that to constitute such a relation, all the owners must actually engage in working the mine.

A cotenant in possession, whether his interest be large or small, cannot bind those who do not voluntarily participate in the venture.[2]

He cannot force direct contribution for improvements made,[3] nor for the costs and expense of development or working.[4]

The right of one cotenant to compel contribution from the others is limited to cases where the property is subjected to a common burden, and where one in removing it pays more than his just proportion, or possibly to the case of repairs absolutely necessary to protect the property from going to ruin.[5]

While each cotenant has the privilege of entering upon the property and making such use of it as its nature will permit, without committing destructive waste, he will not be entitled to retain for his exclusive use any more than his proportionate share of the product.[6]

[1] Anaconda C. M. Co. *v.* Butte & Boston M. Co., 17 Mont. 519.

[2] Rico Reduction & M. Co. *v.* Musgrave, 14 Colo. 79; Chase *v.* Savage, 2 Nev. 9.

[3] Newman *v.* Driefurst, 9 Colo. 228; Welland *v.* Williams, 21 Nev. 230; Calvert *v.* Aldrich, 99 Mass. 74; Alleman *v.* Hawley, 117 Ind. 532; Bazemore *v.* Davis, 55 Ga. 504; Austin *v.* Barrett, 44 Iowa, 488; Stevens *v.* Thompson, 17 N. H. 103; Ford *v.* Knapp, 31 Hun. 522; Taylor *v.* Baldwin, 10 Barb. 582; Crest *v.* Jack, 3 Watts, 238; Thurston *v.* Dickinson, 2 Rich. 317; Farrand *v.* Gleason, 56 Vt. 633; Kidder *v.* Rixford, 16 Vt. 169.

[4] Brunswick *v.* Walters' Heirs, 3 New Mex. 241.

[5] Dech's Appeal, 57 Pa. St. 467; Leigh *v.* Dickenson, 12 Q. B. D. 194.

[6] Denys *v.* Shuckburgh, 4 Y. & C. Eq. Ex. 42; Jacobs *v.* Seward, 5 L. R. H. L. 464, 475, 478; Job *v.* Potton, 20 Eq. 84.

He is liable in an action for an accounting by a non-participating cotenant who may recover his proportionate share of the net profits, if any.[1]

The working cotenant may deduct from the gross product all legitimate expense of working;[2] but in case of loss he cannot compel his co-owners to contribute.[3]

The general rule as to the rights and obligations of a working cotenant may be thus stated:—

Tenants in common are not bound to use the common property jointly by means of a contract of partnership between them, but may possess, use, and enjoy it, accounting to their cotenants for so much of the rents and profits as they may receive beyond their just share and proportion. As a general rule, where a tenant in common uses the common property to the exclusion of his cotenants, or occupies and uses more than his just share and proportion, the best measure of his accountability to his cotenants is their shares of a fair rent of the property use. In the case of tenancy in common in a mine, an account of issues and profits is the proper mode of adjustment. Each is to be charged with all his receipts, and credited with all his expenses on account of his operation of the mine. In such case the operating tenant should have a credit for necessary improvements made in the operation of the mine. He will be responsible if by gross negligence he wastes or destroys the common property.[4]

**§ 791. Leases, licenses, and conveyances executed by one of several cotenants.**— A lease or license given by one cotenant to a third person to extract ore from the common property extends only to the interest of the granting cotenant. He cannot bind a dissenting tenant.[5]

[1] Job *v.* Potton, *supra;* McCord *v.* Oakland, Q. M. Co., 64 Cal. 134; Abbey *v.* Wheeler, 85 Hun. 226; Stenger *v.* Edwards, 70 Ill. 631.

[2] *Id.;* Graham *v.* Pierce, 19 Gratt. 28. See, also, Mallett *v.* Uncle Sam G. & S. M. Co., 1 Nev. 188.

[3] Henderson *v.* Eason, 17 Q. B. 701, 721.

[4] Graham *v.* Pierce, 19 Gratt. 28. See, also, Huff *v.* McDonald, 22 Ga. 131; Early *v.* Friend, 16 Gratt. 21.

[5] Omaha & Grant S. & R. Co. *v.* Tabor, 13 Colo. 41; Hartford *v.* Miller, 41 Conn. 112; Tipping *v.* Robbins, 71 Wis. 507.

The terms of a contract of sale by which one cotenant of mining lands disposes of his interest, will not bind the others to accept the royalty therein reserved to the vendor as a fair measure of the value of their rights,[1] and an accounting by the lessee to the lessor for all the ore extracted will not discharge them from their liability to account to the other tenants in common.[2]

One tenant in common cannot convey his right to any specified portion of the premises, or any right in the same, or the right to dig ores, to the prejudice of his cotenants. Such conveyance is void as to the cotenants, though good as against the grantors.[3]

In a conveyance by one tenant in common of his estate in the land held in common, a reservation of his interest in the mines in and upon the land granted is void;[4] but one may convey his entire interest without the consent of the others, and the others have no right to participate in the sale unless by special agreement; and one may purchase the interest of another without consulting the remaining cotenants not parties to the transaction, and the purchase will in no sense inure to the benefit of the latter.[5]

§ 792. **Partition of mining property.**— Mining claims may be partitioned between cotenants the same as other real property, although the fee of the land may reside in the general government.[6]

When we say that mining property held in common

[1] Mercur *v.* State Line & S. R. Co., 171 Pa. 12.

[2] Barnum *v.* Landon, 25 Conn. 137.

[3] Boston Co. *v.* Condit, 19 N. J. Eq. 394; Marsh *v.* Holley, 42 Conn. 453; Hartford *v.* Miller, 41 Conn. 112.

[4] Adams *v.* Briggs Iron Co., 7 Cush. 361.

[5] Bissell *v.* Foss, 114 U. S. 252, 262; Charles *v.* Eshleman, 5 Colo. 107; First Nat. Bank *v.* Bissell, 4 Fed. 694; Harris *v.* Lloyd, 11 Mont. 390.

[6] Hughes *v.* Devlin, 23 Cal. 501; Gillett *v.* Gaffney, 3 Colo. 351; Sears *v.* Taylor, 4 Colo. 38; Fillmore *v.* Reithman, 6 Colo. 120; McKeon *v.* Bisbee, 9 Cal. 137; Watts *v.* White, 13 Cal. 321; Merritt *v.* Judd, 14 Cal. 59; Lowe *v.* Alexander, 15 Cal. 297, 302; Spencer *v.* Winselman, 42 Cal. 479; Dall *v.* Confidence S. M. Co., 3 Nev. 531; Aspen M. & S. Co. *v.* Rucker, 28 Fed. 220. *Contra:* Strettell *v.* Ballou, 9 Fed. 256.

may be partitioned, it is, of course, implied that the tenancy in common may be severed by an actual partition among the parties entitled, and division of the tract into segregated parcels, "quantity and quality relatively con-"sidered," where the nature of the deposits are such as to make such actual partition feasible or possible, or by a sale when such partition cannot be effected without serious detriment to the interest of the cotenant.

It has been said that the only partition that can be made of this class of property is to order a sale, and divide the proceeds.[1]

It is undoubtedly true that an actual division of a mine can rarely be made without doing a possible injustice to some one of the cotenants. Generally partition proceedings must result in a sale.[2]

While in case of placers, superficial deposits, or coal beds, where the ownership is disconnected with extra-limital easements, such as water rights, rights of way, and the like, the court may be able to determine the probable value of an entire tract and the uniformity in the grade of the deposits, so as to effect an equitable actual partition, yet we apprehend that the instances are rare.

In the case of lodes and veins, it would seem impossible to effect a fair, actual division. It is a matter of common knowledge that the metallic substances occurring in veins are not distributed uniformly, either as to quantity or quality. They are found in "shoots," vugs, kidneys, and other irregular bodies, making it impracticable to segregate the interests without great injury to the owners.

The frequent occurrence of faults and dislocations, the alternate disappearance and recurrence of the ore bodies, so as to render their continuance in a particular direction extremely uncertain, are all elements which are proper subjects for the consideration of a court when actions of this character are brought, logically forcing the conclusion

[1] Lenfers *v.* Henke, 73 Ill. 405.
[2] Aspen M. & S. Co. *v.* Rucker, 28 Fed. 220.

that allotments in severalty would result injuriously to the owners or some of them.[1]

Theoretically a mine may be partitioned. Practically it cannot be, but a sale must ordinarily result.

As an abstract proposition of law, a sale of a mine cannot be ordered in a partition suit, except in those cases where a partition would be manifestly injurious to the interests of cotenants.[2]

Whether or not a partition can be made without great prejudice to the owners, is a question of fact, the decision of which is not aided by judicial notice of any fact or circumstance not proved;[3] and where a sale is sought, the burden is upon the party urging it, to show the facts upon which an order of sale may be made, the presumption being that an actual partition may be had;[4] but the burden of overthrowing this presumption in the light of authorities, is by no means onerous.

The right of partition may be maintained only by those occupying the legal relationship of joint tenants, tenants in common, or coparceners. The owner of an incorporeal hereditament or servitude in gross, such as a mining right to enter upon and occupy the ground for the purpose of extracting the minerals, cannot maintain partition as against the owners of the soil. The minerals and ores, so long as they remain in place, unworked and unsevered, are incapable of allotment according to quality and quantity relatively considered.[5]

It has been held that parties may, by contract, waive the right of partition and create a permanent tenancy in common which would prevent a severance of interests, such a covenant being one running with the land.[6]

[1] Coleman *v.* Coleman, 19 Pa. St. 100; Conant *v.* Smith, 1 Aikens (Vt.), 67.

[2] Dall *v.* Confidence S. M. Co., 3 Nev. 531.

[3] Mitchell *v.* Cline, 84 Cal. 409, 418.

[4] Freeman on Cotenancy and Partition, § 537, and cases cited.

[5] Smith *v.* Cooley, 65 Cal. 46, 48; Boston Franklinite Co. *v.* Condit, 19 N. J. Eq. 394.

[6] Coleman's Appeal, 62 Pa. 252.

A parol partition, executed by the parties taking actual exclusive possession of the portions respectively assigned to them in pursuance of the agreement to partition, which partition and possession are acquiesced in by the parties, is valid, and upon such partition the parties cease to be tenants in common.[1]

[1] 420 M. Co. *v.* Bullion M. Co., 3 Saw. 634; Freeman on Cotenancy and Partition, § 398.

## CHAPTER II.

### MINING PARTNERSHIPS.


§ 796. Nature of relationship.
§ 797. Mining partnership — how created.
§ 798. Special instances wherein mining partnership held to be created.
§ 799. Special instances where mining partnership held not to be created.
§ 800. Rights and obligations of mining partners *inter sese*.
§ 801. Authority of the members — Liability of copartnership to third parties.
§ 802. Partnership property.
§ 803. Dissolution.


§§ **796. Nature of relationship.**— Where several owners unite and co-operate in working a mine, they form what is termed a mining partnership,[1] which is governed by many of the rules relating to an ordinary partnership, and also by some rules peculiar to itself.[2]

The distinctive features of mining partnerships are,—

(1) The absence of the *delectus personarum*, which characterizes ordinary partnerships;

(2) Neither death nor bankruptcy of one of the members dissolves it;

(3) A sale of an interest in a mining partnership by a partner does not dissolve the partnership; such stranger by his purchase becomes a partner. Hence its membership is changeable and uncertain. This naturally flows from the absence of the *delectus personæ*.[3]

[1] Lindley on Partnership, 2d Am. ed. 332.

[2] Kahn *v.* Central Smelting Co., 102 U. S. 641; Skillman *v.* Lachman, 23 Cal. 199. Mr. Bates, in his work on partnership (§ 14), characterizes a mining partnership as "a cross between a tenancy in common and regu- "lar partnership."

[3] Lamar *v.* Hale, 79 Va. 147; Jones *v.* Clark, 42 Cal. 180; Kahn *v.* Central Smelting Co., 102 U. S. 641; Bissel *v.* Foss, 114 U. S 252; Meagher *v.*

The origin of this species of limited partnerships may be traceable to the early periods of mining in the west, and while it has been the subject of legislation in some of the states in recent years,[1] such legislation is but little more than declaratory of the rules announced by the courts as governing the relation under what may be termed the American common law of mining partnerships.[2]

In some of its aspects the relationship resembles that arising under the cost-book system prevalent in Cornwall and Devonshire, but in America the law has grown up out of the necessities of the miners; and mining partnerships, as a distinctive class, possessing peculiar attributes, have, by common consent, been recognized. They have become "second nature" to mining enterprises.[3]

As was said by Justice Field:—

"Mining partnerships as distinct associations, with different rights and liabilities attaching to members of ordinary trading partnerships, exist in all mining communities; indeed, without them, successful mining would be attended with difficulties and embarrassments greater than at present."[4]

This class of limited partnerships has always been recognized in England, where the rules governing them are similar to those established in this country, making some slight allowance for difference in environment.

§ 797. **Mining partnership — how created.** — A mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working

Reid, 14 Colo. 335; Charles *v.* Eshleman, 5 Colo. 107; Harris *v.* Lloyd, 11 Mont. 390; Boucher *v.* Mulverhill, 1 Mont. 306; Taylor *v.* Castle, 42 Cal. 367; Patrick *v.* Weston, 22 Colo. 45; Nisbet *v.* Nash, 52 Cal. 540; Congdon *v.* Olds, 18 Mont. 487.

[1] Montana, Civil Code, §§ 3350-3359; California, Civil Code, §§ 2511-2520; Idaho, Rev. Stats., §§ 3300-3309 (these statutes are counterparts of each other); Nevada, Comp. Laws, §§ 468-480.

[2] Congdon *v.* Olds, 18 Mont. 487.

[3] Kahn *v.* Old Tel. M. Co., 2 Utah, 174, 218.

[4] Kahn *v.* Central Smelting Co., 102 U. S. 641, 645.

it and extracting the mineral therefrom actually engage in working the same.[1]

It does not arise from mere cotenancy.[2]

An express agreement to become partners or to share the profits and losses of mining is not necessary to the formation of a mining partnership.[3]

Persons jointly conducting a mining venture are partners, though there is no express agreement for a partnership.[4]

A partnership may be formed by verbal agreement to acquire title by location to public mineral lands. Such contracts are not within the statute of frauds;[5] but to create a partnership in working the mines not even this is necessary.

The relationship arises from the ownership of the shares and the joint working of the same for the purpose of extracting the minerals therefrom.[6]

What a partnership is, is a question of law. Its existence in a given case, however, is a question of fact, depending for its solution upon inferences to be drawn from the evidence adduced.[7]

Of course, general partnerships may be formed for the purpose of mining; but we are concerned only with the special class distinctively known as mining partnerships.

**§ 798. Special instances wherein mining partnership held to be created.**— An agreement between one or more persons who claim an undeveloped mine and another person, that if the latter will devote his labor and skill in

[1] Skillman *v.* Lachman, 23 Cal. 199; Dougherty *v.* Creary, 30 Cal. 290; Duryea *v.* Burt, 28 Cal. 569; Settembre *v.* Putnam, 30 Cal. 490; Stuart *v.* Adams, 89 Cal. 367; Manville *v.* Parks, 7 Colo. 128; Higgins *v.* Armstrong, 9 Colo. 38; Nolan *v.* Lovelock, 1 Mont. 224; Santa Clara M. Assn. *v.* Quicksilver M. Co., 8 Saw. 330.

[2] Tuck. *v.* Downing, 76 Ill. 71.

[3] Manville *v.* Parks, 7 Colo. 128, 134.

[4] Snyder *v.* Burnham, 77 Mo. 52; Duryea *v.* Burt, 28 Cal. 569.

[5] Moritz *v.* Lavelle, 77 Cal. 10; Murley *v.* Ennis, 2 Colo. 300; Lawrence *v.* Robinson, 4 Colo. 567; Meagher *v.* Reid, 14 Colo. 335; Hirbour *v.* Roeding, 3 Mont. 15. *Contra:* Craw *v.* Wilson (Nev.), 40 Pac. 1076.

[6] Anaconda C. M. Co. *v.* Butte & B. M. Co., 17 Mont. 519.

[7] Hurd *v.* Tomkins, 17 Colo. 394.

exploring and developing the mine, the former will furnish him with tools and provisions and give him a share in the mine if it proves valuable, and a joint working of the mine and sharing in the profits by the parties after development, constitutes a mining partnership.[1]

The verbal conveyance of one-third interest in a mining claim by a party who retains the other two thirds, the purchaser agreeing to pay the price therefor out of the product of the property, the working of all parties together in developing the mine, a time book being kept in which were entered the wages accruing each party and the payment of sums of money by the purchaser agreeable to the contract, are facts sufficient to make out a mining partnership.[2]

Where conveyances were made by the plaintiff, who was the owner of mining property, of an undivided two-thirds interest therein to defendant who, in consideration thereof, agreed to cause such development work to be done as to put the property into a marketable condition, and to use his best endeavors to sell the property at the highest price obtainable, bearing all expenses of development and of negotiating a sale and to pay the plaintiff one third of the gross proceeds upon a sale, a partnership relation is created between the plaintiff and defendant in respect to the property which was the subject of the enterprise.[3]

A contract between three persons to operate a mining property as a company, creates a partnership of such persons from the date thereof, and makes each of them liable for the debts contracted in the prosecution of the enterprise; and this notwithstanding the fact that such contract provides that there shall be no division of the profits between the parties until two of them are reimbursed therefrom, the money expended in the purchase of two thirds of the property from the other one, and the cost of improving the same.[4]

Such a partnership may exist as well where the parties

[1] Settembre *v.* Putnam, 30 Cal. 490.
[2] Southmayd *v.* Southmayd, 4 Mont. 100.
[3] McIntosh *v.* Perkins, 13 Mont. 143.
[4] Bybee *v.* Hawkett, 12 Fed. Rep. 649.

have an interest in the working of the mine in carrying on mining operations as where they own the mine itself.[1]

A contract providing that one party should have a certain undivided interest in all ores extracted from certain mines, and should bear a proportionate share of the expenses of extracting the same, the other parties to have a remaining interest in the ore and to bear the balance of expense, and also that first party should furnish a mill for concentrating the ore, the expenses of contracting and rental of the mill to be divided among the parties, renders them partners in the extraction of the ore.

A subsequent verbal agreement that the first party should receive a certain price for each ton of ore concentrated, to be paid from the proceeds of the ore, he to pay the rental of the mill, repairs, and improvements, does not prevent the parties being partners; neither does an agreement that one of the parties shall ship the ore after concentration, receive the proceeds, and pay out the money under the direction of another partner who was to manage the mine.[2]

A party, by an instrument in writing, contracted to purchase from the owners certain undivided interests in mining property. Subsequently, by oral agreement, he obligated himself to furnish money to carry on exploitation. It was *held* that the deed and contract were admissible in evidence for the purpose of showing that a mining partnership existed between him and the co-owners of the mine; and defendants, who were the owners of unequal interests, agreed that the mine should be worked for the purpose of obtaining ore, each to furnish money for that purpose in proportion to his interest, and that the profits and losses should be shared in the same proportion. It was held that there was sufficient evidence of a partnership.[3]

[1] Manville *v.* Parks, 7 Colo. 128.
[2] Ashenfelter *v.* Williams, 7 Colo. App. 332.
[3] Randall *v.* Merideth, 76 Tex. 669; Perkins *v.* Peterson, 2 Colo. App. 242.

**§ 799. Special instances where mining partnership held not to be created.**— No mining partnership or co-ownership exists between the owners of a mine and the holders of a deed from them intended as security for indebtedness, where the holders of the deed are not in possession, and are interested in the work only as creditors, although it is agreed between them and the owner of the mine that all gold produced as the result of mining operations is to be received and retained by the creditors, and that the profits are to be applied toward payment of the indebtedness secured by the deed.[1]

There is no element of a mining partnership where the contract alleged is one of hiring, to procure and work a mine for the defendant, upon the payment of wages and giving of an interest in the mine, in addition to wages conditioned upon its being found to be a paying mine.[2]

An agreement for an interest in the profits of a mining venture as a means of compensation only, does not constitute a partnership.[3] It is simply a contract for working the mine on shares.[4]

In the case of Vietti *v.* Nesbitt,[5] the defendants with others were the owners of a mine, which was being worked by the plaintiff under an agreement that the ore extracted should be worked in a mill belonging to the defendants, and the proceeds divided as follows: the defendants were to be paid twenty-five dollars per ton for the milling, the plaintiff was then to be paid the expense of extracting the ore, and the balance was to be divided equally between him and the owners of the mine. It was held that these partners were simply tenants in common of the ore and its proceeds, and no partnership existed between them.

A recorded agreement between a mining corporation and private parties, in which it was agreed that the corporation

[1] Chung Kee *v.* Davidson, 102 Cal. 188.
[2] Berry *v.* Woodburn, 107 Cal. 504.
[3] Butler *v.* Hinckley, 17 Colo. 523, 527; Stevens *v.* McKibbin, 68 Fed. 406.
[4] Stuart *v.* Adams, 89 Cal. 367.
[5] 41 Pac. Rep. 157.

should convey an undivided one half of the mining property to the private parties, when they had expended ten thousand dollars in developing and improving the property, but that the corporation should not be liable for any debts incurred in developing and improving the property, taken in connection with the fact that the corporation never held itself out as a partner of the private parties, does not constitute a partnership, even though the corporation was to share in contingent profits with the private parties.[1]

Where two persons entered into an agreement to engage together in a mining venture under a firm name, and to share the profits and losses equally, and as a firm they purchased a mine and paid a note given in the firm name for a portion of the price, *held*, that the contract was one of partnership in the ordinary sense, as distinguished from a "mining partnership," and that either partner had the same authority to bind the firm as if it were an ordinary trading partnership.[2]

**§ 800. Rights and obligations of mining partners inter sese.**—In the conduct of the business for which a mining partnership is formed, the copartners owe to each other the same degree of fidelity, good faith, and fair dealing as is exacted from ordinary partners.[3]

The rule of *uberrima fides* is just as applicable to this class of partnerships as it is to those more general in their scope.

One member may not conduct operations to the detriment and disadvantage of his associates, or acquire for his own exclusive benefit property which rightfully belongs to the partnership;[4] but so far as the disposal of his own or the purchase of another's interest is concerned, where the partnership relation does not extend to selling the property,

[1] Horton *v.* New Pass G. & S. M. Co., 21 Nev. 184.
[2] Decker *v.* Howell, 42 Cal. 636.
[3] Jennings *v.* Rickard, 10 Colo. 395.
[4] Kimberly *v.* Arms, 129 U. S. 512; Continental Divide M. Co. *v.* Bliley (Colo.), 46 Pac. 633; Settembre *v.* Putnam, 30 Cal. 490.

but only to developing and mining it, neither of the parties are under any legal obligation to consult with the others.

One may sell his interest to a stranger, and the latter becomes thereby a partner, whether the other copartners are willing or unwilling.[1]

In the absence of a special contract there is no relation of trust between tenants in common of mining property, who are partners only for the purpose of exploitation, which prevents one from receiving a higher sum for his interest than is paid to his co-owners; nor is the selling cotenant under any obligation to disclose to the others the fact that upon the sale of the entire property he is to receive a higher sum for his interest than the others.[2]

A purchase by one cotenant of the interest of another does not inure to the benefit of all the remaining tenants in common.[3]

In a mining partnership, the firm has no right of pre-emption as to the interests of retiring partners in the mine. Therefore a tenant in common of mining property and a partner in the working of the mine cannot claim any benefit in the purchase of the interests of certain cotenants and retiring partners by other cotenants and partners.[4]

The decision of the members owning a majority of the shares or interests in a mining partnership binds it in the conduct of its business. This rule is statutory in Montana,[5] California,[6] and Idaho.[7]

This has always been the rule in the absence of legislation; but, as was said by the supreme court of California,—

"The conduct of the partners holding the major portion "of the property in a mining concern is to be most

[1] Nisbet *v.* Nash, 52 Cal. 540; Kahn *v.* Central Smelting Co., 102 U. S. 641; Bissell *v.* Foss, 114 U. S. 252; Kimberly *v.* Arms, 129 U. S. 512.

[2] Harris *v.* Lloyd, 11 Mont. 390.

[3] Bissell *v.* Foss, 114 U. S. 252.

[4] First Nat. Bank *v.* Bissell, 4 Fed. 694.

[5] Rev. Code of 1895, § 3359.

[6] Civil Code, § 2520.

[7] Rev. Stats., § 3309; Hawkins *v.* Spokane H. M. Co., 2 Idaho, 970.

"jealously scrutinized when complaint is made, by the "minority in interest, of oppression. It might, and often "would, work great inconvenience and damage to the "minority in interest of a mining partnership, if the "majority were allowed to do as they might deem to their "own advantage, regardless of the rights and interests of "the minority: but, notwithstanding the danger of the "abuse of power in such cases, what may be necessary and "proper for carrying on the business of mining for the "joint benefit of all concerned must be determined by "those owning and holding in the aggregate the major "part of the property; and if the powers which are thus "attempted to be exercised are not necessary and proper "for the success of the enterprise, those whose interests are "imperiled or disastrously affected thereby have the right "to resort to the courts for redress and protection."[1]

As in the case of general partnership, the minority must be consulted. Any other course of proceeding on the part of the majority is not in good faith.[2]

Each member of a mining partnership has a lien upon the partnership property for the debts due the creditors of the concern, and for moneys advanced by him for its use, which he may enforce in equity, even if there has been no agreement among the partners that such lien shall exist.[3] By statute in Montana, Idaho, and California, the lien exists, although there may be an agreement that it must not.

If a member of a mining partnership sells his interest, the purchaser takes subject to such lien. He is deemed to have purchased with notice of any lien resulting from the relation of the partners to each other and to the creditors of the partnership.[4] Such lien does not give to either partner a right of possession to the exclusion of the other; nor is it dependent upon possession.[5] As a matter of law the possession of one partner is possession of all.[6]

[1] Dougherty v. Creary, 30 Cal. 291, 301.
[2] Lindley on Partnership, p. 600.
[3] Duryea v. Burt, 28 Cal. 569.
[4] *Id.*
[5] Morganstern v. Thrift, 66 Cal. 577.
[6] Waring v. Crow, 11 Cal. 366; Patterson v. Keystone M. Co., 30 Cal. 360.

An incoming partner takes subject to the payment of the antecedent partnership debts out of the partnership property,[1] although he may not be held liable personally for such debts.

So far as the creditor is concerned, the personal liability of the retiring partner continues, but such partner, in disposing of his interest, parts with his equity to have the partnership debts paid out of the partnership property.[2]

A location made by one partner after dissolution, upon a discovery of mineral indications made prior, will not inure to the benefit of a former partner, unless failure to make location during the existence of the partnership was fraudulent.[3]

Where an agreement providing for the prospecting and location of mining claims for the benefit of all the parties thereto is dissolved by mutual consent, neither of the parties is under any obligation to the others to perfect locations commenced in pursuance of the agreement; and subsequent locations covering the same ground made by some of them are not held in trust for the others.[4]

§ 801. **Authority of the members — Liability of copartnership to third parties.**— In a limited sense each member of a mining partnership is the agent of the other.[5]

The powers of members and managers of such partnerships are limited to the performance of such acts in the name of the partnership as may be necessary to the transaction of the business, or which is usual in like concerns,[6] or, as we find the rule stated in Bainbridge,[7]—

[1] Jones v. Clark, 42 Cal. 180.
[2] *Id.*
[3] Jennings v. Ricard, 10 Colo. 395.
[4] Page v. Summers, 70 Cal. 121.
[5] Abbott v. Smith, 3 Colo. App. 264.
[6] Charles v. Eshleman, 5 Colo. 107, holding that employment of counsel to litigate the title to the mine does not come within the limited powers vested in a mining partner.
[7] 4th ed., p. 589.

"The limit of liability must, with respect both to the "partners themselves and the public, be determined by "the general usage of trade applicable to the particular "branch of industry in which the society is engaged. An "authority for one partner to bind another, will, there- "fore, in all such cases be presumed to exist, so far as, by "the general usage of persons engaged in similar pursuits, "such an authority has been determined to be necessary "for effectually conducting the business of the concern. "In cases where usage may not have established any "particular practice, or in which the custom may be "doubtful, it will still be necessary to recur to the original "principle upon which all customs are founded, viz. "whether the act in question can be considered to be "necessary for the efficient management of the concern."

One member of a partnership does not possess implied authority to bind the copartnership by a promissory note.[1]

This rule is based upon the reason that in such partnership there is no *delectus personæ*, and that, consequently, the membership is continually subject to changes beyond the control of the partners;[2] nor may one borrow money to carry on the business. Yet, as an incident of such partnership, each has authority to bind others by dealing on credit for the purpose of working the mines, if it appears to be necessary or usual in the management and course of such working.[3]

As mining operations cannot be conducted without the employment of labor, the firm would be responsible to employees hired by one of the partners.[4]

So with the purchase of supplies and articles necessary to carry on the business, the debt being contracted in the usual course of business and within the scope of the partnership venture.[5]

There is no implied authority to purchase land, and no obligation given by a member for the purpose of effecting

[1] Manville v. Parks, 7 Colo. 128; Skillman v. Lachman, 23 Cal. 199; Congdon v. Olds, 18 Mont. 487.

[2] Decker v. Howell, 42 Cal. 636; Duryea v. Burt, 28 Cal. 569, 570.

[3] Manville v. Parks, 7 Colo. 128.

[4] Burgan v. Lyell, 2 Mich. 102; Nolan v. Lovelock, 1 Mont. 224.

[5] Higgins v. Armstrong, 9 Colo. 38.

such purchase can be enforced against the others;[1] but, of course, the rule is different where the partnership is an ordinary one, whose object is to purchase as well as exploit mines, and where the element of *delectus personæ* is present.[2]

A mining partnership may, by its general practice and course of business, be held liable for acts which were not, strictly speaking, within the scope of such partnership; but this is based upon the principle that such conduct estops the partnership from repudiating obligations in favor of those who deal with it in the light of its customary practices.

In other words, in thus dealing with third parties the partners may, by their acts in the ordinary conduct of their business, hold themselves out to be something more than mining partners.[3]

Where a third party seeks to charge the firm upon obligations incurred by one of its members, which obligations are beyond the scope of a mining partnership, it devolves upon the one seeking to enforce such obligations to show either that it was entered into under express authority, or that the acts were usual and customary with the particular partnership in the ordinary conduct of its business.[4]

The recognized and established usage on the part of the firm should be taken as a part of the contract of partnership.[5]

Whatever authority may be exercised by a member of the firm, may be exercised by its ostensible agents, such as managers, and superintendents in charge of operations; but the exercise of this authority is subject to the same limitations as control the acts of individual members.[6]

This, of course, does not preclude the delegation to such agent of enlarged powers by the joint authority of all the

[1] Judge v. Braswell, 13 Bush (Ky.), 69.
[2] Decker v. Howell, 42 Cal. 636.
[3] Randall v. Merideth, 76 Texas, 669.
[4] *Id.;* Judge v. Braswell, 13 Bush (Ky.), 69.
[5] Taylor v. Castle, 42 Cal. 367.
[6] Jones v. Clark, 42 Cal. 180; Stuart v. Adams, 89 Cal. 367.

partners, nor prevent the subsequent ratification by the partnership of an unauthorized act; and, by accepting the benefit of a contract unauthorized in its inception, and acquiescing in it to the extent of performing some of the obligations flowing from it, the partnership may be estopped from disputing its validity.[1]

These are familiar rules, applicable to all classes of partnership.

As in the case of general partnerships, the liability of a mining partner for the acts of his associates continues, after he sells his interest and retires from the firm, in favor of persons who have had dealings with, and given credit to, the partnership, until they have had actual personal notice of the dissolution.[2]

Constructive notice imparted by the recording of an instrument, by which the retiring partner disposes of his interest in the partnership, will not suffice.[3]

While the members of a mining partnership contribute to the expense of conducting its business, and participate in the profits of the venture in proportion to the amount of interests respectively held, it has been decided by the supreme court of California that, in respect to the obligations of the copartnership, each is liable jointly with the others for the full amount of the indebtedness justly chargeable to the partnership, and not merely for a *pro rata* share.[4]

§ 802. **Partnership property.**—The mining ground belonging to and worked by a mining partnership, and acquired for mining purposes, whether purchased with partnership funds or brought into the concern by individual members as a portion of the capital stock, is, in equity, for the purpose of a settlement of the partnership affairs, to be treated as partnership property.[5]

Where land is brought into a partnership as stock, it

[1] Jones v. Clark, 42 Cal. 180.
[2] Dellapiazza v. Foley, 112 Cal. 380.
[3] *Id.*
[4] Stuart v. Adams, 89 Cal. 367.
[5] Duryea v. Burt, 28 Cal. 569.

is, as between the partners, their creditors, and one who has knowingly dealt with them for it, personalty belonging to the firm.[1]

Real estate belonging to a partnership will, in equity, be treated like its personal funds and distributed accordingly. If the title stands in the name of one of the partners, he will be held as a trustee of the partnership and be made to account to the other partners according to their several rights and interests;[2] but it by no means follows, however, that real estate used for partnership purposes is partnership property. A contrary presumption prevails when the title is not in the firm, and to rebut that presumption it must appear either that it was paid for with the firm money or was, by agreement, actually brought into the common stock.[3]

There may indeed be partnerships in the business of milling or mining or farming; but unless the intent of the joint owners to throw the real estate into the funds as partnership stock is distinctly manifested, or unless the real property is bought out of the social funds for partnership purposes, it must still retain the character of realty.[4]

The use to which the property is applied does not necessarily determine the question as to whether it is to be treated as personal or real estate, but the intention of the parties is the controlling element.[5] Such intention may be shown by parol. It may be manifested by the acts and declarations of the parties.[6]

It seems to be settled that the mere fact that property held by the firm as tenants in common is used in and for the partnership business, or a mere agreement to use it for partnership purposes, is not of itself sufficient to convert it into partnership stock. There must be some

[1] West Hickory M. Assn. v. Reed, 80 Pa. St. 38.

[2] Faulds v. Yates, 57 Ill. 416; 1 Lindley on Partnership, 2d Am. ed., p. 332, note.

[3] Shafer's Appeal, 106 Pa. St. 49, 55.

[4] Wheatley's Heirs v. Calhoun, 12 Leigh, 264, 272.

[5] Holmes v. Self, 79 Ky. 207, 209; Alexander v. Kimbro, 49 Miss. 529.

[6] Shafer's Appeal, 106 Pa. St. 49, 55.

evidence of further agreement to make it partnership property.[1]

These principles are applicable to all classes of trading and commercial partnerships. That the same rules govern mining partnerships, is quite apparent. A further elaboration of this subject would lead us too far beyond the legitimate scope of this treatise, into the domain of ordinary partnership.

**§ 803. Dissolution.** As one cotenant may not compel the others to join him in the working of the common property, when a copartnership does arise by a joint working, it may be terminated at will by either cotenant,[2] so far as the retiring cotenant is concerned. While the remaining cotenants may continue to operate the common property, subject to the rules announced in a preceding section, the withdrawing copartner is relegated to his position as tenant in common, with all the rights and privileges and subject only to such obligations as are incident to a tenancy in common, pure and simple.[3]

Neither of the cotenants can force the others to operate the property at a loss, or to continue a relationship which might be either unsatisfactory or, in the judgment of a withdrawing cotenant, inexpedient. Necessarily the dissatisfied partner must give to his associates fair and unequivocal notice of his withdrawal, and to protect himself from future liability as to creditors with whom the partnership had been theretofore accustomed to deal, a like notice to such creditors must be given.[4]

As a matter of course, such determination of the partnership cannot operate to defeat rights accrued under it while it is in force.[5]

A silent withdrawal will not relieve a partner from

[1] Alexander v. Kimbro, 49 Miss. 529, 537.
[2] Lawrence v. Robinson, 4 Colo. 567.
[3] Slater v. Haas, 15 Colo. 574.
[4] *Id.*
[5] Lawrence v. Robinson, 4 Colo. 567.

liability for work done or debts contracted after such withdrawal.

Under ordinary circumstances, dissolution may be effected without resort to the courts.

When, however, the real property used for partnership purposes has, by the agreement or acts of the parties, been impressed with the character of partnership property, has been brought into the common stock or treated as a partnership fund, there is no method of adjusting the equities of the partners if they are unable to reach an amicable agreement, except by an action for dissolution and accounting.

When the relationship of the parties is that of a mining partnership only, the death of one of the partners will not dissolve it.[1]

The surviving partner has no right as survivor to take control of the property, this right only applying where the *delectus personæ* exists.[2]

[1] Kahn v. Central Smelting Co., 102 U. S. 641; Taylor v. Castle, 42 Cal. 367.

[2] Jones v. Clark, 42 Cal. 180.

# TITLE IX.

## RIGHTS AND OBLIGATIONS OF PARTIES ENGAGED IN WORKING MINES, AS BETWEEN THEIR NEIGHBORS AND THE GENERAL PUBLIC.


CHAPTER

I. DRAINAGE OF MINES—RELATIVE RIGHTS AND DUTIES OF MINERS OPERATING AT DIFFERENT LEVELS, WITH RESPECT TO WATER.

II. MUTUAL RIGHTS AND DUTIES WHERE TITLE TO MINERALS IS SEVERED FROM THAT OF THE SURFACE.

III. LATERAL OR ADJACENT SUPPORT.

IV. DEPOSIT OF MINING DEBRIS IN RUNNING STREAMS AND ON LANDS OF OTHERS—PRIVATE NUISANCES.

V. GOVERNMENTAL SUPERVISION OF HYDRAULIC MINING IN CALIFORNIA—THE CALIFORNIA DEBRIS COMMISSION—ITS JURISDICTION AND POWERS.

# CHAPTER I.

## DRAINAGE OF MINES—RELATIVE RIGHTS AND DUTIES OF MINERS OPERATING AT DIFFERENT LEVELS, WITH RESPECT TO WATER.

§ 806. Introductory — Statutory regulations on the subject of mine drainage.
§ 807. The law of natural flow.
§ 808. Foreign water — Flooding.

**§ 806. Introductory — Statutory regulations on the subject of mine drainage.**— Many of the states of the union have enacted laws upon the subject of mine drainage and the care of water encountered in the exploitation and development of mines. Some of these laws purport to authorize condemnation proceedings, whereby one mine owner may acquire easements through lands of others for the purpose of securing artificial outlets. In Massachusetts, Kentucky, and Tennessee, mining is considered a public use, and the right of eminent domain may be lawfully exercised for mining purposes, and laws in this behalf have been passed.[1]

Colorado and Arizona have statutes regulating the subject, the former based upon a provision of its organic law authorizing the legislative branch of the state government to make such regulations from time to time as may be necessary for the proper equitable drainage of mines,[2] and the latter[3] acting under the supposed authority granted by Section twenty-three hundred and thirty-eight of the Revised Statutes.

We have heretofore treated of this class of legislation and its application to mining easements generally.[4]

[1] *Ante*, § 19.
[2] Art. xvi, § 3, Constitution of Colo.; Mills' Annot. Stats. §§ 3172-3180.
[3] Rev. Stats. 1887, §§ 2352-2557.
[4] *Ante*, §§ 252-264.

There is another class of legislation, such as found in Pennsylvania,[1] which may fall within the police power of the state, providing for methods for the prevention of damage by releasing accumulated water through adits or drifts run under official supervision.

It is not our purpose to analyze these special laws. To some extent they embody the equitable principles established by the courts in the absence of any legislation. Where they go beyond these, they are not altogether free from constitutional objections.[2]

Our presentation of the subject is intended to be limited to the consideration of the equitable rules which guide the courts in defining the relative rights and duties of coterminus or adjacent mine owners in the care and discharge of percolating waters encountered in mining operations. These principles, generally speaking, will be found to be of universal application.

They are few and simple, are based upon rational and natural laws and the dictates of common sense. They are peculiar to no locality. While local subterranean conditions vary in a geological sense, water is encountered everywhere pursuing the same universal and unvarying natural laws until interfered with by the artificial devices of man. To recognize these natural forces is just as essential in the case of the underground circulatory system as it is with surface flowage. The subject does not afford much latitude for judicial disagreement, and in the literature of this branch of jurisprudence we rarely encounter discordant decisions. The questions most likely to arise in any community where mining is carried on may be determined by reference to a few well-established maxims.

§ 807. **The law of natural flow.**— In conducting mining operations, water, as was said by Lord Tenterden,[3] is a sort of common enemy, against which each man must defend

[1] Laws of 1893, p. 52, art. 14, § 3.
[2] See People *v.* Parks, 58 Cal. 624.
[3] Rex *v.* Pagham Commissioners of Sewers, 8 B. & C. 355.

himself. Yet while this property right of defense is a natural one, it must be so exercised as not to endanger the lives or property of others.

Each mine owner has all the rights of property in his mine, and, among them, the right to extract all minerals therefrom, provided he works with skill and in the usual manner; and if, while the occupier of a higher level, exercises that right, nature causes water to flow to a lower mine, he is not responsible for this operation of nature.[1]

Land on a lower level owes a natural servitude to that on a higher, in respect of receiving, without claim to compensation, the water naturally flowing down upon it.[2]

From the necessity of the case, every owner of a mine must submit to the inconvenience of having water of an adjoining mine upon a higher level descend upon his land so long as it descends in the natural course of drainage.[3]

If the owner of the servient heritage wishes to guard against this operation, he must leave barriers "to bay back "the water of his higher neighbor."[4]

Otherwise the resulting damage, if any, is *damnum absque injuria;*[5] but the owner of the higher level has no right, by the use of artificial methods, to become an active agent in sending water into the mine of his lower neighbor. He is not authorized to interfere with the gravitation, so as to make it more injurious to the lower mine or advantageous to himself.[6]

"The rule defining the rights and liabilities of adjoin-"ing mine owners may be stated in this form: For dam-"ages resulting from natural causes or from lawful acts "done in a proper manner, the law gives no redress; but "where one of the two adjoining mine owners conducts

[1] Baird *v.* Williamson, 15 Com. B. Rep. N. S. 376.
[2] Smith *v.* Kerwick, 7 Com. B. 515, 18 L. J. N. S. C. P. 172; Lord *v.* Carbon Iron Mfg. Co., 38 N. J. Eq. 452.
[3] Attorney-General *v.* Council Birmingham, 4 Kay & J. 528.
[4] Baird *v.* Williamson, *supra:* Jegon *v.* Vivian, L. R. 6 Ch. App. 742.
[5] Lord *v.* Carbon Iron Mfg. Co., 38 N. J. Eq. 452.
[6] Baird *v.* Williamson, *supra.*

"water into his neighbor's mine which would not other-
"wise go there, or causes it to go there at different
"times and in larger quantities than it would go there
"naturally, he commits a wrong which the law will
"redress."[1]

Or, as stated in another form by Lord Hatherley in Phillips *v.* Homfray:[2]—

"The natural percolation of water from one mine to
"another is not a matter as to which the owner of the
"lower mine has any right of complaint as against the
"owner of the other mine. The owner of the upper mine
"has a right to work it just as he likes, and his neighbor
"below cannot complain unless he finds that the water
"has been turned into his mine by a channel or artificial
"arrangement."

But where the owner of the lower mine seeks to protect himself from the flowage of water from the adjoining higher levels by means of natural barriers left standing in his own land, the upper owner will not be permitted to remove such barriers, so as to permit the water to flow into his neighbor's mine. While the higher proprietor has the right to extract all of his mineral up to the common boundary, and the lower must submit to the inconvenience of receiving the water into his mine which reaches it by natural gravitation, he has no right to interfere with the lawful methods adopted by the owner of the lower level to protect his own property.[3]

After the removal by the higher proprietor of such a barrier, the duty is enjoined upon him of preventing the flow of the water into the mine of the lower owner.[4]

§ 808. **Foreign water — Flooding.**—In conformity with the rules announced in the preceding section, the owner of the upper mine will not be permitted to introduce into the works of the lower proprietor foreign water which would

[1] Lord *v.* Carbon Iron Mfg. Co., 38 N. J. Eq. 452.
[2] 6 L. R. C. Ch. App. 770.
[3] Bannon *v.* Mitchell, 6 Ill. App. 17.
[4] Firmstone *v.* Wheeley, 2 Dowling & L. (Q. B.), 203. See Clegg *v.* Dearden, 12 Q. B. 576.

not by gravitation flow into the works of the lower owner.[1]

This doctrine was applied by the supreme court of Pennsylvania to a case where the owner of a coal mine in working it removed the pillars which supported the roof. The superincumbent surface subsided, forming a catchment basin. The rains and melted snow penetrated into the defendant's mine through cracks and breaks in the basin, and thence flowed in great quantities into the plaintiffs' mines, which were lower than defendants'. The suit was by the plaintiffs to recover damages. The defendants pleaded, and supported the plea by evidence, that the flowing of the water into plaintiffs' mine was the result of the ordinary and proper working by defendants of their mine, and not the result of negligence or want of care. They also sought to establish the existence of a neighborhood custom which approved the removal of pillars without reference to its effect as to the sinking of the surface.

The appellate court affirmed the judgment which held the defendants liable, intimating that if the alleged custom existed it would be unreasonable and would not furnish a ground of defense.[2]

Where the owner of the upper mine impounds water upon his premises by means of embankments or artificial reservoirs for his own convenience, it would seem that he owes a duty to the lower proprietor to so construct his devices that they will withstand all pressure which may be reasonably anticipated.

In the leading case of Fletcher *v.* Rylands,[3] the extreme doctrine was announced by the English court of exchequer chamber, that where such artificial reservoirs were subsequently discharged onto the lands of the lower proprietor,

[1] Baird *v.* Williamson, 15 Com. B. N. S. 376.

[2] Homer *v.* Watson, 79 Pa. St. 242. See Wilson *v.* Waddell (2 L. R. Appeal Cases, 95), where it was held that the owner of the upper level had a right to remove all the coal, and was not liable, if the surface subsided, for water introduced into the lower proprietor's mine through percolations from the artificial basin thus formed.

[3] 1 L. R. Ex. 265.

the liability of the owner upon the higher level for damages thus caused was absolute, and it was no defense to plead that the devices were constructed skillfully and properly, or that the discharge was not caused by his fault or negligence.

Said Justice Blackburn: —

"We think that the rule of law is, that the person who, "for his own purposes, brings on his land and collects and "keeps there anything likely to do mischief if it escapes, "must keep it at his peril; and if he does not do so, is, "*prima facie*, answerable for all the damage which is the "natural consequence of its escape. . . . The person "whose grass or corn is eaten down by the escaping cattle "of his neighbor, or whose mine is flooded by the water "from his neighbor's reservoir, or whose cellar is invaded "by his neighbor's privy, or whose habitation is made "unhealthy by the fumes and noisome vapors of his neigh-"bor's alkali works, is damnified without any fault of his "own; and it seems but reasonable and just that the neigh-"bor who has brought something on his own property "(which was not naturally there), harmless to others so "long as it is confined to his own property, but which he "knows will be mischievous if it gets on his neighbor's, "should be obliged to make good the damage which ensues "if he does not succeed in confining it to his own property; "but for this act in bringing it no mischief could have "accrued, and it seems but just that he should, at his peril, "keep it there so that no mischief may accrue, or answer "for the natural and anticipated consequences; and upon "authority, this, we think, is established to be the law, "whether the things so brought be beasts or water or filth "or stenches."

This doctrine was fully approved on appeal to the house of lords.[1]

In the later case of Fletcher *v.* Smith,[2] however, this doctrine seems to have been somewhat relaxed. The facts were these: Fletcher's mine was on the higher, Smith's on the lower level; Fletcher had diverted the course of a

[1] 3 L. R. H. L. 330.

[2] 2 L. R. App. Cases, 781. For decision of the Court of Exchequer, see 7 L. R. Exch. 305.

stream, and had made a new course for it; in working his mine he had occasioned certain portions of the surface to sink into holes, though in doing this he had not acted negligently. On the happening of a very heavy downfall of rain the water had overflowed its new course, got into the holes on the surface and passed into Fletcher's mine and thence flooded Smith's mine.

The jury having determined that the new channel by which the course of the stream was diverted was insufficiently constructed, Fletcher was held liable.

While the opinion of the lords justices delivered by Lord Penzance is somewhat ambiguous, we think the rule to be deduced therefrom is fairly stated in the headnotes to the report of the case:—

"A mine owner will not be liable to the owner of an "adjacent mine for injury occasioned to such adjacent mine, "where such injury proceeds from natural causes in themselves beyond his control, though his own acts may have "conduced to produce the injury, if his acts have only "been those of the proper and ordinary working of his "own mine without default or negligence."[1]

In the American courts the English cases have been the subject of frequent quotation and analysis. The discussion has taken a very wide range between the *ultra* doctrine of the Rylands-Fletcher case and the more moderate rule suggested by the headnote to the Smith-Fletcher case.[2]

The commission of appeals for the state of New York

[1] See, also, Nichols *v.* Marsland, L. R. 10 Exch., 255 S. C. on appeal, 2 Exch. Div. 1, where Rylands *v.* Fletcher is differentiated and its doctrine limited.

[2] The American courts are not altogether agreed as to the true purport of the decision in this case, some of them insisting that it supports the radical doctrine of Rylands *v.* Fletcher; others, that it is authority for the relaxation of that rule, making the question of negligence in all cases the test of liability. Still others contend that Rylands *v.* Fletcher is authority only for the rule that the upper proprietor constructing artificial reservoirs is only *prima facie* liable, and that in cases of this character, the burden, which would ordinarily be cast upon the plaintiff to show negligence, is shifted to the defendant, who is compelled to prove affirmatively the exercise of care and diligence. As each case depends so much on the peculiar circumstances there arising, it is very difficult to evolve from the adjudicated cases a rule that is absolutely uniform.

held that Rylands *v.* Fletcher was in direct conflict with the law as settled in this country.[1] In this conclusion the New Hampshire[2] and New Jersey courts[3] practically agree, whereas the supreme court of Minnesota seems to accept the doctrine of that case as the correct one.[4]

The Minnesota case is a unique and interesting one, and arose out of the following state of facts:—

Hennepin Island divides the waters of the Mississippi River into two channels at the Falls of St. Anthony and above and below them, extending for about one thousand feet above and five hundred feet below. The bed of the river below is about thirty feet lower than the bed of the river above. A stratum of limestone, ten feet in thickness, forms the bed of the river above the falls, extends across the island and rests upon hard sand to the depth of the river below the falls. Cahill owned a leasehold estate of the island, and had constructed at the lower end a warehouse, mill, and machinery.

Eastman excavated a tunnel, starting from the lower end of the island and traversing its entire length, penetrating for the distance of several hundred feet under the bed of the river above the upper end of the island. The tunnel was driven through the stratum of hard sand underlying the limestone, and at a vertical depth of more than thirty feet below the level of the bed of the river above the falls. Opposite Cahill's mill it was dug within seventy-five feet of the east shore, which was a steep perpendicular bank down to the bed of the river below the falls, and as low as the bottom of the tunnel.

The water of the river burst into the tunnel at its upper end, washed through it in great volume, filling it and rending the rocks and tearing away the ground on the top and sides of the tunnel for its entire length. Thereafter the flow of the water was temporarily stopped, but

[1] Losee *v.* Buchanan, 51 N. Y. 476.
[2] Garland *v.* Towne, 55 N. H. 57.
[3] Marshall *v.* Wellwood, 38 N. J. 339.
[4] Cahill *v.* Eastman, 18 Minn. 324.

later, and during the ordinary spring freshet, the water again burst into the tunnel, filling it, and washing through it with such volume and force that it washed out and undermined the lower end of the island and the land on which Cahill's mill and machinery stood. Hence the action. The court, in considering the case, examined it from the standpoint most favorable to the defendant, assuming that the tunnel was excavated with the utmost care and skill, and under the belief that it was perfectly safe. Eastman was held responsible upon the principle, that by digging the tunnel he did an act which necessarily tended to injure Cahill, and that this liability existed without regard to the question of care and skill, following the doctrine announced in the Rylands-Fletcher case:—

"He had artificially caused foreign water to get into "plaintiff's mine, water which did not arise there nor get "there by merely natural means, water which got there, "not by the defendants not preventing it, but by their caus- "ing it."

The following excerpts from the decisions of courts in other states of the union illustrate the current of judicial thought.

Where one builds a mill dam on a proper model, and the work is well and substantially done, he is not liable to an action, though it break away, in consequence of which his neighbor's dam and mill below is destroyed. Negligence should be shown in order to make him liable.[1]

Each proprietor, in exercising his own rights in his own territory, shall act with reasonable skill and care to avoid injury to others; and as an approximate rule for measuring that degree, it shall be that degree of ordinary skill, care, and diligence which men of common and ordinary prudence, in relation to similar subjects, would exercise in the conduct of their affairs.[2]

The measure of care required in such a case is that

[1] Losee *v.* Buchanan, 51 N. Y. 476. See, also, Pixley *v.* Clark, 35 N. Y. 520; Sheldon *v.* Sherman, 42 N. Y. 484.

[2] Inhabitants of Shrewsbury *v.* Smith, 12 Cush. 177.

which a discreet person would use if the whole risk were his own.[1]

The dam should be constructed in such a manner as to resist such extraordinary floods as might be reasonably expected occasionally to occur.[2]

One has a right to build a dam, and if in doing so he exercises ordinary care and skill, he will not be held liable for the consequences should it subsequently give way without his fault.

While it is customary for the owners of mines to keep them as free from water as practicable, yet they are not bound in law to do so. The only obligation resting upon them in such respect is that of self-interest. The upper owner may abandon his own mine whenever he pleases, notwithstanding his doing so may largely increase the flow of water into the mine below, and thereby greatly enhance the labor and expense of the owner in operating it. So the owner of a mine, for the purpose of protecting himself from the encroachments of water, which is regarded as the common enemy of mines and mining interests, may erect a dam or other structures on his own premises, if necessary for such purpose, subject to the limitation that such dam, or other structure, does not have the effect to collect water from adjacent territory and eventually cast it upon a lower mine, which, but for such dam or other structure, would not have reached it.[3]

What is and what is not *vis major*, or act of God, in a legal sense, which will relieve parties from liability for damages caused by discharge of artificially stored water, will depend largely upon the extent to which human agency negligently contributed to the catastrophe. The correct rule in this class of cases must be determined by a consideration of the general law of negligence.

[1] Todd *v.* Cochell, 17 Cal. 97; Hoffman *v.* Tuolumne County Water Co., 10 Cal. 413; Wolf *v.* St. Louis Water Co., 10 Cal. 541; Campbell *v.* Bear River and Auburn W. & M. Co., 35 Cal. 679; Angell on Water Courses, § 336.

[2] The Mayor of New York *v.* Baily, 2 Denio, 433, 441; Angell on Water Courses, § 366.

[3] Jones *v.* Robertson, 116 Ill. 543.

Judge Thompson, in his work on this subject, has collated the authorities, both English and American, by reference to which the state of the law in the different jurisdictions may be fairly ascertained.[1]

A more extended discussion of this matter will lead us too far afield.

[1] 1 Thompson on Negligence, notes, pp. 77-106.

# CHAPTER II.

## MUTUAL RIGHTS AND DUTIES WHERE TITLE TO MINERALS IS SEVERED FROM THAT OF THE SURFACE.

ARTICLE I. GENERAL PRINCIPLES — RIGHTS AND DUTIES OF MINE OWNERS — USE OF SURFACE.

II. VERTICAL OR SUBJACENT SUPPORT.

III. RIGHTS AND DUTIES OF SURFACE PROPRIETOR — OWNERSHIP OF SEPARATE STRATA.

### ARTICLE I. GENERAL PRINCIPLES — RIGHTS AND DUTIES OF MINE OWNERS — USE OF SURFACE.

§ 812. Application of the doctrine of the common law on the subject of severance — Severance under the federal law — General principles.

§ 813. To what extent owner of minerals may use surface — Ways of necessity.

§ 814. Manner of conducting mining operations.

**§ 812. Application of the doctrine of the common law on subject of severance — Severance under the federal laws — General principles.** — We have already observed that under the English law nothing was more common than to sell or demise a piece of land, excepting the mines. In like manner the different strata of the subsoil might be shown to be the subject of different rights; also that there might be in one mine different minerals which were the property of different persons. Thus one person might be entitled to the iron and another to the limestone. One seam or stratum of coal in the same lands might belong to a third person, and another distinct seam to a fourth owner. When the surface and underlying mines or the different strata of the subsoil were differently

owned, they were separate tenements, with all the incidents of separate ownership, a distinct possession and distinct inheritance.[1]

When Lord Campbell, as chief justice of the Queen's Bench, delivered the opinion in the leading case of Humphries *v.* Brogdon,[2] he sought in vain among the law writers of other nations for precedents touching questions arising out of the severance of the title to minerals from that of the surrounding soil.

Said that distinguished jurist:—

"We have attempted, without success, to obtain from "the codes and jurists of other nations information and "assistance respecting the rights and obligations of persons "to whom sections of the soil, divided horizontally, "belong as separate properties. This penury, where the "subject of servitude is so copiously and discriminately "treated, probably proceeds from the subdivision of the "surface of the land and the minerals under it into separ-"ate holdings, being peculiar to England."

After observing the absence of any suggestions on the subject in the civil law he continues:—

"The American lawyers write learnedly on the support "which may be claimed for land for lateral pressure, and "for buildings which have long rested against each other, "but are silent as to the support which the owner of the "surface of lands may claim from the subjacent strata "when possessed by another."

This "penury" of American legal literature upon this interesting subject was due solely to the lack of opportunity. Were Lord Campbell permitted to rewrite his decision in the light of the present exposition of the law in America, he would have no occasion to complain of the dearth of American precedents. Lord Campbell and his contemporary judges, in whose bosom rested the common law, had easy tasks compared with those assigned to some of our American judges half a century later.

Said Justice Paxson, speaking for the supreme court of

[1] *Ante*, § 9.

[2] 1850, 12 Q. B. 739.

Pennsylvania (1893) in Chartiers Coal Company *v.* Mellon:[1]—

"The discovery of new sources of wealth and the spring-
" ing up of new industries (petroleum and natural gas) which
" were never dreamed of half a century ago, sometimes
" present questions to which it is difficult to apply the law
" as it has heretofore existed. It is the crowning merit of
" the common law, however, that it is not composed of
" ironclad rules, but may be modified to a reasonable
" extent to meet new questions as they arise. This may be
" called the expansive property of the common law. Min-
" ing rights are peculiar, and exist from necessity, and the
" necessity must be recognized and the rights of mine and
" land owners adjusted and protected accordingly."

A few years after the decision by Lord Campbell we find the supreme court of Pennsylvania (1858) reiterating the doctrine of the common law.

"Coal and minerals in place are land. It is no longer
" to be doubted that they are subject to conveyance as
" such. Nothing is more common in Pennsylvania than
" that the surface right should be in one man and the
" mineral right in another. It is not denied, in such a case,
" that both are land owners, both holders of a corporeal
" hereditament."[2]

And in a comparatively recent case (1891) we find the same court announcing, that "we have for nearly half a
" century judicially regarded the ownership of mineral,
" where it has been severed from the surface, as the owner-
" ship of land, to all intents and purposes."[3]

These rules prevail wherever in the United States conditions exist in an economic sense, making their application necessary.[4]

[1] 152 Pa. St. 286.

[2] Caldwell *v.* Fulton, 31 Pa. St., 475

[3] Lilliebridge *v.* Lackawanna Coal Co., 143 Pa. St. 293. See, also, Caldwell *v.* Copeland, 37 Pa. St. 427; Scranton *v.* Phillips, 94 Pa. St. 15; Sanderson *v.* Scranton City, 105 Pa. St. 469; Delaware, etc., R. R. Co. *v.* Sanderson, 109 Pa. St. 583.

[4] Williams *v.* Gibson, 84 Ala. 228; Marvin *v.* Brewster, 55 N. Y. 538; Ryckman *v.* Gillis, 57 N. Y. 68; Benavides *v.* Hunt, 79 Tex. 383; Silva *v.* Rankin, 80 Ga. 79; Knight *v.* Indiana Co., 47 Ind. 105; Arnold *v.* Stevens, 24 Pick. 106; Hartwell *v.* Camman, 10 N. J. Eq. 128; Massot *v.* Moses, 3 S. C. 168.

In the mining regions of the west, where lands of the public domain are held under federal mining tenures, the subject of severance of title is not encountered as frequently as it is in the older states of the union. As a rule the title emanating from the government carries both surface and all the minerals.[1] There are three instances, however, where the government itself has provided for the creation of such a severance:—

(1) In issuing patents to Mexican grants, under the act of March 3, 1891, situated in Colorado, Wyoming, Utah, Nevada, New Mexico, and Arizona;[2]

(2) In issuing patents to incorporated cities for townsites, under the act of March 3, 1891, recognizing correlative rights of lode mining claimants and prior occupants of the surface;[3]

(3) By granting a lode throughout its entire depth, although it may enter the land adjoining.[4]

As between private individuals, where a severance is created, it rarely happens that their mutual rights are not precise and ascertained by the deed, by which the right to mines is acquired, and then the only question would be as to the construction of the deed, which may vary in each case.[5]

Be that as it may, whenever and wherever such a severance is affected, certain reciprocal rights and obligations arise between the two classes of owners, with reference to the manner in which the respective estates may be enjoyed, each having due regard for the rights of the other.

It is necessary to briefly consider the nature and extent of these rights and obligations.

The underlying principles involved may be thus expressed: The proprietor of the minerals has a right to win them. In exercising this right all privileges reasonably

[1] *Ante*, § 80.
[2] *Ante*, § 127.
[3] *Ante*, § 172 (4).
[4] *Ante*, § 568.
[5] Rowbotham v. Wilson, 8 H. L. Cases, 348, 360.

necessary for its full and fair enjoyment are necessarily implied; but these privileges must be exercised with due care and in a lawful manner, so as not to wantonly or unnecessarily interfere with the rights of the surface owner. The owner of the surface is subjected to such inconveniences as naturally flow from the severance of the underlying minerals and the incidents necessarily attaching to mineral ownership. To this extent the estate in the entire fee, which originally was in one and the same person, has been lessened and burdened. The surface owner must exercise his rights in such a manner as not to wantonly or unlawfully impair the rights of the owner of the minerals or interfere with the necessary means by which they are won and brought to the surface.

**§ 813. To what extent owner of minerals may use surface.**—A grant of minerals implies the right to win them from the underlying soil. The use of some portion of the surface is necessary for the proper enjoyment of this right. To reach the minerals the miner must pass from the surface downward. To do this he has a right of way of necessity. He may sink through such land from the surface to the mines, in order to reach and work them.[1]

This way of necessity ought not to be of larger dimension than is reasonably requisite.[2]

This right, however, cannot be extended to the use of other lands belonging to the grantee, for the purpose of transporting ore;[3] nor can it be asserted for any purpose not legitimately associated with the search for and extraction of the minerals.[4]

And it would seem that this right of surface user is not

[1] Wardell *v.* Watson, 93 Mo. 107; MacSwinney on Mines, 372; Stewart on Mines, 33; Goold *v.* Gt. West Coal Co., 2 De G. J. & S. 600; Rogers *v.* Taylor, 1 H. & U. 706; Turner *v.* Reynolds, 23 Pa. St. 199.

[2] MacSwinney on Mines, 372; Monmouth Canal Co. *v.* Harford, 1 Cr. M. & R. 614, 634.

[3] Goold *v.* Gt. Western Coal Co., 2 De G. J. & S. 600.

[4] Monmouth Canal Co. *v.* Harford, 1 Cr. M. & R. 614.

restricted by reason of the fact that the surface owner had granted a right of way for a tunnel, by means of which the ore could be removed from the mine.[1]

Where the instrument by which the title to the minerals is severed from that of the superjacent soil does not define the extent to which the grantee of the minerals may use the surface, he has a right to use so much of such surface as is strictly necessary and reasonable.[2] He cannot claim as an incident that which is simply convenient; he can only have, as to the surface, that which is necessary, but that which is necessary he may have in a convenient way.[3]

This involves the right to use such means and processes, for the purpose of mining and removing the minerals, as may be reasonably necessary in the light of modern invention and of the improvements in the arts and sciences.[4]

It includes the necessary ground for machinery for working the mine[5] and stowing the ore in its first marketable state, but not for the erection of smelting works, or accessories, for the purpose of treating the product, such as converting coal into coke or clay into brick.[6]

What improvements are reasonably necessary for the profitable and beneficial working of the mines, is a question of fact to be determined from the evidence in each particular case.[7]

Where it is necessary to artificially store water as an adjunct to mining operations, a limited quantity of the surface may be devoted to that purpose.[8]

So a right of ingress and egress over the surface, to and from the necessary mine openings, for the purpose of transporting supplies, machinery, and the product of the

[1] Rankin's Appeal (Pa.), 16 Atl. Rep. 82.
[2] Turner *v.* Reynolds, 23 Pa. St. 199.
[3] Marvin *v.* Brewster, 55 N. Y. 538.
[4] Williams *v.* Gibson, 84 Ala. 228; Bainbridge, 4th ed., p. 208.
[5] Wardell *v.* Watson, 93 Mo. 107.
[6] Bainbridge, 4th ed., p. 208; Marvin *v.* Brewster, 55 N. Y. 538; Williams *v.* Gibson, 84 Ala. 228; Dand *v.* Kingscote, 6 M. and W. 174.
[7] Williams *v.* Gibson, 84 Ala. 228.
[8] Dand *v.* Kingscote, 6 M. and W. 174.

mine, would be a way of necessity;[1] but the exercise of this right must be in the course least prejudicial to the owner of the surface.[2]

The acquisition and enjoyment of surface easements and rights of way for mining purposes other than those of necessity are the subject of private contract. The existence of such rights, as well as their proper measure, depends entirely upon the true interpretation of the instrument creating or reserving them. With reference to proceedings *in invitum*, to condemn lands for such purposes under the eminent domain laws, we have endeavored in preceding sections[3] to explain what we conceive to be the state of the law, and have also noticed what easements were contemplated under the federal laws, subject to which mining rights upon the public domain are granted.[4] It is unnecessary to here recur to these subjects.

§ 814. **Manner of conducting mining operations.**— The owner of a mine beneath the surface, though he have a right of way through the surface soil, has no right so to exercise the same as to interfere with the power of the owner of the land to make any lawful use thereof.[5]

He is bound to erect proper guards around his mine openings, so as to prevent them from being a source of danger to the cattle of the surface owner.[6]

He is not liable for any incidental damage necessarily occasioned by the ordinary and careful operation of his mine.[7]

The loss of springs to the owner of the surface by reason of the ordinary working of the mines does not render the owner of the minerals liable for damages.[8]

[1] Clark *v.* Vermont & C. R. R. Co., 28 Vt. 103.
[2] Farnum *v.* Platt, 8 Pick (Mass.), 339.
[3] *Ante*, §§ 252-264.
[4] *Ante*, §§ 529-531.
[5] Park Coal Co. *v.* O'Donnell, 7 Leg. Gaz. 149.
[6] Williams *v.* Groncott, 4 B. & Sm. 149.
[7] Williams *v.* Gibson, 84 Ala. 228.
[8] Coleman *v.* Chadwick, 80 Pa. St. 81. See, also, Haldeman *v.* Bruckhart, 45 Pa. St. 514; Trout *v.* McDonald, 83 Pa. St. 144; Wheatley *v.* Baugh, 25 Pa. St. 528.

A mine owner is not responsible to the surface owner for disturbances caused by necessary blasting in the mine;[1] but this necessarily implies that the blast must not be discharged in an improper or negligent manner.[2]

As heretofore noted, the miner is authorized to use such means and processes for the purpose of mining and removing the minerals as may be reasonably necessary in the light of modern invention and of the improvements in the arts and sciences.[3]

## Article II. Vertical or Subjacent Support.

§ 818. Right of surface support reserved by implication in grant of minerals—Nature of the right.
§ 819. Right an absolute one—Negligence not involved.
§ 820. Right limited to support of soil in its natural state—Buildings.
§ 821. Waiver or release of the right.
§ 822. Statutory regulations on subject of subjacent support.

**§ 818. Right of surface support reserved by implication in grant of minerals—Nature of the right.**—In every grant of mines there is an implied reservation of surface support.[4]

There is a *prima facie* inference at common law upon every grant of minerals or other subjacent strata, where the surface is retained by the grantor, that the grantor in granting them does so in such a manner as is consistent with the retention by himself of his own right to support. In the absence of express words showing clearly that he has waived or qualified his right, the presumption is, that what he retains is to be enjoyed by him *modo et forma* and with the natural support which it possessed before the grant.[5]

The owner of the surface of land from which the title

[1] Marvin *v.* Brewster, 55 N. Y. 538.
[2] Moody *v.* McDonald, 4 Cal. 297.
[3] Williams *v.* Gibson, 84 Ala. 228.
[4] Proud *v.* Bates, 34 L. J. Ch. 406; Wilms *v.* Jess, 94 Ill. 464; Yandes *v.* Wright, 66 Ind. 319; Williams *v.* Hay, 120 Pa. St. 485.
[5] Dugdale *v.* Robertson, 3 Kay & Johnson, 795.

to the minerals has been severed has, in the absence of a contrary agreement, an absolute right to have it supported as it was in its original state, and one mining under it is answerable for damages arising from failure to properly support it, or from negligence in conducting mining operations, or from both of these causes together.[1]

Of natural right the surface land is entitled to support from the strata below, and when one owning the whole fee grants the minerals, reserving the surface to himself, his grantee is entitled to so much of the minerals as he can get without injury to the superincumbent soil.[2]

A grant or reservation of all and "every part of the "mines and minerals in the land" in the strongest possible terms would not authorize the owner of the minerals to excavate without leaving proper support for the surface.

"By reasonable intendment the grantee of minerals or "the grantor of the minerals reserving the surface could "only be entitled to so much of the mines below as would "be consistent with the proper enjoyment of the surface."[3]

This rule obtains without reference to the nature of the strata or the difficulty of substituting artificial for natural supports or the comparative value of the surface and mineral.[4]

The mineral proprietor may substitute artificial supports in place of the ore removed, but being bound under the law to leave sufficient ribs or pillars to support the soil,[5] he substitutes the artificial for the natural at his peril.

**§ 819. Right an absolute one — Negligence not involved.** — This right of subjacent support exists entirely

[1] Pringle v. Vesta Coal Co., 172 Pa. St. 438.

[2] Coleman v. Chadwick, 80 Pa. St. 81, 87; Jones v. Wagner, 66 Pa. St. 429, 434.

[3] Horner v. Watson, 79 Pa. St. 242, 249 (citing Harris v. Ryding, 5 Mees. & W. 60; Mickle v. Douglass, 75 Ia. 78; Richards v. Jenkins, 18 Law Times U. S. 438.

[4] Lord Campbell in Humphries v. Brogden, 12 Q. B. 739; Horner v. Watson, 79 Pa. St. 242, 250.

[5] 1 Thompson on Negligence, note 8, p. 280.

independent of the question of negligence on the part of the mine owner.[1]

If subsidence is caused by not leaving sufficient support, it will be no defense that he worked the mines carefully and according to custom.[2]

The entire removal of the inferior strata, however skillfully done, if productive of damages by withdrawing that degree of support to which the owner of the surface was entitled is actionable, the duty of the owner of the servient tenement forbidding him to do any act whereby the enjoyment of the easement could be disturbed.[3]

One who conveys land to another, reserving the right to remove the underlying coal, is bound to exercise care in the removal and, if necessary, to leave pillars to support the surface, although the reservation exempted him from liability by reason of "mining operations."[4]

The right of support is not affected by a provision in the deed that the minerals shall be mined and removed "with as little damage as possible to the surface."[5]

A neighborhood custom, by which the proprietor of the minerals was permitted to take out pillars and remove all supports, has been held to be unreasonable and void,[6] and is no defense to an action for damages, where the subsidence occurs through failure to support.

**§ 820. Right limited to the support of the soil in its natural state — Buildings.**— The right of subjacent support, in the absence of agreement, express or implied, is limited to the soil in its natural state. The owner of the minerals is not called upon to support superadded

[1] Nelson *v.* Miller, 1 Leg. Rec. 187 (Pa.); Yandes *v.* Wright, 66 Ind. 319.

[2] 1 Thompson on Negligence, note 8, p. 289 (citing Humphries *v.* Brogden, *supra*). See, also, Harris *v.* Ryding, 5 Mees. & W. 556; Proud *v.* Bates, 34 L. J. Ch. 406; Wilms *v.* Jess, 94 Ill. 464.

[3] Humphries *v.* Brogden, 12 Q. B. 739. See, also, Carlin *v.* Chappel, 101 Pa. St. 348.

[4] Livingston *v.* Moingona Coal Co., 49 Ia. 309.

[5] Williams *v.* Hay, 120 Pa. St. 485.

[6] Hilton *v.* Lord Granville, 5 Q. B. 701.

weight occasioned by the erection of buildings or superstructures.[1]

Although the mine owner is not bound to leave support more than sufficient to stay the surface, yet if a subsidence occur, the mere presence of the building will not prevent a recovery, unless it be shown that the subsidence would not have occurred without the aid of the buildings, and the mine owner will be liable for damage both to the building and to the land.[2]

**§ 821. Waiver or release of right of surface support.**— The owner of land may, in the instrument whereby he severs the title of the minerals from that of the overlying surface, waive or surrender this right of support,[3] and when there is such waiver or surrender, the miner may take out all the mineral, even though the surface fall in;[4] but it must clearly appear that the grantor, in conveying the minerals, has released his right to support. Such release will not be inferred from ambiguous clauses in the instrument.[5]

The right of surface support may be divested by grant to the party working the mineral, and the subsequent purchaser of the surface will take subject to such grant.[6]

And in case of leases, the terms of the lease may be

[1] Rogers v. Taylor, 2 Hurl. & N. 828.

[2] Wilms v. Jess, 94 Ill. 464, Hilton v. Lord Granville, 5 Q. B. 701. See, also, Gumbert v. Kilgove (Pa.), 6 Cent. Rep. 400; Humphries v. Brogden, 12 Q. B. 739; Hamer v. Knowles, 6 H. & N. 454; Jeffries v. Williams, 5 Exch. 792; Hilton v. Whitehead, 12 Q. B. 734; Hunt v. Peake, 1 Johnson (Eng.), 705; Brown v. Robins, 4 H. & N. 186; Backhouse v. Bownie, 9 H. L. Cases, 503; Bell v. Love, 10 Q. B. D. 547.

[3] Rowbotham v. Wilson, 8 H. L. cases, 348; Williams v. Gibson, 84 Ala. 228, 5 Am. St. Rep. 368; Smart v. Morton, 5 Ellis & Bl. (40 Eng. Eq.) 30; Jones v. Wagner, 66 Pa. St. 429; Smith v. Darby, 7 L. R. Q. B. 716; Aspden v. Seddon, 10 L. R. Ch. App. Cases, 394.

[4] Scranton v. Phillips, 94 Pa. St. 15.

[5] Robertson v. Youghiogeney R. R. Co., 172 Pa. St. 566; Williams v. Hay, 120 Pa. St. 485, 6 Am. St. Rep. 719.

[6] Smith v. Dalby, 7 L. R. Q. B. 716; Williams v. Bagnall, 12 Jurist & N. S. 987.

such that the lessee is compelled to extract all the mineral, regardless of surface support.[1]

**§ 822. Statutory regulations on subject of subjacent support.**— In some of the mining states legislation exists on the subject of subjacent support. Colorado has enacted the following provision:—

"When the right to mine is in any case separate from "the ownership or right of occupancy to the surface, the "owner or rightful occupant of the surface may demand "satisfactory security from the miner, and if it be refused, "may enjoin such miner from working until such security "is given. The order for injunction shall fix the amount "of the bond."[2]

Wyoming[3] and the two Dakotas,[4] and probably other states have similar provisions. We are not aware that this class of legislation has been the subject of judicial investigation. It seems to us that such legislation is not altogether free from constitutional objections.

## Article III. Rights and Duties of Surface Proprietor—Ownership of Separate Strata.

§ 825. Responsibility of surface owner for injuries to miners' rights.

§ 827. Rights of access to lower strata—Reciprocal servitudes between owners of different strata.

**§ 826. Responsibility of surface owner for injuries to miners' rights.**— The owner of the surface owes the same duty to the owner of underlying mines as the latter owes to the former. The obligations are reciprocal. While the doctrine of absolute liability, independent of the

[1] Shafto *v.* Johnson, 8 B. & S. 252.

[2] Mills' Annot. Code, § 3159. § 3139 of the same code is as follows: "No "person shall have the right to mine under any building or other "improvement unless he shall first secure the parties owning the same "against all damages, except by priority of right."

[3] Laws of Wyoming 1888, p. 83.

[4] Rev. Code of Dak. 1877, p. 150.

elements of negligence announced in the English case of Rylands *v.* Fletcher, discussed in a preceding chapter under the subject of drainage,[1] has been modified by some of the American courts as between individuals whose estates are more or less removed from each other, yet when the special relationship of surface and mineral proprietor exists in the same tract, we think the rule of that case is fairly applicable.

The principle is aptly illustrated in the case of Bagnall *v.* L. & N. W. Railway Co., decided by the English court of Exchequer.[2]

The plaintiffs owned and occupied a coal mine. The surface soil, as well as the coal below, formerly belonged to the same owner, but a railway company took the surface under the authority of a private act of Parliament for their railway, and constructed it thereon.

The railway company removed the surface soil to a depth of twenty feet vertically over the plaintiff's coal mine to reach the level at which they laid their rails. The surface soil was clay, impervious to water; by removing it a porous rock was reached. On the occurrence of a freshet, the water overflowing the banks of a neighboring brook found its way by gravitation to the cut overlying the plaintiff's mine, and seeping through the porous rocks, loosened them so that the surface subsided, causing the injury to the mine below. The railway company was held liable, the court also announcing that the reasoning applied to water other than that from the flood. Through no default of the plaintiffs the natural condition of things had been altered, and the railway company having failed to protect the mine by the maintenance of sufficient drains, it was mulcted.

This is but the application of the same principle governing the duties of the mine owner in regard to surface support. Negligence is not a test of liability. As skillful and prudent working is no defense to the miner, where

[1] *Ante*, § 808.

[2] 7 Hurlstone & N. 423; affirmed on appeal, 1 Hurlstone & C. 544.

the surface subsides for lack of support, so the careful and ordinary use of the surface will not excuse the surface owner if damage occurs to the underground workings through such use.

Mr. Wood, in his treatise on the law of nuisances,[1] draws the following conclusion from the adjudicated cases:—

The fact that the surface owner makes a lawful use of his premises, or uses it for one of the ordinary purposes of life, and is in the exercise of the highest care, will not excuse him if the consequences are wrongful to, and in contravention of, the rights of another.

**§ 827. Right of access to lower strata — Reciprocal servitudes as between owners of different strata.**— A grant of minerals underneath a given surface does not divest the grantor of the ownership of anything underlying them; but how may he reach strata underlying a stratum conveyed to another? Having sold the mineral underlying the surface, is he to be forever barred from reaching his estate lying beneath it?

True, in most instances there would be but little inducement to reach it; but cases are by no means rare where, underlying a granted mineral zone, there are other zones of the same character, or even other deposits of a different nature, possessing economic value.

The foregoing inquiries were suggested by the supreme court of Pennsylvania in a case of this character,[2] the facts of which were as follows:—

The plaintiff owned the coal beneath the surface, having acquired it by deed, not only conveying all the coal, but also the mining rights and privileges, including the right to enter the mines and carry away all the coal, the right to make openings or entries, air courses, water courses, drainage, and shafts, with right of ingress and egress for the purpose of making such openings, with right of way for

[1] § 294.
[2] Chartiers Block Coal Co. *v.* Mellon, 152 Pa. St. 286.

taking such coal, or any other coal, through the entries, and also the right to use the surface of the land for the purpose of storing the coal and waste.

"The grantor, in conveying the coal with these privil-
" eges, reserved to himself no right, privilege, or ease-
" ment in said coal, or any part thereof, and no right of
" way through said coal from the surface to obtain gas, or
" oil, or any other substance. It is not likely at the time
" the grant was made that it occurred either to the grantor
" or the grantee of the coal that underneath the latter there
" might lie another substance of perhaps greater value than
" the subject of the grant itself. It now appears that the
" coal is underlaid with oil and gas-bearing sand, which can
" only be reached by sinking wells from the surface through
" the strata of coal. . . . The surface owner made
" leases for oil and gas purposes, and the lessees began at
" once to drill."

Under this state of facts the coal company applied for an injunction to restrain the lessees from drilling any wells which would pass through the coal, basing its right to equitable relief upon two grounds: (1) That the defendants had no right to drill the wells; (2) That assuming that they had such an abstract right, it was impossible to so drill them as to allow the removal of all the coal without exposing the mine to leakage from gas from said wells and rendering the mine operations so hazardous as to greatly injure and depreciate the value of coal property, if not wholly destroy it.

The court below refused the injunction, upon condition that the defendants should execute bonds indemnifying the coal company for any damage which might inure from the operation of sinking the wells and removing the oil and gas. This decision was based upon the theory that the owner of the surface has a right of way by necessity through the coal to reach his oil and gas lying beneath it.

The appellate court affirmed the ruling of the court below and dismissed the appeal, but not, as we shall hereafter observe, for the reasons given by the trial court. In

the course of its opinion, which they say is one of "first "impressions," the court, speaking through Mr. Justice Paxson, said:—

"Prior to the sale of the coal the estate of the surface "owner reached from the heavens to the center of the "earth. With the exception of the coal, his estate is still "bounded by these limits. It is impossible for him to "reach his underlying estate, except by puncturing the "earth's surface and going down through the coal he has "sold. While the owner of the coal may have an estate "in fee therein, it is at the same time an estate that is "peculiar in its nature. Much of the confusion of thought "upon this subject arises from a misapprehension of the "character of this estate. We must regard it from a busi- "ness use as well as a legal standpoint. The grantee of "the coal owns the coal, but nothing else, save the right "of access to it and the right to take it away. . . . It "is the grant of an estate which owes a servitude of sup- "port to the surface. When the coal is all removed, the "estate ends, for the plain reason that the subject of it has "been carried away. The space it occupied reverts to the "grantor by operation of law. . . . It cannot be "seriously contended that, after the coal is removed, the "owner of the surface may not utilize the space it occupied "for his own purposes, either for shafts or wells to reach "the underlying strata. The most that can be claimed is, "that pending the removal his right of access to the lower "strata is suspended. The position that the owner of the "coal is also the owner of the hole from which it has been "removed, and may forever prevent the surface owner "from reaching underlying strata, has no authority in "reason, nor do I think in law.[1] The right may be sus- "pended during the operation of the removal, to the extent "of preventing any wanton interference with the coal min- "ing, and for every necessary interference with it, the "surface owner must respond in damages. The owner of "the coal must so enjoy his own rights as not to interfere "with the lawful exercise of the rights of others who may "own the estate, either above or below him. The right of

[1] The same court had previously said: "How could the defendant "own the coal absolutely and not own the space it occupied? How is it "possible to conceive of such a thing as ownership of the space inde- "pendently of the coal?" (Lilliebridge v. Lackawanna Coal Co., 143 Pa. St. 293.)

" the surface owner to reach his estate below the coal exists " at all times. The exercise of it may be more difficult at " some times than at others, and attended with both trouble " and expense."

In the light of this reasoning the conclusions reached by the majority of the court seems somewhat inconsistent. While in another portion of the opinion the court extols the "expansive property" of the common law and its elastic susceptibility of application " to meet new questions " as they arise," it declined to apply the common-law right of way of necessity over the surface to the facts of the case.

" While the right of the surface owner to reach, in some " way, his underlying strata is conceded, it involves too " many questions affecting the rights of property and of " injury to the underlying strata to be settled by the " judiciary."

It then referred the matter to the legislature, but affirmed the ruling of the court below in refusing the injunction, on the ground that the coal company had not as yet sustained any irreparable damage by reason of the sinking of the wells, and it might never do so.

Mr. Justice Williams, in a specially concurring opinion, touched the keynote of the situation. Said Justice Williams:—

" I concur in the decree made in this case and in the " opinion which so ably vindicates it, but I would go " further. I would lay down the broad proposition that " the several layers, or strata, composing the earth's crust " are, by virtue of their order and arrangement, subject to " reciprocal servitudes; and as these are imposed by the " laws of nature, and are indispensable to the preservation " and enjoyment of the several layers, or strata, to and " from which they are due, the courts should recognize and " enforce them. As it now stands, the decree of this court " recognizes the existence of a right of access existing in " the nature of things, wholly independent of all statutory " enactments, and yet refuses to enforce that right or regu- " late its exercise. It says to the owner of the lower " estate: ' You have an undoubted right of access to the " ' layer of the earth's crust in which your wealth lies, but

" 'equity will not protect or aid you in its exercise. The " 'owner of the intermediate stratum may sue you and " 'recover damages from you for doing what it is your right " 'to do, and a chancellor cannot hear your complaint or " 'lift his hands to protect you until the legislature has " 'provided him with ears and hands for that purpose.' I " would hold, that the jurisdiction is as clear as the right " of access; that the parties are in a court competent to " deal with the whole subject, and that the decree of the " court below should be affirmed for that reason and at " the cost of the appellant."[1]

This concurring opinion "snaps like a whip." Its force and logic are irresistible. If it be true, and the court in this case so says, that each of the separate layers, or strata, becomes a subject of taxation, of encumbrance, levy, and sale, precisely like the surface, why should the ownership of each successive strata not be clothed with the same attributes as surface ownership, and be invested with all things necessary or incident to the right of enjoyment?

Each overlying stratum would have the right of support from the lower;[2] all being under a common servitude to the surface owner, and each owner would owe a duty to the other to so conduct his operations as to not interfere with his over or underlying neighbor.

The suggestion that the remedy of the parties being doubtful, relief should be sought from the legislature, is hardly practicable. If the right of access does not arise out of the very nature of the estate or is not conceded by contract, it is difficult to conceive how, in Pennsylvania at least, the legislative branch can interfere. The supreme court of that state has determined that private property cannot be condemned for purpose of ways to be used as mere appurtenances to a mine.[3]

It seems to us that the opinion of Justice Williams heretofore quoted is unanswerable, and affords the only correct solution of the problem.

[1] Chartiers Block Coal Co. *v.* Mellon, 152 Pa. St. 286.

[2] Mundy *v.* Rutland, 23 Ch. Div. 81, 96; Dixon *v.* White, 10 L. R. App. Cases, 833, 842.

[3] *Ante*, § 261.

Where minerals are granted or reserved, it is to be presumed that they are to be enjoyed, and, therefore, that a power to get them must also be granted or reserved as a necessary incident.[1]

There is no substantial difference between a title by exception or reservation out of a grant and a title by direct grant of the same subject. The books make no distinction.[2]

[1] Rowbotham *v.* Wilson, 8 H. L. Cases, 348, 360.

[2] Lilliebridge *v.* Lackawanna Coal Co., 143 Pa. St. 293; Marvin *v.* Brewster, 55 N. Y. 358.

## CHAPTER III.

### LATERAL OR ADJACENT SUPPORT.

§ 831. Introductory.
§ 832. General Principles — Negligence as an element.
§ 833. Right limited to support of soil in its natural state.
§ 834. The right of lateral support as applied to mines worked by hydraulic process.

§ 831. **Introductory.**—The right of lateral or adjacent support is founded on the same general principles as that of vertical or subjacent support.[1] To what extent this right exists in connection with ownership of land used for mining purposes, will be considered after we have outlined the general rules of law governing it. In comparing the adjudicated cases on the subject of vertical with those dealing with lateral support, we may observe some slight variations in the principles; but these, we think, are more apparent than real. A brief statement of the doctrine of adjacent support, considered in the light of adjudicated cases, will be serviceable. We would hardly be justified in investigating the subject exhaustively, for the simple reason that in prosecuting mining ventures it is relatively unimportant. When controversies do arise involving the question between two coterminous mining properties, where the right of adjacent support exists to any degree, we look for their solution to the decisions and treatises on the subject generally, seeking there analogies and applying them.

§ 832. **General principles — Negligence as an element.**— Every man has the natural right to the use of his

[1] Stewart on Mines, p. 165; MacSwinney on Mines, p. 286.

land in the situation in which it was placed by nature, surrounded and protected by the soil of adjacent lots. When one adjoining owner removes the soil, he is not doing simply what he may with his own, but he is interfering with the right which his neighbor has in the same soil.[1]

"Few principles of law can be traced to an earlier or to "a more constant recognition, through a long series of "uniform and consistent decisions, than this."[2]

In the case of land which is fixed in its place, each owner has the absolute right to have the land remain in its natural condition, unaffected by any act of his neighbor; and if the neighbor digs upon or improves his own land so as to injure this right, the one injured may maintain an action against him without proof of negligence.[3]

The right of lateral support is an absolute one. The obligation to respect it is in no way affected by the question of negligence.

"If the owner of the adjoining land takes away the "natural support, it does not matter whether he acts with "due care and is guilty of no negligence."[4]

With regard to the element of negligence, some confusion of thought has arisen by a failure to recognize the distinction between negligence *in law* and negligence *in fact*. Where a measure of duty is ordinary and reasonable care, it is a question of fact.

"In such cases the standard of duty is not fixed, but "variable. . . . When the standard shifts with the "circumstances of the case, it is in its very nature incapable of being determined as a matter of law; . . . "but when the standard is fixed, when the measure of "duty is defined by the law and is the same under all

[1] Losee *v.* Buchanan, 51 N. Y. 476 (citing Farrand *v.* Marshall, 21 Barb. 409).

[2] Foley *v.* Wyeth, 2 Allen, 131, 132.

[3] Chief Justice Gray in Gilmore *v.* Driscoll, 122 Mass. 199.

[4] Washburn on Easements, 4th ed., p. 582. See Victor M. Co. *v.* Morning Star M. Co., 50 Mo. App. 525.

" circumstances, its omission is negligence, and may be so " declared by the court." [1]

There may be instances where this duty is not enjoined at all; but wherever it is enjoined, its standard and measure is fixed. If one may not excavate his land, so that by using ordinary or even the highest degree of skill, he will be unable to prevent his neighbor's soil from being disturbed, the duty is enjoined upon him to refrain from excavating. If he violates this duty, he is guilty of negligence in law. If by the exercise of care he may remove his soil without disturbing his neighbor's, yet fails to exercise such care, he is guilty of negligence in fact. There may be a shade of difference in the legal principle to be applied; but where the neighbor's land falls, without any act of his contributing to it, the one whose acts proximately caused it will be responsible. He is guilty of either negligence in law or fact.

We think this is the rule deducible from a fair consideration of all the authorities, although there are precedents which seem to inject the element of negligence in fact into all cases of this character.[2]

**§ 833. Right limited to support of soil in its natural state.**— As in the case of subjacent support,[3] the lateral right applies only to the land in its natural condition.

" While each owner may build upon and improve his " own estate at his pleasure, provided he does not infringe " upon the natural right of his neighbor, no one can, by " his own act, enlarge the liability of his neighbor for an " interference with this natural right. If a man be not " content to enjoy his land in its natural condition, but " wishes to build or improve upon it, he must either make " an agreement with his neighbor, or dig his foundation " so deep, or take such other precaution as to insure the " stability of his buildings or improvements, whatever

[1] West Chester R. R. Co. *v.* McElwee, 67 Pa. St. 311, 315; McCully *v.* Clarke, 40 Pa. St. 399, 406.

[2] See Panton *v.* Holland, 17 Johns. 92.

[3] *Ante*, § 820.

"excavation the neighbor may afterwards make upon his "own land in the exercise of his right."[1]

This rule is well established in America[2] and in England.[3]

The rule is inoperative where the right to the lateral support of the land with the superadded weight of structures has been acquired by prescription or by contract.

Also where a grant of land is made expressly for the purpose of erecting buildings thereon, or where, in contemplation of the parties, the land conveyed is to be enjoyed in a particular manner or for a particular purpose, a legal easement is created in favor of the land purchased, and a corresponding servitude imposed on the adjoining land held by the grantor for support to the land with the superimposed structures.[4]

This statement of the principles governing the law of lateral support is, we think, sufficient for all practical purposes.

**§ 834. The right of lateral support as applied to mines worked by hydraulic process.**—The English and Scotch writers on mining subjects devote some considerable space to the exposition of the law of lateral support and its application to the conduct of mining operations,[5] and there can be no doubt that in the main the doctrine of the English and Scotch cases is closely followed and adopted in the United States.

[1] Gilmore *v.* Driscoll, 122 Mass. 199.

[2] Thurston *v.* Hancock, 12 Mass. 220; Charless *v.* Rankin, 22 Mo. 566; Quincy *v.* Jones, 76 Ill. 231; Stevenson *v.* Wallace, 27 Gratt. 77; Mamer *v.* Lussem, 65 Ill. 484; Busby *v.* Holthaus, 46 Mo. 161; McGuire *v.* Grant, 25 N. J. L. 356.

[3] Wyatt *v.* Harrison, 3 Barn. & Adol. 871; Peyton *v.* Mayor and Commonality of London, 9 Barn. & Cress. 725; Partridge *v.* Scott, 3 M. & W. 220.

[4] Robinson *v.* Grave, 27 L. T. 648; Rigby *v.* Bennett, 21 Ch. D. 559; S. C. 40 L. T. 47; Murchie *v.* Black, 19 C. B. N. S. 190; Caledonian R. R. Co. *v.* Sprot, 2 Jurist N. S. 623; Palmer *v.* Fleshees, 1 Sid. 167; Cox *v.* Mathews, 1 Vent. 237.

[5] Bainbridge, 4th ed. pp. 284-293; Rogers, pp. 632-644; Stewart, p. 166; MacSwinney, p. 293.

In the precious-metal-bearing states where vein mining is extensively carried on, we do not find that the question has assumed a serious degree of importance. The lodes, or veins, usually descend into the earth on planes approaching the vertical. Where the miner in the pursuit of his vein on its downward course passes out of his boundaries and enters the land adjoining, as he may lawfully do, he is usually so far removed vertically from the overlying surfaces as to render it impossible that his neighbor should be injured by the underground exploitation. In pursuing the lode on its strike or onward course, upon reaching a common boundary there is little likelihood of the undisturbed portion of his neighbor's vein falling into the openings. It is usually rock in a most compact form, "in place," held in the firm embrace by the enclosing rocks, "in the mass "of the mountain."

In dealing with the auriferous gravels existing in the form of superficial deposits which are mined by the hydraulic process, that is by means of the application of water under pressure through a nozzle against a natural bank, the supreme court of California has held that the right of lateral support does not exist. The case in which this doctrine was announced was an action of trespass, coupled with a prayer for injunction,[1] and arose out of the following facts:—

Plaintiff and defendant owned adjoining placer mining claims, consisting of surface deposits of gold-bearing gravel, worked by the hydraulic process. In mining its own ground the defendant washed away the gravel to a point distant in one place, seventy feet, and at other places from one hundred to one hundred and fifty feet from the plaintiff's claim. At these points the bank was deep, and as a necessary consequence of defendant's acts a portion of plaintiff's claim gave way and fell onto defendant's ground. This portion contained a small amount of gold-bearing gravel, a part of which defendant washed away; but the value of the gold

[1] Hendricks v. Spring Valley M. & I. Co., 58 Cal. 190.

extracted was much less than the necessary cost of extracting it. Some time after the defendant ceased to work its ground, large portions of the surface of plaintiff's claim caved and fell upon the adjoining ground of defendant, where it still remains. All of the caving was caused by the mining done by the defendant, but it was not claimed that the defendant's work was performed in a careless or improper manner. Said the court:—

"The question in the case is, whether the doctrine of "lateral support applies to cases like the present. We "think not. The very purpose of locating the ground, "both on the part of the plaintiff and the defendant, was "to tear it down and wash it away. Its only value con- "sisted in the gold it contained. To apply the doctrine "contended for by appellant (plaintiff) to ground of this "character, would, therefore, to a great extent defeat the "very purpose for which it was located.

"Defendant would be liable for the gold taken from the "gravel that fell from the plaintiff's claim but for the fact "that its value was less than the necessary cost of extract- "ing it."

At the time the alleged trespass was commited, and when the case was decided, the following statutory provision, not referred to by either court or counsel, in the case, was (and still is) in force in California:—

"Each coterminous owner is entitled to the lateral and "subjacent support which his land receives from the "adjoining land, subject to the right of the owner of the "adjoining land to make proper and usual excavation on "the same for the purpose of construction, on using ordi- "nary care and skill and taking reasonable precautions to "sustain the land of the other and giving previous reason- "able notice to the other of his intention to make such "excavations."[1]

As the case was considered independently of any questions of priority of location, it logically follows from the doctrine announced, that as to which one of the coterminous owners of placer mining ground worked by the hydraulic process is to suffer an inevitable diminution of

[1] Civil Code, § 833.

his estate, will depend entirely upon which one of them exercises the most diligence in approaching the common boundary.

The Hendricks-Spring Valley case was cited and strongly urged by counsel in Victor Mining Co. *v.* Morning Star Mining Co., considered by the court of appeals of the state of Missouri.[1] We find no mention of it, however, in the opinion of the court, which expresses the following views:—

"If the character of the adjoining soil is such that it "will, and does, sustain its own weight, and the natural "pressure thereon by the power of its coherence without "the aid of the support of the surrounding soil, the adjoin- "ing owner may remove his soil without liability to "damage."

[1] 50 Mo. App. 525.

## CHAPTER IV.

### DEPOSIT OF MINING DEBRIS IN RUNNING STREAMS AND ON LAND OF OTHERS—PRIVATE NUISANCES.


§ 838. The use of water in the conduct of mining operations.

§ 839. Pollution of streams — The English rule—Tin streaming in Cornwall.

§ 840. The American rule as declared in states not accepting the Pacific Coast doctrine as to right of appropriation and user of water.

§ 841. The rule in the mining states and territories where the right of appropriation is recognized.

§ 842. The remedy by injunction to prevent pollution of water.

§ 843. The deposit of tailings and refuse on the lands of others.

§ 844. Measure of damages for unlawfully depositing debris on another's land.


**§ 838. The use of water in the conduct of mining operations.**— Water in the conduct of mining ventures is an all important factor. Without it mining operations cannot be prosecuted. While in underground exploitations it is looked upon as a common enemy to be met and conquered, yet when brought to the surface, or found in the running brooks and streams, it becomes an indispensable auxiliary in the various processes by which the miner extracts the metals from the rocks and ore-bearing earth. The right to appropriate and use water for such purposes, and the manner in which such rights may be acquired and enjoyed, is so intimately associated with the mining industry, particularly in the precious-metal-bearing states and territories, that it is almost impossible to treat of some of the phases of mining law without discussing the law pertaining to the use of water. Yet, to intelligently present even in outline this interesting branch of the law and reach

conclusions as to the underlying principles which control it as applied to mining, we would not only be forced to recognize and draw geographical lines, but would be compelled to introduce into the discussion elements involving the utilization of water for an infinite variety of purposes wholly disassociated with mining ventures.

In one section of the union the strict doctrine of riparian ownership as known to the common law is administered with rigid uniformity. In another there has been a manifest tendency to depart from the doctrine by reason of industrial environments and public necessity.

It may be assumed, without examining or citing authorities, "where we meet an embarrassment of abund-"ance,"[1] that under the common law no absolute right of appropriation of water for useful or beneficial purposes was recognized. The owner of land through or along which a stream flowed had a right to insist that it should so flow, whether in so flowing he derived any practical benefit from it or not. His neighbor above had no right to divert it or use any part of it in such a way as to either appreciably diminish its quantity or affect its quality, unless he had acquired a right to do so by grant or prescription. The maxim, *Aqua currit et debet currere, ut currere solebat*, embodies both the letter and spirit of the common law.

We have also the privilege of assuming that this maxim is not, nor was it ever, recognized as possessing controlling force in the Pacific states and territories. In this behalf we may accept without question the statements announced by the supreme court of the United States in the cases of Atchison *v.* Peterson[2] and Basey *v.* Gallagher.[3]

"By the custom which has obtained among miners in "the Pacific states and territories where mining for the "precious metals is had on the public lands of the United "States, the first appropriator of mines, whether in placers, "veins, or lodes, or of waters in the streams on such lands

[1] Lux *v.* Haggin, 69 Cal. 255.
[2] 20 Wall. 507.
[3] 20 Wall. 670.

" for mining purposes, is held to have a better right than " others to work the mines or to use the waters. The first " appropriator who subjects the property to use, or takes " the necessary steps for that purpose, is regarded, except " as against the government, as the source of title in all " controversies relating to the property. As respects the " use of water for mining purposes, the doctrines of the " common law declaratory of the rights of riparian owners " were, at an early day after the discovery of gold, found to " be inapplicable, or applicable only in a very limited extent, " to the necessities of the miners, and inadequate to their " protection. By the common law the riparian owner on a " stream not navigable takes the land to the center of the " stream, and such owner has the right to the use of the " water flowing over the land, as an incident to his estate. . . .

" This equality of right (at the common law) among all " the proprietors on the same stream would have been " incompatible with any extended diversion of the water " by one proprietor, and its conveyance for mining pur- " poses to points from which it could not be restored to the " stream; but the government being the sole proprietor " of all the public lands, whether bordering on streams or " otherwise, there was no occasion for the application of " the common law doctrines of riparian proprietorship " with respect to the waters of these streams. The govern- " ment, by its silent acquiescence, assented to the general " occupation of the public lands for mining, and to en- " courage their free and unlimited use for that purpose, " reserved such lands as were mineral from sale and the " acquisition of title by settlement. And he who first con- " nects his own labor with property thus situated and open " to general exploration, does in natural justice acquire a " better right to its use and enjoyment than others who " have not given such labor. So the miners on the public " land throughout the Pacific states and territories, by " their customs, usages, and regulations, everywhere recog- " nized the inherent justice of this principle; and the " principle itself was at an early period recognized by legis- " lation, and enforced by the courts in those states and " territories. . . .

" This doctrine of right by prior appropriation was rec- " ognized by the legislation of congress in 1866 [quoting " the statute of congress]. The right to water by prior " appropriation, thus recognized and established as the law " of miners on the mineral lands of the public domain, is

"limited, in every case, in quantity and quality, by the "uses for which the appropriation is made. . . ."

In the case of Basey *v.* Gallagher,[1] Mr. Justice Field, speaking for the court, after quoting the decision in Atchison *v.* Peterson said:—

"The views there expressed and the rulings made are "equally applicable to the use of water on the public lands "for purposes of irrigation. No distinction is made in the "states and territories of the Pacific coast by the customs "of miners or settlers or by the courts, in the rights of the "first appropriator from the use made of the water, if the "use be a beneficial one."

After referring to the California case of Tartar *v.* Spring Valley M. Co.,[2] he adds:—

"Ever since that decision, it has been held generally "throughout the Pacific states and territories that the right "to water by prior appropriation for any beneficial pur"pose is entitled to protection. Water is diverted to pro"pel machinery in flour mills and sawmills and to irrigate "land for cultivation, as well as to enable miners to work "their mining claims; and in all such cases the right of the "first appropriator, exercised within reasonable limits, is "respected and enforced. We say within reasonable limits, "for this right to water, like the right by prior occupancy "to mining or agricultural land, is not unrestricted. It "must be exercised with reference to the general condition "of the country and the necessities of the people, and not "so as to deprive a whole neighborhood or community of "its use, and vest an absolute monopoly in a single indi"vidual."[3]

The doctrine of these decisions is fully recognized in all the Pacific states and territories in cases where the appropriation of water is made *prior* to the conveyance by the government of lands through which the stream flows. Whoever purchases land from the United States or from the state after the whole or some part of the water of a natural water course running through such land has been

[1] 20 Wall. 670.

[2] 5 Cal. 396.

[3] See. also, Jennison Exr. *v.* Kirk, 98 U. S. 453; Broder *v.* Natoma Water Co., 101 U. S. 274.

appropriated by someone else, takes subject to the rights acquired by such appropriator.[1]

But the supreme court of California, by a divided court, has denied any right of appropriation as against a nonconsenting riparian owner acquiring title *prior* to the act of attempted appropriation. In other words, where the government sells lands traversed by running streams, the common law doctrine of riparian rights, with all its incidents and attributes, attaches immediately upon such sale, and prevents any future appropriation of the water as against such riparian proprietor.[2]

The supreme court of Oregon coincides with this view.[3]

The supreme court of Nevada has declined to acquiesce in this interpretation of the law,[4] following the rule announced by the supreme court of Colorado:—

"The right to water in this country by priority of "appropriation, we think, is and has always been the "duty of the national and state governments to protect. " . . . It is entitled to protection as well after patent "to a third party of the land over which the natural "stream flows as when such land is a part of the public "domain."[5]

In addition to the conflict of opinion in the different states as to the extent to which the doctrine of the common law on the subject of appropriation and use of water for useful purposes has been modified, it may also be noted that in each state and territory where the right of appropriation is recognized we encounter legislation more or

[1] Black's Pomeroy on Water Rights (Mr. Black's addendum to § 26, citing Lux *v.* Haggin, 69 Cal. 255; South Yuba Water Co. *v.* Rosa, 80 Cal. 333; Barnes *v.* Sabron, 10 Nev. 217; Speake *v.* Hamilton, 21 Ore. 3; Kaler *v.* Campbell, 13 Ore. 596; Drake *v.* Earhart, 2 Idaho, 716; Kirk *v.* Bartholomew, 2 Idaho, 1087; Elliott *v.* Whitmore, 8 Utah, 253).

[2] Lux *v.* Haggin, 69 Cal. 255, and California cases cited *supra*; Hargrave *v.* Cook, 108 Cal. 72.

[3] Curtis *v.* La Grande Water Co., 20 Ore. 34.

[4] Jones *v.* Adams, 19 Nev. 78 (overruling Vansickle *v.* Haines, 7 Nev. 249); Reno Smelting M. & R. Works *v.* Stevenson, 20 Nev. 269.

[5] Coffin *v.* Left Hand Ditch Co., 6 Colo. 443. See, also, Armstrong *v.* Larimer Co. Ditch Co., 1 Colo. App. 49; Golden Canal Co. *v.* Bright, 8 Colo. 144.

less comprehensive in its scope, regulating the manner in which water may be appropriated and the nature and extent of its use.

Considering all these varying conditions, it would be impossible for us to deal comprehensively with the subject of water without practically writing a special treatise. This it is wholly unnecessary to do. Others have devoted themselves to the task, and to their works we should necessarily turn for enlightenment upon this branch of the law. We are permitted here to deal with it only in a collateral and limited way. We shall confine ourselves to the question of fouling the waters of the running streams in the conduct of mining operations, and the injuries flowing from the deposit of tailings and other refuse upon the lands of others.

§ 839. **Pollution of streams — The English rule — Tin streaming in Cornwall.** — The English and Scotch authors on mining subjects are agreed, generally speaking, as to the extent to which the waters of running streams may be used by persons engaged in conducting mining and manufacturing operations on their banks, independently of rights acquired by grant or prescription. We may accept their conclusions without undertaking a citation or analysis of all the cases from which these conclusions are adduced.

We quote from Bainbridge:—

"A riparian owner has the general right to receive the "waters in as pure a state as nature affords them, and such "owners are equally bound to transmit them to pro- "prietors below without diminution, diversion, or deterior- "ation. For all riparian owners acquire no property in "the water itself, but only the privilege of using it in its "passage by reasonable interference. For the same reason "the waters cannot be forced back upon the owners above, "nor so retarded or accelerated as to cause injury to those "below."[1]

Mr. Rogers says:—

"*Prima facie*, no one has a right to defile water, and "there is no distinction in this respect between water

[1] Bainbridge, 4th ed. (1878), p. 227.

"which flows and water which percolates through the "soil."[1]

Mr. MacSwinney states the rule more liberally:—

"On the same principle that a riparian owner may "use a stream in a reasonable degree, or abstract or divert "it in reasonable quantities, he may, by washing his min- "erals by means of it, or pumping water from his mines "into it, alter its quality in a reasonable degree; but, as he "may not sensibly diminish the body of the stream, he may "not sensibly alter its quality. He must not, therefore, "*prima facie*, impregnate the stream with poisonous or foul "matter."[2]

We select the following excerpts from the recent treatise of Mr. Ross Stewart.[3]

"A lower heritor has this interest in the stream: that "in passing through the lands of others it shall be trans- "mitted to him undiminished in quantity, unpolluted in "quality, and unaffected in force and natural direction and "current, except in so far as the primary uses[4] of it may "legitimately operate upon it within the lands of the upper "heritor. . . . Any one may, *prima facie*, use a run- "ning stream for the purpose of washing minerals, or, "if it would have reached the stream naturally within his "own lands, may pump the water from his mine into it, "provided it does not thereby alter its quality to the preju- "dice of his neighbor. No upper heritor is entitled to pol- "lute the water of a stream to the injury of those below him, "and in the act of throwing impurities into the river arti- "ficially produced, he is a wrong-doer. He has no right to "do this merely because the premises he occupies are on "the banks of the stream."

And quoting from the Esk pollution case:[5]—

"Riparian proprietors are entitled to use the water in "any way they may like as it passes through their prop- "erty, subject to only certain conditions. Now these

[1] Rogers, 2d ed. (1876), p. 667.

[2] MacSwinney on Mines (1884), p. 396.

[3] Stewart on Mines and Minerals (Edinburgh, 1894), pp. 223, 230.

[4] "Primary use of water includes its use for *all* domestic purposes, "including, as well, its use for man or beast." (Wood on the Law of Nuisances, § 445.)

[5] Duke of Buccleuch v. Cowan, 2 App. Cases, 344.

" conditions are, that they shall send down the water to " their neighbors below undiminished in quantity and " unimpaired in quality. . . . As regards the matter of " purity, it is impossible, in the nature of things, that a " running stream should not receive in its course certain " impurities as it passes along. The action of nature is " inconsistent with such a condition as that; but the mean- " ing of the condition is, that no unnecessary or artificial " impurity shall be put into the stream so as thereby to " diminish the purity of the water as it passes to the pro- " prietors or the inhabitants below."

But in England there are some localities where the common law rules in this behalf do not obtain. In the mining regions where water is necessary for the proper conduct of mining operations, we find that the law elsewhere prevailing has been there altered by custom.

"Streaming" for tin, which is the ancient method of getting tin in Cornwall, is a process of obtaining granular tin by means of washing. It is necessarily carried on entirely by means of open workings, and it appears usually to result in as complete a destruction of the surface as takes place in the case of quarrying,[1] or in mining by the hydraulic process in the auriferous placers of the United States.

Therefore, in Cornwall, by a custom founded upon industrial necessity, tin bounders were entitled to the free use of the water over the whole district within their bounds, and to the right of diverting that water into other streams. Cleansing the produce of their workings by "streaming" is almost always a necessary part of their operations.[2]

Therefore, tin bounders are entitled by custom to wash their minerals in the streams of water within their bounds, and to send down such streams the sand, stone, rubble, and other stuff dislodged in the process of making, and the right exists even in the case of natural surface streams,

[1] MacSwinney on Mines, p. 384.

[2] *Id.*, p. 434 (citing Rogers *v.* Brenton, 10 Q. B. 25; Gaved *v.* Martyn, 19 C. B. N. S. 732, 751).

although its exercise may either foul or obstruct them to the damage of other riparian owners.[1]

So a claim by custom to a right to foul the water of a stream is a defense to an action for polluting it, and such custom has been held not to be either indefinite or unreasonable, but limited to the necessary working of the mines.[2]

A right to so foul a stream might also be acquired by either grant or prescription, the prescription period, as fixed by act of parliament, being twenty years.[3]

§ 840. **The American rule as declared in states not accepting the Pacific Coast doctrine as to right of appropriation and user of water.**—With the exception of those mining states of the west accepting and recognizing the right to appropriate, divert, and use running water (the doctrine referred to in a preceding section), the decisions of the American courts follow in the main the English rule. The American commentators and authors upon the subject restate and apply the maxims of the English common law, and there can be no doubt, generally speaking, that the doctrine prevails in most of the states of the union, except those wherein the federal mining laws are operative. We observe, however, particularly in later years, a manifest tendency in the older states of the union towards relaxing the common law rules of riparian ownership, with regard

[1] MacSwinney on Mines, p. 435 (citing Carlyon v. Lovering, 1 H. & N. 784). Under the laws of the stannaries, they must not, however, in exercising the right, injure rivers or lands adjoining rivers, and, if as a consequence of its exercise, lands become overflowed by a river, they are bound within two days after receiving notice from any person thereby injured to clear the river, and in default are liable to damage and a fine; and for the protection of havens and ports in Cornwall, persons who stream for tin near any waters or rivers flowing into such havens or ports are under a statutory obligation to prevent the dislodged sand, stones, gravel, and rubble from being conveyed into such havens or ports.

[2] MacSwinney on Mines, p. 397.

[3] The act of parliament passed in 1876 (39 and 40 Vict. 75), known as the rivers pollution prevention act, inhibits miners from permitting to flow into streams "any poisonous, noxious, or polluting solid or liquid "matter proceeding from any mine, other than water in its same condi- "tion as that in which it has been drained or raised from such mine." (Bainbridge, 4th ed., p. 329.)

to the extent to which the flowing waters may be used in connection with the manufacturing interests of the country and the industrial necessities of communities. While conceding that the upper proprietor must so use the water of a stream as not to appreciably diminish its volume or impair its quality, the courts are liberally disposed when dealing with what constitutes such impairment.

As Mr. MacSwinney observes, purity is a relative term. No water is absolutely pure. No one would contend that in any state of the union one owner on the bank of a stream would have a right to deposit in such stream offal from slaughter houses, cattle yards, hog pens, or water charged through metallurgical operations with sulphuric or muriatic acid, where the proprietor below was compelled to use such water for domestic purposes. These substances injure and taint the water. The offensive elements will remain in solution perpetually, whether the water flows or is at rest; but between offensive and poisonous elements of this character and the sand or tailings from an ordinary quartz mill or placer mine, or sawdust from a sawmill, there is a wide difference. The tailings from a mine are carried by the stream in suspension. When the water is at rest the sand, silt, and comminuted particles settle to the bottom. The water above is not tainted, and can be used for all the primary purposes for which water is used. Every stream on its road to the sea carries earthy substances in suspension and mineral substances in solution, gathered on its way from the operation of natural causes. Every storm in the mountains loads the running waters to the utmost of their carrying capacity with the same class of material that the gold miner places in them by artificial methods.

So with ordinary sawdust from the sawmills. Depositing sawdust in a stream is not, *per se*, a nuisance. If the lumber manufacturer operates his works in a reasonable manner, he has a right to discharge the sawdust and waste from it into the stream in the ordinary course of his operations. He is not bound as a matter of law to prevent them

from going into the stream, nor to impound or draw them off or deposit them so that they cannot get into the stream.[1] We may quote instructively from Chief Justice Redfield, speaking for the supreme court of Vermont:—

"In regard to many uses of the water in streams, it has "long been settled by common consent, or is so obvious in "itself that it is determinable as matter of law. Such are "the uses for irrigation, for propelling machinery, and for "watering cattle, and some others. And in regard to some "debris or waste deposits in such streams, there would seem "to be no question. The uniform practice, the convenience, "and in some instances the indispensable necessity would "seem sufficiently to decide such cases. . . . The "deposit of sawdust to some extent is nearly indispensable "in the running of sawmills and most other machinery "used in the manufacture of wood and propelled by water "power. The reasonableness of such use must determine "the right, and this must depend upon the extent of the "detriment to the riparian proprietor below."[2]

Of course, even the deposit of waste from a sawmill *may* become a nuisance.

In Lockwood Co. v. Lawrence, decided by the supreme court of Maine,[3] the complainants were operating extensive cotton manufactories on the Kennebec River. Numerous defendants were engaged at different points above in operating sawmills, planing mills, clapboard, and other manufacturing machines, and discharging into the river sawdust, edgings, shavings, refuse, and other debris. Such material commingling into one indistinguishable mass was carried by the current of the river and brought to the ponds, raceways, and wheels of complainant, filling the same, stopping the wheels and retarding and preventing the running of the cotton mills.

An injunction was ordered restraining the defendants from casting or depositing in the river above complainant's dams and manufactories any refuse materials, edgings,

[1] Jacobs v. Allard, 42 Vt. 303.

[2] Quoted in Gould on Waters, § 220, from Green v. Gilbert, 60 N. H. 144. See, also, Waterman v. Buck, 58 Vt. 519.

[3] 77 Me. 297.

shavings, debris, wood refuse, and what is denominated "long sawdust," not including, however, common sawdust. As to this latter substance the court declined to consider it as a nuisance. In reaching its conclusions the court quoted approvingly from the Minnesota case of Red River Roller Mills *v.* Wright.[1]

"In determining what is a reasonable use, regard must "be had to the subject-matter of the use, the occasion, and "the manner of its application, the object, extent, neces- "sity, and duration of the use; the nature and size of the "stream; the kind of business to which it is subservient; "the importance and necessity of the use claimed by one "party and the extent of the injury to the other party; the "state of improvement of the country in regard to mills "and machinery, and the use of water as a propelling "power; the general and established usages of the country "in similar cases, and all the other and ever-varying cir- "cumstances of each particular case bearing upon the "question of the fitness and propriety of the use of the "water under consideration."

To the same effect is the case of Prentice *v.* Geiger,[2] decided by the New York court of appeals, where it was held that the jury, in determining the question of reasonable use, would be entitled to consider all the circumstances, such as the general character and condition of the stream, its volume and rapidity, the degree of injury which it occasioned, the custom and usage of the country, and the necessity for using the stream for this purpose.

While sawdust, quartz, and placer tailings are, when discharged into running streams in reasonable quantities, comparatively speaking, innocuous, when we enter the coal and iron regions of the east and south we naturally look for the application of less liberal rules. Water used in cleansing the iron ores of the coal measures becomes charged with more or less deleterious chemical substances. So water used in washing coal, or which is pumped from coal mines, is almost invariably so impregnated with sulphur, coal gas, oil, or other mineral hydrocarbons, as to

[1] 30 Minn. 249. [2] 74 N. Y. 341.

render it unfit for any reasonable use. While the courts of all the eastern and southern states concede the operative force of the common law on the subject of the pollution of water in the conduct of mining operations, yet in many instances we find a disposition to qualify the law as interpreted by the English courts.

According to Judge Paxson, of the supreme court of Pennsylvania,[1] English cases are not safe precedents upon such a question. They are influenced to some extent by the social and political conditions of the country. The mines in England are generally located in highly improved sections, where the land possesses great intrinsic value and the streams are filled with choice fish, the sole right to which is in the nobility and landed gentry. Under such circumstances, we could hardly expect the English judges to lay down a rule suited to the rough mountain lands which, in the main, constitute the mining regions of Pennsylvania.

For the purpose of ascertaining the current of judicial thought on the subject in the eastern and southern states, we may advantageously select a few leading cases, without attempting to present such an exhaustive collection of authorities as may be found in the special treatises on the law of water courses or nuisances.

We naturally turn to the state of Pennsylvania when seeking precedents on mining questions disconnected with the features peculiar to the federal system. Of all the cases considered by the supreme court of that state involving the subject of pollution of water in the conduct of coal mining operations, the case of Sanderson *v.* Pennsylvania Coal Co. is the most noted. It was before the appellate tribunal four times,[2] and has been referred to in every case of importance involving the pollution of running

[1] See his dissenting opinion rendered in Sanderson *v.* Pennsylvania Coal Co. (first appeal), 86 Pa. St. 401, which on the fourth appeal was adopted by the majority of the court. Pennsylvania Coal Co. *v.* Sanderson, 113 Pa. St. 126, a case fully discussed, *post*.

[2] 86 Pa. St. 401, 94 *Id.* 302, 102 *Id.* 370, 113 *Id.* 126.

water which has been decided by the courts of any of the states since the first opinion was rendered.

It arose out of the following state of facts: Plaintiff, Sanderson, purchased a tract of land in the city of Scranton and erected a residence thereon at a cost of eighty thousand dollars. Before the purchase, Meadow Brook, a stream of pure water, ran through the tract. The existence of this stream was the leading inducement to plaintiff to buy and build. Dams were built across it by plaintiff for the purpose of a fish and ice pond and to supply a cistern. Water was carried from the cistern to a ram, and thence to a tank in the attic of the house. After these improvements were perfected, the Pennsylvania Coal Co., defendants, established a colliery on lands belonging to them along the stream and about two miles above the land of plaintiff. A drift was first made into their mine and a shaft was afterwards sunk. The water which collected in the drift, as well as that pumped by powerful engines from the shaft, ran into Meadow Brook. It was alleged on the trial that the effect of the mine water was to corrupt the water of the stream and to render it worse than worthless for any domestic or household use. There was evidence that the fish in the brook were destroyed; that the willows along the bank died; that the pipes connecting with the cistern, the ram, and the house, were corroded and eaten out; that the water became unfit for domestic uses, and its use for all purposes was abandoned. The court below held that the facts were insufficient to warrant a verdict, and granted a nonsuit, from which ruling the plaintiff appealed.[1]

The coal company, in defending its right to pollute the water, asserted that it was conducting a lawful business in a lawful way; that in working its mine it encountered water, and the only way in which it could be disposed of was by raising it to the surface by means of pumps; that when discharged at the surface it sought the natural

[1] 86 Pa. St. 401.

outlet through Meadow Brook and thence to the Lackawanna River; that the material carried down the stream in suspension and solution was not the result of any artificial treatment of the coal after mining, but the contamination of the water arose from the natural underground percolation into the mine; that the operation of the mine would have to be abandoned unless such waters could be so discharged, and that were a rule to be recognized which inhibited it, anthracite coal mining in Pennsylvania would be practically at an end. It was urged that the law should be adjusted to the exigencies of the great industrial interests of the commonwealth, and that the production of an indispensable mineral should not be crippled and endangered by adopting a rule that would make collieries answerable in damages for corrupting a stream into which mine water would naturally run.

The appellate court, in reviewing the action of the trial court, took occasion to remark that in granting the nonsuit, sight appeared to have been lost of some distinctions which the law has settled, and that a mistake had been made in selecting the class of precedents there followed. While proprietors of large and useful interests should not be hampered or hindered for frivolous or trifling causes, and that for slight inconveniences or occasional annoyances they ought not to be held responsible, and in dealing with such complaints juries should be held with a steady hand, yet the appellate tribunal insisted that there must be one rule of law maintained for all men, and by that rule all men's rights must be tested.

"Undoubtedly," said the court, "the defendants were "engaged in a perfectly lawful business in which large "expenditures had been made and with which widespread "interests were connected; but however laudable an "industry may be, its managers are still subject to the rule "that their property cannot be so used as to inflict injury "on the property of their neighbors."

The decision is replete with quotations of common law maxims and citations from English cases. After quoting

from Justice Mellor's charge to the jury in St. Helen's Smelting Co. *v.* Tipping,[1] the court closes with the following:—

"Relaxation of legal liabilities and remission of legal "duties to meet the current needs of great business organ- "izations in one direction would logically be followed by "the same relaxation and remission on the same grounds "in all other directions. One invasion of individual right "would follow another, and it might be only a question of "time when, under the operation of even a single colliery, "a whole countryside would be depopulated."

The judgment was reversed and the cause remanded for a new trial. The second trial was conducted upon the legal theories announced by the supreme court, and resulted in a verdict for plaintiff for two hundred and fifty dollars' damages. Both parties sued out writs of error, the defendant to secure reconsideration of the question of its liability, and the plaintiff who complained of errors in excluding testimony as to the *quantum* of damages.

The two appeals were heard separately. As to the defendant's liability the appellate court held to its former opinion. Said the court:—

"It is urged that mining cannot be carried on without "this outflow of acidulous water, hence neighboring streams "must be polluted. This is true; and it is also true that "coal mining would come to nothing without roads upon "which to transport the coal after it is mined; therefore "roads are necessary; but it does not follow that for such "purposes the land of an adjacent owner may be taken or "his right of way encumbered without compensation."[2]

The judgment was affirmed. This would have finally disposed of the case had it not been for the writ of error sued out by the plaintiff. His exceptions to the refusal of the court to admit certain testimony were sustained by the appellate court, and the case was remanded for a third trial,[3] upon which plaintiff received a larger judgment and

[1] 11 House of Lords Cases, 642.

[2] Pennsylvania Coal Co. *v.* Sanderson, 94 Pa. St. 302-308. In Pennsylvania, mining is not a "public use." A coal miner could not condemn rights of way for roads or other mining easements (*ante*, § 261).

[3] Sanderson *v.* Pennsylvania Coal Co., 102 Pa. St. 307.

the coal company appealed. The question of the defendant's liability was reopened and reargued. In the meantime there had been a change in the personnel of the supreme bench. The court, sitting on the last appeal, declined to follow the former opinion rendered in the case.[1]

Said the court, reversing the judgment:—

"The plaintiff's grievance is for a mere personal inconvenience, and we are of opinion that mere private personal inconvenience, arising in this way and under such circumstances, must yield to the necessities of a great public industry, which, although in the hands of a private corporation, subserves a great public interest. To encourage the development of the great natural resources of a country, trifling inconveniences to particular persons must sometimes give way to the necessities of a great community. Nor do we say that a miner, in order that his mines may be made available, may enter upon his neighbor's lands or inflict upon him any other immediate or direct injury, but we do say that in the operation of mining in the ordinary and usual manner, he may, upon his own lands, lead the water which percolates into his mine into the streams which form the natural drainage of the basin in which the coal is situated, although the quantity as well as the quality of the water in the stream may thereby be affected."

The court referred to the dissenting opinion written by Justice Paxson, when the case was first before the court, by quoting and adopting the following portion of it:—

"The population, wealth, and improvements are the result of mining and that alone. The plaintiffs knew when they purchased their property that they were in a mining region. They were in a city born of mining operations and which had become rich and populous as a result thereof. They knew that all mountain streams in that section were affected by mine water, or were liable to be. Having enjoyed the advantages which coal mining confers, I see no great hardship nor any violence to equity in their also accepting the inconveniences necessarily resulting from the business."

[1] Pennsylvania Coal Co. *v.* Sanderson, 113 Pa. St. 126.

It must be candidly conceded that the reasoning of these later opinions of the Pennsylvania court goes beyond that of any other case found in the books. They announce a doctrine which might become extremely dangerous, if generally accepted.

The court itself has, in subsequent cases, been careful to limit the application of the principles lastly announced to cases where the water discharged was such only as came into the mine by natural percolation, and has declined to extend it to instances where material was brought to the ground and artificially treated, the refuse and waste being discharged into the streams,[1] and it may be plausibly asserted that these later cases weaken the force of the rule finally announced in the Sanderson case.[2] There is an abundance of authority in the earlier decisions for the doctrine that a stream of water may not be fouled by the introduction into it of any foreign substances to the damage and injury of the lower riparian proprietor.[3]

In a state which does not recognize the right to appropriate and divert water for useful or beneficial purposes, or acquire by prior appropriation the right to use a running stream in a particular manner, there is no sanction for any doctrine which measures the rights of an individual by his convenience or necessity.

"If the injury complained of were merely a fanciful "wrong, or produced simply personal discomfort, there "might be no real ground of complaint; but when the "result of the acts of one on his own land is a direct "and material injury to the property and property rights "of another, a very different question arises, and in such "cases the maxim of *sic utere tuo ut alienum non lædas* "applies."[4]

As was said by the supreme court of Ohio:—

[1] Robb *v.* Carnegie, 145 Pa. St. 324; Leutz *v.* Carnegie, 145 Pa. St. 612.

[2] See Hauck *v.* Tide Water Pipe Line Co. Ld., 153 Pa. St. 366; Elder *v.* Lykens Valley Coal Co., 157 Pa. St. 490.

[3] Howell *v.* McCoy, 3 Rawle, 256; Barclay *v.* Commonwealth, 1 Casey, 503; McCallum *v.* Germantown W. Co., 4 P. F. Smith, 40.

[4] Columbus & Hocking Coal & Iron Co. *v.* Tucker, 48 Ohio St. 41.

"While the thing to be done may be lawful in a general "way, there is and must be limitation upon the means by "which it is to be done. Nor is it of consequence that the "operation of mines tends to the development of the "natural resources of the country. But few enterprises, "the product of which is useful, fail to advance the gen- "eral good."[1]

The supreme court of Alabama, in a case involving the washing of iron ore and discharging the waste into a running stream, gives its sanction to the views expressed in the first decision of the supreme court of Pennsylvania in the Sanderson case,[2] recognizing the exigencies of the great industrial interests of the country, and adds:—

"Nor must we shut our eyes to the tendency, the inevi- "table tendency, of these and other uses in which water is "an indispensable element, to detract somewhat from its "nominal purity. These modifications of individual right "must be submitted to in order that the greater good of the "public be conserved and promoted; but there is a limit "to this duty to yield to this claim and right to expect and "demand. The water course must not be diverted from "its channel or so corrupted and polluted as practically to "destroy, or greatly impair, its value to the lower riparian "proprietor."[3]

This is in harmony with the rule declared in Georgia in a similar case.[4]

In the very nature of things it is impossible to enunciate a general rule as to what constitutes a reasonable use of running water, which may be applied uniformly to all cases. It depends upon circumstances.[5]

The limits which separate the lawful from the unlawful is a question of degree.[6]

[1] Columbus & Hocking Coal & Iron Co. *v.* Tucker, 48 Ohio St. 41.

[2] 86 Pa. St. 401.

[3] Tennessee Coal, I. & R. Co. *v.* Hamilton, 100 Ala. 252. See, also, Drake & Lady Ensly Coal, I. & R. Co., 102 Ala. 501, wherein Pennsylvania Coal Co. *v.* Sanderson, 113 Pa. St. 126, was relied upon to sustain the right to pollute the water.

[4] Satterfield *v.* Rowan, 83 Ga. 187.

[5] Dilling *v.* Murray, 6 Ind. 324; Elliott *v.* Fitchburg R. R., 10 Cush. 191; Thurber *v.* Martin, 2 Gray, 394.

[6] Mayor of Baltimore *v.* Appold, 42 Md. 442.

No positive rule of law can be laid down to define and regulate such use with entire precision. As to this all courts agree.[1] It is a question of fact to be determined by the jury.[2]

**§ 841. The rule in the mining states and territories where the right of appropriation is recognized.**— We reserve for a subsequent article the larger questions arising from the deposit of mining debris into navigable waters and their tributaries in the conduct of hydraulic mining on the gigantic scale practiced in some of the western states, and the regulation of this class of mining by congressional law in certain portions of California — questions affecting the general public. For the present we confine ourselves to a consideration of the extent to which the miner in the Pacific coast states and territories is permitted to utilize the carrying power of water in the discharge of tailings and mining refuse into the running streams, and what are the limitations upon his permitting them to flow into the natural water courses.

As heretofore noted[3] the common law rule regulating riparian rights has not been recognized or applied in the Pacific states and territories. This departure from the English doctrine had its origin in the same necessities which compelled the tin bounders of Cornwall in the early period of British history, or probably in the prehistoric period, to utilize the waters of the running streams for the purpose of mining and washing their ores.[4]

The peaceful invasion of California, upon the discovery of gold and the inauguration of placer mining, may not be likened to the Roman occupation of Britain and the inception of tin streaming in Cornwall; but there are

[1] Timm *v.* Bear, 29 Wis. 254. For a valuable collection of cases upon the subject of reasonable use, consult the elaborate note to Davis *v.* Getchell, 50 Me. 602.

[2] Batavia Mfg. Co. *v.* Newton Wagon Co., 91 Ill. 230; Hayes *v.* Waldron, 44 N. H. 580. See note to Davis *v.* Getchell, 79 Am. Dec. 636, 644.

[3] *Ante*, § 838.

[4] *Ante*, § 839.

marked analogies. The economic necessities of both were the same. In both countries a custom originated in these necessities. Both countries were new in an industrial sense. There were no fertile fields to injure, no cultivated farms or orchards to be destroyed, and no navigation of inland waters to be obstructed. In time these customs in both countries were recognized by those having proprietary dominion over the soil. The charters of John and Edward I. affirmed the right of tin bounders to appropriate and use the running waters, "*divertere aquas — sicut "consueverunt;*"[1] and the government of the United States, first by passive acquiescence and then by legislative enactment and judicial declaration, recognized and established as the law of miners on public mineral lands the customs and regulations adopted in the gold regions of the west.[2]

While in some of the Pacific states and territories the extent to which these customs, as defined by legislation and judicial sanction, have left their impress on the existing system, may be the subject of controversy, yet in all the states and territories of the west where mining is a prominent and permanent industry we find the right of appropriation and the use of running water for mining purposes to some degree, at least, well recognized and established.

In the early days of mining in California, where the miners' rules and customs originated, the right to mine and the right to divert water stood upon an equal footing, and when a conflict arose it was determined by the fact of priority. The miner who selected a piece of ground to work took it as he found it, subject to prior rights which had an equal equity on account of an equal recognition from the sovereign power.[3]

The law did not tolerate any injury by one to the prior rights of another.[4]

[1] Bainbridge on Mines, 4th ed. p. 153.

[2] Atchison v. Peterson, 20 Wall. 507; Basey v. Gallagher, 20 Wall. 670; *ante*, § 838.

[3] Irwin v. Phillips, 5 Cal. 140.

[4] Hill v. Smith, 27 Cal. 476.

The owner of a mining claim in the bed of a cañon might erect dams across it for the purpose of enabling him to work it, even if thereby other dams above were flooded, provided the claim in the bed of the cañon held priority. In such case the injury sustained by the subsequent locators was *damnum absque injuria*.[1]

So the prior locator of a mining claim on the banks of a stream had the right to the use of the bed of the stream for the purpose of fluming and working his claim, and any subsequent erection of a dam which interfered with the right was an encroachment for which damages might be recovered.[2]

One who entered upon a stream of water above a prior appropriator and erected hydraulic works, was required to so construct them as not to impede the regularity of the flow of the water if its irregular flow would injure the first appropriator.[3]

Where a ditch was dug by a prior appropriator for the purpose of conducting water from a natural water course, a miner had no right to work a mine above the head of the ditch in such a manner as to mingle mud and sediment with the water and injure its value to the ditch owner for mining purposes, or to fill up the ditch and reservoir of the same so as to lessen their capacity and increase the expense of cleaning them out.[4]

Some deterioration in the quality of the water necessarily resulted from carrying on mining operations on a running stream. A prior ditch proprietor could not insist that the stream above him should not be used to any degree by subsequent appropriators for mining purposes, and that the water should flow to the head of his ditch in a state of absolute purity. While the miner would not be permitted to so conduct operations as to destroy the ditch, or

[1] Stone v. Bumpus, 46 Cal. 218.

[2] Davis v. Smith, 7 Cal. 148.

[3] Phœnix Water Co. v. Fletcher, 23 Cal. 482; Bear River, etc., Co. v. New York M. Co., 8 Cal. 327.

[4] Hill v. Smith, 27 Cal. 475; Hill v. King, 8 Cal. 337; Junkans v. Bergin, 67 Cal. 267; McLaughlin v. Del Re, 71 Cal. 230.

unreasonably interfere with its fair enjoyment, or to taint the water by the injection of poisonous chemicals,[1] the law recognized the necessity for some deterioration, and within reasonable limits it was *damnum absque injuria*.[2]

Any other rule might have involved an absolute prohibition of the use of all the water of a stream above any ditch supplied by it in order to preserve the quality of a small portion taken therefrom.[3]

In the case of Atchison *v.* Peterson[4] the supreme court of Montana, while conceding that the first appropriator of water for mining purposes was entitled to the same as against subsequent appropriators, without material interruption in the flow thereof in quantity or quality, refused to enjoin a subsequent mining appropriator from discharging tailings into a stream which caused sediment and sand to be carried into the prior appropriator's ditch, thereby compelling him to construct a sand gate, or reservoir, which had to be "flushed" each day.

The supreme court of the United States affirmed the decree of the Montana court,[5] and laid down the law as quoted in a previous section.[6]

As between those mining on the same stream, the true rule was thus stated by the supreme court of California:—

"Each person mining in the same stream is entitled to "use in a proper and reasonable manner both the channel of "the stream and the water flowing therein, and where, from "the situation of different claims, the working of the same "will necessarily result in injury to others if the injury be "the natural and necessary consequence of the exercise of "this right, it will be *damnum absque injuria*, and will "furnish no cause of action to the party injured. The "reasonableness of the use is a question for the jury, to be "determined by them upon the facts and circumstances of "each particular case."[7]

[1] Crane v. Winsor, 2 Utah, 248.
[2] Bear River & Auburn Water Co. v. New York M. Co., 8 Cal. 327.
[3] *Id.*
[4] 1 Mont. 561.
[5] 20 Wall. 507. [6] *Ante*, § 838. [7] Esmond v. Chew, 15 Cal. 137.

"Live and let live" was one of the homely maxims of the miners' law.

The foregoing illustrations serve to demonstrate the early doctrines as upheld and sanctioned by the courts. A retrospective view for the period of a half century fails to disclose any serious judicial innovations upon these rules. While the supreme court of California, in the case of Lux v. Haggin[1] and a line of cases following it, has limited the right of appropriation to waters traversing public lands, there has been no disposition to deny to the miners the privilege, reasonably or rationally exercised, of depositing tailings in the running streams.[2] The customs of the miners have been recognized factors in administering the law in the mining regions. As was said by Justice Henshaw, speaking for the supreme court of California, in a recent case:[3]—

"There are certain essentials to the practical conduct of "all hydraulic mining operations. Water must be obtained "in quantities and carried to the mining ground under "pressure sufficient to disintegrate and wash down the "natural bank. For these purposes, in the mining districts "of this state, reservoirs, ditches, flumes, and pipe lines are "indispensable. The soil and gravel thus eroded must be "carried by gravity, and the force of the refluent water "through cuts, sluice ways, and flumes, where the gold, by "reason of its greater specific gravity, is deposited, caught, "and gathered. Lastly, by aid of the same beneficent agent, "the resulting waste matter, soil, and gravel must be car- "ried away through convenient channels, so as not to impede "further operations. The water itself does not lose its "utility to the miner, nor become an impediment to his "work during any of these processes. Through them all "it is not only of high utility but an absolute necessity. " . . . These facts are of such general knowledge and "undisputed acceptance, so inherent in the character of

[1] 69 Cal. 255.

[2] This statement is subject to the qualification noted in § 841, with reference to the conduct of hydraulic mining in that portion of California subject to the jurisdiction of the California debris commission, as defined in the chapter following.

[3] Jacobs v. Day (1896), 111 Cal. 571, 575.

"hydraulic mining, that they scarcely need the evidence "of local custom or any evidence at all for their establish- "ment. . . . Every use of water for purposes of "hydraulic mining, sanctioned by local custom and law, is "recognized as a right and protected as such."

What is here said applies with equal force to general mining and milling operations. The tailings from an ordinary quartz mill, when discharged into the running streams, have no greater tendency to deteriorate the quality of the water than the material washed from the natural banks. As a physical impediment they are comparatively harmless. They are fine particles of sand artificially produced, but of the same character as that washed into the streams from the rocks eroded by processes of nature which are universal. While the privilege of depositing such tailings in the streams must be reasonably exercised, and so as not to materially impair or destroy rights acquired by a lawful prior appropriator, yet to say that the discharge of such tailings is a nuisance *per se*, or to restrict it within unreasonable limits, is to interdict the prosecution of a lawful enterprise and practically to confiscate property of inconceivable value. Should any such stringent rule be invoked in regard to either quartz or hydraulic mining, the industry would be abandoned, awaiting the advent of the magician who will separate gold and silver from the earth and rocks without the aid of water.

We think the decisions in the California cases have been generally followed by the courts in the mining regions. The hydraulic questions have not been as prominent in the other states and territories as in California. Most of the litigation encountered elsewhere has arisen out of injuries from depositing tailings and debris upon the lands of others, not involving necessarily the law of riparian rights or the rights of subsequent appropriators on the same stream; and even cases of this character are comparatively few in number. They remain to be considered in a succeeding section.[1]

[1] *Post*, § 843.

A recent decision of the court of appeals of the state of Colorado in the case of Suffolk Gold M. and M. Co. *v.* San Miguel Cons. M. and M. Co.,[1] invites attention.

The Suffolk company erected a stamp mill on a stream and diverted part of the water there flowing, for the purpose of motive power and supplying the mill batteries. After so using, the water was returned to the stream through means of a ditch. As discharged from the Suffolk works it necessarily carried in suspension to the stream below pulverized quartz and pulp in the form of tailings. The Suffolk company's appropriation was prior in point of time. The San Miguel company, a subsequent appropriator of the waters of the stream lower down, utilized such waters for the purpose of generating electricity and transmitting it for use at the mines and in the town of Telluride. The waters were carried through a pipe and discharged onto a Pelton water wheel. The presence in suspension in the water of the particles of pulp, sand, and grit from the Suffolk mill had the effect of wearing away the nozzle and iron buckets of the San Miguel's water wheel and causing injury of a similar character to the pipe line. The San Miguel company applied for an injunction to restrain the pollution of the stream. There was no pretense that the Suffolk company was conducting its operations maliciously or recklessly; but the court found that it might, with little expense, impound the tailings and return the water to the stream in such a state as not to interfere with the San Miguel's enterprise, and that it was its duty to do so. An injunction was granted. The court was very guarded in its opinion, and was evidently oppressed with the fear that its decision might be misconstrued and improperly applied.

It seems to us that this is a resurrection of the "phan-" tom of riparian rights"[2] in a state where, by a consistent line of decisions, it has been effectually exorcised.

Were the decision one emanating from a court in Great

[1] Colo. App., 48 Pac. 828.

[2] Judge Beatty in Drake *v.* Earhart, 2 Idaho, 716.

Britain, where no right of appropriation is recognized, it would occasion neither comment nor surprise. It has been held there that one using water for condensing purposes has a right to insist that his upper neighbor shall not discharge it from his works at an increased temperature,[1] and that a lower proprietor engaged in the manufacture of distilled spirits was entitled to relief in equity against the *supra* proprietor increasing the hardness of the water by discharging into the stream water pumped from his mine.[2]

Is the decision of the Colorado court of appeals in full harmony with Atchison *v.* Peterson, wherein the supreme court of the United States upheld a decree which practically compelled the subsequent appropriator to impound the water as it came from the upper proprietor, permit the matter in suspension to settle, and then "flush" his reservoir each day?

These suggestions are deferentially made. We appreciate the embarrassments which the courts encounter when dealing with these questions, and recognize that much depends upon the circumstances surrounding each particular case. The danger lies in an erroneous application of precedents which do not purport to enunciate general rules, to instances where the facts are materially different.

It would not be contended for a moment that where a prior appropriator of a virgin stream was engaged in supplying the inhabitants of a village with water for domestic and culinary purposes, that a subsequent appropriator on the same stream, for mining purposes, would be permitted to so pollute the entire stream as to render it unfit and unwholesome for human use.[3]

Nor could it be plausibly asserted that where the miner is the first appropriator, the next comer who desired to make a profit by supplying cities and towns with drinking water could compel the miner to cease his usual and customary

[1] Tapping *v.* Eckersley, 2 K. & J. 264.
[2] Bankier Distilling Co. *v.* Young, 19 R. 1083; affirmed, 20 R. H. L. 76.
[3] Crane *v.* Winsor, 2 Utah, 248.

method of working, and deliver the water to his neighbor below in the same state of absolute purity as he received it. Such a doctrine would be wholly incompatible with the ordinary use of water for mining purposes, and in direct antagonism to the liberal principles established and maintained by repeated decisions of the highest courts in the land.

§ 842. **The remedy by injunction to prevent pollution of water and deposit of tailings.**— The ordinary rule in reference to the abatement of private nuisances and the remedy by injunction to prevent their continuance, is too well known to require elaboration in this treatise. It may be noted, however, in dealing with the subject of pollution of water through mining operations, that an injury arising from the deposit of tailings in running streams may be actionable, and at the same time may not, under all circumstances, justify a court of equity in granting an injunction.

It is not every case of nuisance or continuing trespass which a court of equity will restrain by injunction. Where the injury is merely temporary and trifling, and not permanent and serious, the writ will be refused; and in determining whether the injury is serious or not, regard must be had to all the consequences which may flow from it.[1]

The supreme court of Alabama has said, that in determining this question the court should weigh the injury that may accrue to the one or to the other party and also to the public, by granting or refusing the injunction.[2]

The court should consider the necessity or importance of the right claimed, as well as the injury likely to be caused to the complaining party.[3]

"Whenever a court of equity is asked for an injunction "in cases of such a nature, it must have regard not only

[1] Clifton Iron Co. v. Dye, 87 Ala. 468; Goldsmid v. Tunbridge Wells Impt. Co., L. R. 1 Ch. App. 354.

[2] Clifton Iron Co. v. Dye, 87 Ala. 470.

[3] Hayes v. Waldron, 44 N. H. 580.

" to the dry, strict rights of the plaintiff and defendant, but " also to the surrounding circumstances." [1]

A case illustrative of this principle came before the supreme court of Michigan. A man bought for speculation certain bottom lands, upon which large quantities of sand were being deposited by a stream which operated a stamp mill higher up. He put a valuation upon the land from three to five times what it cost him, and tried to sell it to the corporation which owned the mill, but it declined to buy. Then he prayed for an injunction to restrain the corporation from sanding his land and polluting the stream. The supreme court, speaking through Judge Cooley, held that an injunction would not lie, and that the speculator was entitled to such remedy as the law would give him and no more.[2]

It has been said by the supreme court of Montana that it would require a very strong case for an injunction to justify the granting thereof when such an act would cause infinitely more damage than it would prevent.[3]

An injunction will be granted where its denial is tantamount to the denial of all protection;[4] but it may be refused where the injury complained of is comparatively trifling.[5]

**§ 843. The deposit of tailings and refuse on the lands of others.**— While the deposit of mine tailings in running streams to a reasonable extent is permitted, subject to the limitations outlined in the preceding sections, the doctrine never has been extended so as to authorize the miner to flood his neighbor's lands, and by depositing thereon mining debris and "slickens" deprive such neighbor of any substantial right or depreciate the value of his property.

[1] Wood *v.* Sutcliffe, 2 Sim. N. S. 163, 16 Jur. 75, 8 Eng. Law & Eq. 217, 221.

[2] Edwards *v.* Allouez M. Co., 38 Mich. 46.

[3] Atchison *v.* Peterson, 1 Mont. 561, 570.

[4] Henshaw *v.* Clark, 14 Cal. 461.

[5] See, also, Slade *v.* Sullivan, 17 Cal. 103; Jacobs *v.* Day, 111 Cal. 571; United States *v.* North Bloomfield G. M. Co., 53 Fed. 625.

"No person, natural or artificial, has a right, directly "or indirectly, to cover his neighbor's land with mining "debris, sand, or gravel, or other material so as to render "it valueless."[1]

While the miner is entitled to the free use of the channel for the purpose of carrying away his waste and tailings, he has no right to fill the channel with debris, causing the stream to overflow and thus deposit the material on the lands of the lower proprietor.[2]

The miner is entitled to use his claim in a lawful manner, but no use can be considered lawful which precludes others from enjoying their rights.[3]

However cautiously or carefully the miner works is of no consequence, for if his work in fact injures another he is none the less liable.[4]

The doctrine of necessity, which has been frequently invoked in justification of injuries of this character, has no application. Under certain circumstances a person may have a right of way by necessity over the land of another; but the doctrine that one person may have a right of necessity to go upon the land of another and erect thereon buildings, or other structures, such as flumes and ditches from which tailings are discharged, has never been recognized.[5]

This doctrine is peculiar to no locality. It is one of universal application. A few illustrations will suffice to demonstrate this.

In the case of Columbus and Hocking Coal and Iron Company *v.* Tucker, considered by the supreme court of the state of Ohio,[6] the following facts appeared:—

Plaintiff owned a tract of land in the Hocking Valley, through which flowed Monday Creek. The channel of this

[1] Hobbs *v.* Amador & Sacramento Canal Co., 66 Cal. 161.
[2] Nelson *v.* O'Neal, 1 Mont. 284.
[3] Logan *v.* Driscoll, 19 Cal. 623.
[4] Hill *v.* Smith, 27 Cal. 476; Levaroni *v.* Miller, 34 Cal. 231.
[5] Esmond *v.* Chew, 15 Cal. 137. See, also, Ralston *v.* Plowman, 1 Idaho, 598.
[6] 48 Ohio St. 41.

creek until after the acts of the coal company had been of sufficient capacity to carry its waters, except during unsual freshets. The defendant placed the slack, dirt, and other refuse from its mine at such place upon its lands that they were carried off by various natural streams emptying into Monday Creek, and the effect of their being emptied into this latter creek was the filling of its channel through the plaintiff's farm, causing it to overflow its banks, inundating plaintiff's land, covering a portion thereof with debris, and rendering it valueless.

The defendant insisted that its mining operations were conducted in a prudent and careful manner, and in the mode generally employed in operating similar mines in the neighborhood; that its acts were not characterized by any malice or negligence towards the plaintiff; that the deposits made upon its own land were upon the only feasible places on which they could be deposited so as to continue carrying on the business of mining for coal. Said the court:—

"The claim of the company that it had the right to
" make the deposits in the places complained of, because it
" was necessary to the successful conduct of its own business,
" seems wanting in substance. The effect is to measure the
" rights of the plaintiff in his lands and the waters of Mon-
" day Creek by the convenience or necessity of the com-
" pany's business. An owner of land in Ohio is not subject
" to any such narrow and arbitrary rule."

In considering a parallel case, the supreme court of California said:—

"The refuse matter was the product of the defendant's
" mining operations, and was deposited in the creek through
" agencies controlled by the defendant; and although it was
" not responsible for the inundation of the plaintiff's land
" by the water of said creek, it was responsible for the
" deposit of the deleterious substances with which said
" water was charged through its agency upon said land.
" This does not in any manner involve the question of the
" defendant's right to mine or prosecute any other legiti-
" mate business on its premises. It would not be claimed

" that the defendant could convey and deposit refuse matter " from its mine by means of carts or cars, without incurring " liability for any damages which the plaintiff might " suffer by reason thereof. And we know of no principle " upon which it could be held that a person may escape " liability by doing that indirectly which would render " him liable if done directly."[1]

Where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, so as to effectually destroy or impair its usefulness, it is a taking of the property without compensation.[2]

The early customs of the western miners which were recognized and confirmed by the courts, both state and federal, never sanctioned any such taking. Where a place of deposit for tailings was necessary for the fair working of a mine, the miner had a right to appropriate unoccupied public land for the purpose, provided he did not interfere with existing rights, and those who came after him took subject to his prior privilege.[3]

But this was the extent of the rule. While the right to foul the waters of a stream with mining debris to a reasonable extent may be asserted under custom, as in the case of tin streaming in Cornwall,[4] yet the law will not allow such a custom to take away and destroy the lands of others by depositing over the surface sand and debris. The custom of "free tailings" cannot be invoked to relieve one from liability for injuries thus occurring.

"A mining custom which would allow the total destruc- " tion of a junior locator's mining operations, in a gulch " below prior locators, on ground which was vacant, cannot " be maintained under any statute or common mining law " with which we are acquainted."[5]

[1] Robinson *v.* Black Diamond Coal Co., 57 Cal. 412, 413. See, also, Hobbs *v.* Amador and Sacramento Canal, 66 Cal. 161.

[2] Pumpelly *v.* Green Bay Co., 13 Wall. 166; Ashley *v.* Port Huron, 35 Mich. 296; Arimond *v.* Green Bay Co., 31 Wis. 316; Rowe *v.* Portsmouth, 56 N. H. 291; Woodward *v.* Worcester, 121 Mass. 245.

[3] Jones *v.* Jackson, 9 Cal. 238; O'Keife *v.* Cunningham, *Id.* 589.

[4] Carlyon *v.* Lovering, 1 Hurls. & N. 784, 26 L. J. Exch. 251.

[5] Lincoln *v.* Rodgers, 1 Mont. 217, 224. See, also, Ralston *v.* Plowman, 1 Idaho, 595; Fuller *v.* Swan River, 12 Colo. 12, 14.

In Colorado it is provided by statute that,—

"In no case shall any person or persons be allowed to "flood the property of another person with water, or wash "down the tailings of his or their sluice upon the claim or "property of other persons, but it shall be the duty of "every miner to take care of his own tailings or become "responsible for all damages that may arise therefrom."[1]

This we apprehend is nothing more than declaratory of the law as it existed prior to this enactment. It does not inhibit the use of the channel of the stream in a reasonable way to carry off tailings.

As was said by the supreme court of the United States: —

"No system of law with which we are acquainted toler- "ates the use of one's property in this way so as to destroy "the property of another."[2]

This we understand to be fully supported by the California debris cases.[3]

As was said by the supreme court of California in People *v.* Gold Run Ditch and Mining Co.:[4]—

"Undoubtedly the fact must be recognized, that in the "mining regions of the state the custom of making use of "the waters of streams as outlets for mining debris has "prevailed for many years; and as a custom it may be con- "ceded to have been founded in necessity, for without it "hydraulic mining could not have been economically "operated. In that custom the people of the state have "silently acquiesced, and upon the strength of it mining "operations, involving the investment and expenditure of "a large capital, have grown into a legitimate business, "entitled equally with all other business pursuits in the "state to the protection of the law; but a legitimate private "business founded upon a local custom may grow into a "force to threaten the safety of the people, and destruc- "tion to public and private rights; and when it develops "into that condition the custom upon which it is founded "becomes unreasonable, because dangerous to public and

[1] Mills' Ann. Stats., § 2393.

[2] Jennison Exr. *v.* Kirk, 98 U. S. 453.

[3] Woodruff *v.* North Bloomfield G. M. Co., 9 Saw. 441; People *v.* Gold Run D. & M. Co., 66 Cal. 138; Hardt *v.* Liberty Hill, 11 Saw. 611.

[4] 66 Cal. 138.

" private rights, and cannot be invoked to justify the con-
" tinuance of the business in an unlawful manner."

The rule is undoubtedly correctly stated by the supreme court of Ohio:—

"Upon reason we think the proposition sound, that " where no right by prescription exists to carry on a par-
" ticular business in a particular manner at a particular
" place, and the natural result of the place selected and
" the manner adopted is to cause material injury to the
" property rights of another, it is not a sufficient defense
" to an action for damages to show that the locality where
" it is carried on is one generally in use by persons in
" such business, and the manner in which it is carried
" on is commonly adopted by others in such business.
" Even though it appear that the use made of the land,
" while not the common ordinary use of land as such, is
" not an unnatural nor improper one in and of itself, nor
" even an unusual one, and the proposition will be found
" sustained by abundant authority."[1]

That others engaged in like business have been accustomed to disregard the rights of their neighbors can furnish no justification.

The general doctrine herein announced applies not only to refuse deposited on another's land by means of water, but to all other processes by which foreign material is conducted to the premises of another and there deposited to his detriment and injury. There is no difference in principle between transporting such material by rail and by water.

§ 844. **Measure of damages for unlawfully depositing debris on another's land.**—There seem to be no decisions upon the question of the measure of damages where mining debris is deposited on the agricultural land of another. Where the effect of such deposit is to practically destroy its use for industrial purposes, and the injury is permanent, the measure would undoubtedly be the general one adopted in actions for injuries to real property;

[1] Columbus & Hocking Coal & I. Co. v. Tucker, 48 Ohio St. 528.

that is, the difference between the market value of the land before and immediately after the injury is complete;[1] but when the injury is only partial and the nuisance is one which may be abated by injunction, or for the continuance of which successive actions may be brought, the measure would be the same as in case of flooding; that is, the loss sustained by the continuance of the nuisance to the rental value of the property, and not the difference between its market value as an absolute estate before and after the nuisance.[2]

[1] 2 Wood on Nuisances, p. 1318, and cases cited in note 5.

[2] Pinney *v.* Berry, 61 Mo. 359, 367; Chicago *v.* Huenerbein, 85 Ill. 544; Carli *v.* Union Depot R. R. Co., 32 Minn. 101; City of South Bend *v.* Paxon, 67 Ind. 228; Willey *v.* Hunter, 57 Vt. 479; 2 Wood on Nuisances, p. 1318, and cases cited in note 6.

## CHAPTER V.

### GOVERNMENTAL SUPERVISION OF HYDRAULIC MINING IN CALIFORNIA—THE CALIFORNIA DEBRIS COMMISSION—ITS JURISDICTION AND POWERS.


§ 848. Causes leading up to the passage by congress of the act creating the California debris commission.

§ 849. Hydraulic mining not a nuisance *per se*—Principles established by the debris cases.

§ 850. Essential features of the congressional act creating the California debris commission and regulating hydraulic mining in the state of California.

§ 851. Necessity for definition of term "hydraulic mining."

§ 852. What constitutes "hydraulic mining," or "mining by the hydraulic process," within the meaning of the act.

§ 853. Judicial interpretation of the act—Its constitutionality.


**§ 848. Causes leading up to the passage by congress of the act creating the California debris commission.**—Mining in the United States is not a governmental function. As a rule the government does not interfere with it, looking upon it as a private industry, to be carried on by private enterprise, subject to the same general rules regulating its conduct as apply to other industries; but in California we have a novel instance of governmental intervention in the nature of police regulation, an anomaly in the federal mining system which deserves more than a passing notice. While the geographical scope of its operation is limited to that portion of the watershed of the Sierra Nevada Mountains representing the drainage areas of the principal navigable rivers of the state, the San Joaquin and the Sacramento, within this area is embraced not only the field of early placer mining, but by far the greater portion of the known auriferous gravel deposits of that

marvelous state. The passage of the act of congress creating the California debris commission, and the causes which superinduced it, are matters of current history.

In the early days of placer mining in California, that industry was the paramount one. Everything else was subservient to its necessities and dependent upon its successful operation. While agricultural and pastoral pursuits were carried on to some extent, they were mere auxiliaries and the bases of supplies for the mining communities. The farmers and stockraisers produced, and the miners consumed. Waters of the running streams were appropriated, diverted from their natural courses, and utilized in winning the precious metals from the alluvial soils of the foothills and mountains. Streams were employed in carrying the resultant waste and debris, the coarser material finding lodgment near the scene of active operations and the finer carried in suspension to the channels of the navigable rivers, there to be deposited along the banks and in the beds, or else to be transmitted to the silent depths of the ocean, there to form the fine-grained slates and clays of future geological ages.

This process of sedimentation, at first gradual and almost inappreciable, grew with the years. The primitive methods of washing the auriferous gravels by the use of the "long "tom" and rocker were succeeded, first, by applying water to the natural banks under moderate pressure, through the medium of canvas, or rubber hose, with a nozzle of moderate dimensions, then by the powerful engines of demolition — the "little giants" and "monitors," through the large converging nozzles of which, water was forced under enormous pressure and directed against the banks, bringing down in great volume, bowlders, rocks, gravel, and the finer disintegrated substances, such as sand, silt, and slickens. Natural erosion, the denudation of the forests laying bare large surface areas to the direct action of the elements, and the extension of farming operations into the foothill regions also contributed in some degree, at least, to overtaxing the carrying power of the running streams. By these

combined processes, natural and artificial, the channels of the rivers became clogged. The heavier material, washed from the natural banks by the hydraulic miners, was lodged within reach of the streams, overflowing their banks in seasons of extraordinary floods, and lands below were in places buried beneath the debris brought down by the mountain torrents. The story is graphically described in what is known as the "debris cases," particularly in Woodruff *v.* North Bloomfield Gold Mining Co.[1] and in People *v.* Gold Run Ditch and Mining Co.[2]

Farms and orchards were destroyed, and the industry of hydraulic mining as thus conducted became more than a menace. Under these conditions, land owners in the valleys organized, and through their efforts the courts interfered, injunctions were issued and made permanent, inhibiting to a great extent the conduct of hydraulic mining, and stopping what Colonel Mendell, the government engineer, styled the "irruption of the mountains."

Private individuals claiming to have suffered special damage arising out of the commission and continuance of a public nuisance,[3] the state asserting an unauthorized encroachment upon and interference with its water highways,[4] and the government claiming that its right of navigation was being seriously obstructed,[5] invoked the aid of the courts to the temporary undoing of hydraulic mining on the extensive scale theretofore practiced. The legal struggle was a battle of giants. The question became one of great public importance. It divided communities, was discussed in platforms of political parties, and ultimately found its way into the halls of congress.

During the trial of the cases the only remedy for the evil suggested was the construction of restraining dams, behind which the heavier material might be impounded,

[1] 9 Saw. 441.
[2] 66 Cal. 138.
[3] Woodruff *v.* North Bloomfield G. M. Co., 9 Saw. 441.
[4] People *v.* Gold Run D. & M. Co., 66 Cal. 138.
[5] United States *v.* North Bloomfield G. M. Co., 53 Fed. 625.

allowing the coarser substances to settle at the bottom of artificially constructed reservoirs, the finer silt being comparatively harmless, passing over the dam and being carried seawards.[1]

In the hope that some mode might be devised for obviating the injuries, a clause was inserted by the United States circuit court in the decrees, giving leave on any future occasion, when some plan had been successfully executed, to apply to the court for a modification of the injunction; but when dams were constructed and application was made to vacate the injunction and permit the resumption of mining behind them, controversies arose over their efficiency for the purpose intended. Engineers disagreed as to the restraining power of the dams. They had been built under competent scientific supervision at large expense; but the farmers contended they were perpetual menaces, and supported their contention with expert testimony.

The court, considering that if any such dams were to be accepted they should only be those the ample sufficiency of which was established upon testimony of the most unquestionable and satisfactory character, declined to accept those concerning which there was a difference of opinion among engineers.[2]

The people of the affected districts appealed to congress. This is a brief history leading up to the passage of the act creating the federal board known as the California debris commission.

**§ 849. Hydraulic mining not a nuisance per se—Principles established by the debris cases.**—As was recently said by Judge Ross in a case instituted in the United States circuit court, ninth circuit, by the government against the North Bloomfield Company:[3]—

"In neither of the cases [theretofore decided by the "circuit court] is mining by the hydraulic process regarded

[1] United States v. North Bloomfield G. M. Co., 53 Fed. 625.
[2] Hardt v. Liberty Hill Cons. M. & W. Co., 11 Saw. 611.
[3] United States v. North Bloomfield M. Co., 81 Fed. 243.

" in, and of itself, as unlawful. That it is not unlawful, " but highly useful and commendable when properly con- " ducted, and without injury to the property or rights of " others, hardly needs judicial decision. Nobody wanted " gold mining by the hydraulic process stopped so long as " it could be prosecuted without injury to the navigable " waters or to the property or rights of others."

This is a self-evident proposition.

"It seems to us," said the supreme court of California, " that the business of hydraulic mining is not within " itself unlawful or necessarily injurious to others. The " unlawful nature of the business results from the manner " in which it is carried on, and the neglect of parties " engaged therein to properly care for the debris resulting " therefrom, whereby it is allowed to follow the stream and " eventually to cause injury to property situated below."[1]

Without entering into a detailed analysis of the debris cases, the various defenses interposed, and the reasoning employed by the courts in arriving at the conclusions reached, we will state what we understand to be the principles laid down by the courts.

(1) Hydraulic mining, conducted as heretofore described, where it contributes or threatens to contribute in a material degree to the filling up of the river channels, impairing navigation, and covering the land of others with detritus or debris is a nuisance;

(2) Suit to enjoin such nuisance may be maintained (*a*) at the instigation of a private individual who has suffered special damage, (*b*) by the state, whose navigable water ways have been encroached upon, (*c*) by the government, whose right of navigation and to regulate commerce has been interfered with;

(3) Such a nuisance has neither been authorized by state or national legislation nor legalized by implication, nor could it be so authorized or legalized;

(4) No right or title can be acquired by prescription to commit or continue a public nuisance;

[1] County of Yuba *v.* Cloke, 79 Cal. 239. See, also, People *v.* Gold Run D. & M. Co., 66 Cal. 138, 151; Civil Code of Cal., § 1424.

(5) Such a nuisance cannot be authorized by custom; such a custom would be in conflict with the laws and constitution of the state, and would be illegal and void.

These principles have been accepted as a finality by the hydraulic miners of California. An appeal was allowed to the supreme court of the United States in the leading case, but it was voluntarily abandoned.

§ 850. **Essential features of the congressional act creating the California debris commission and regulating hydraulic mining in the state of California.** — The congressional act entitled, "An act to create the California "debris commission and regulate hydraulic mining in the "state of California," approved March 1, 1893, is printed in full in the appendix to this treatise. It is only necessary here to note its essential features and the controversies which have arisen over its constitutionality and true interpretation.

A commission is created, consisting of three members selected by the President, with the consent of the senate, from officers of the corps of engineers of the United States army, which commission exercises its powers under the supervision of the chief of engineers and under the direction of the secretary of war. The jurisdiction of the commission, in so far as it affects mining carried on by the hydraulic process, extends to all such mining in the territory drained by the San Joaquin and Sacramento river systems. The terms "hydraulic mining" and "mining by the hydraulic "process," as used in the act, are declared to have the "same meaning and application given to said terms in "said state."

Hydraulic mining, as so understood and defined, directly or indirectly injuring the navigability of the river systems named, carried on in the territory over which the jurisdiction of the commission extends, other than as permitted under the provisions of the act, is prohibited and declared unlawful.

The commission is required to formulate plans for improving the navigability of all rivers comprising the systems, deepening their channels, and protecting their banks, with a view of making the same effective as against the encroachment of, and damage from, debris resulting from mining operations, natural erosion, or other causes, and permitting mining by the hydraulic process to be carried on, provided that the same may be accomplished without injury to the navigability of the rivers, or to the lands adjacent thereto. The commission is also empowered to examine, survey, and determine the utility and practicability of storage sites for the storage of debris, with a view to the ultimate construction of impounding dams and reservoirs, and permitting hydraulic mining to be conducted behind them.

Parties desiring to work by the hydraulic process are required to submit themselves to the jurisdiction of the commission by filing a verified petition requesting the issuance of a permit, accompanied by an instrument executed and acknowledged, whereby such petitioner surrenders to the United States the right and privilege to regulate, as provided in the act and rules supplementing it, the manner and method in which the debris resulting from the working of the mine shall be restrained, and what amount shall be produced therefrom. Upon the filing of this petition the commission causes a notice, briefly specifying its contents, to be published. Pending publication an examination is made by the commission, or a committee thereof. A hearing is had, and, if the petition is granted, an order is entered directing the method and specifying in detail the manner in which operations shall proceed, and what restraining or impounding works shall be built and maintained. These works are to be constructed under the direct supervision of the commission, but at the expense of the parties, and the permit to commence mining is not issued until after inspection and approval of the completed work. This permit may, for cause, be revoked, or its terms modified from time to time.

This outline will serve to indicate the general features of the law and furnish a basis for illustrating the few questions which have thus far been the subject of controversy.

**§ 851. Necessity for definition of term "hydraulic "mining."**— As a preliminary to the discussion of the subject of definitions, it is of some importance that attention should be directed to the necessity and object of definition. While the avowed purpose of the act of congress is to protect the navigability of the San Joaquin and Sacramento Rivers, the jurisdiction of the commission does not extend to, nor has it any supervisory control over, any class of mining other than that carried on by the hydraulic process.

For illustrative purposes, we may divide mining as conducted within the territory described in the act into four classes:—

(*a*) Quartz or vein mining, where the ore extracted is crushed in stamp mills, and the resultant tailings, reduced to the form of pulp, find their way into the running streams;

(*b*) Drift mining, where the deep placers found in subterranean channels of ancient rivers are reached by tunnels, shafts, or drifts, and the gold-bearing material resting on the bedrock is brought to the surface for treatment. If the material is cemented, it is crushed in a stamp mill, the same as in quartz mining. If it is loose gravel, it is carried into sluices and washed by a process similar to sluice mining in surface placers;

(*c*) Sluice mining, where the material is placed by manual labor into sluice boxes and the gold is captured in riffles;

(*d*) Hydraulic mining.

We apprehend that the distinctions between these different methods of mining have always been clearly understood, and the lines of demarcation are well defined. The scope of the congressional act and the jurisdiction of the

debris commission is beyond question limited to mining by the hydraulic process. We may concede that quartz, drift, or ordinary sluice mining might be conducted in so wanton and reckless a manner as to injure, or contribute to the injury, of the navigable streams; but this fact does not bring mining by either of these methods within the inhibition of the congressional law, nor subject those engaged in it to the jurisdiction of the debris commission. All kinds of mining other than that falling within the definition of "mining by the hydraulic process" may be carried on without a permit from the debris commission, and whether in a given instance such mining is or is not carried on in such a way as to amount to a nuisance, must be determined by the courts when their jurisdiction is invoked, regardless of any proceedings or lack of them before the debris commission. The situation may be thus stated in another form: No mining by the hydraulic process, however harmless in its results, carried on within the drainage area of the Sacramento and San Joaquin River systems, is lawful, unless conducted under a permit from the debris commission.[1]

All other classes of mining may be conducted without consulting such commission, subject, of course, to the right of the courts to interfere in proper cases, where the manner of conducting is manifestly injurious to the rights of others. The necessity for determining what constituted hydraulic mining, or mining by the hydraulic process, at the time the act was passed, is therefore apparent.

**§ 852. What constitutes "hydraulic mining," or "mining by the hydraulic process," within the meaning of the act?** — The act itself, as heretofore observed, provides, "that for its purposes 'hydraulic mining' and 'mining "'by the hydraulic process' are hereby declared to have "the meaning and application given to said terms in said

[1] This statement is made upon the supposition that the decision of Judge Ross, circuit judge, announced in the case of United States v. North Bloomfield G. M. Co., 81 Fed. 243, outlined in § 853, correctly states the law.

"state." What was the "meaning and application given" in California to these terms at the time the act was passed?

The civil code of California provides[1] as follows:—

"Hydraulic mining within the meaning of this title is "mining by means of the application of water under pres- "sure through a nozzle against a *natural* bank."

But this became a law after the approval of the congressional act.[2]

This section of the code, therefore, may be referred to only upon the theory that it was but a legislative declaration of a definition which was commonly accepted at the time the law was passed. We have italicized the word *natural* in quoting from the code, for the reason that a controversy has arisen over the use of this word as an element of definition.

All parties seem to agree that the application of water under pressure and through a nozzle were always essential elements of definition of the terms "hydraulic mining" and "mining by the hydraulic process"; but it has been contended that unless the water is directed against a *natural* bank, one that is a part of the mass of the mountain in a state of nature, the application to it of water under pressure through a nozzle does not constitute hydraulic mining as understood in California. In other words, such application against a bank of material artificially constructed, such as a mine dump or deposit of tailings or loose gravel impounded or caved from its natural position by human agency, is not "hydraulic mining."

The California anti-debris association, representing the farming interests, contend that the term is, and always has been, sufficiently comprehensive to embrace the application of water under pressure through a nozzle to any kind of a bank or body of material, natural or artificial, where the object sought was to liberate and secure the gold.

[1] § 1425.

[2] The congressional act was approved March 1, 1893. The amendment to the civil code was approved March 24, 1893, and took effect sixty days after its passage.

The lexicographers afford us but little aid in determining the local signification of phrases. The definition given in the Standard Dictionary is as follows:—

"HYDRAULIC MINING. A method of mining, in which "a bank of gold-bearing earth or gravel is washed away by "a powerful jet of water and carried into sluices, where the "gold separates from the earth by its specific gravity."

Dr. Henry De Groot, a writer of prominence on subjects connected with California, in his contribution to the Brittanica[1] on the industrial history of that state, says:—

"Hydraulic mining consists in the plan of breaking "down and disintegrating the banks of auriferous gravel "as they stand in place, by means of water discharged "against the same in large quantity and under great "pressure."

Lieut.-Col. G. H. Mendell, of the engineer corps, in his report made pursuant to the provisions of the river and harbor act of 1880, upon a project to protect the navigable rivers of California from the effects of hydraulic mining,[2] gives the following definition:—

"Hydraulic mining, as it is understood in California, is "that process by which a natural bank is excavated by a "jet of water and conveyed by the same water through the "sluices to the dumps. Water does all the work; manual "labor is needless to a perfect bank. When bowlders are "found too large to pass through the sluice, they are some-"times blasted into smaller pieces. Where the bank is "cemented or contains masses of pipe clay, it is shattered "by charges of powder."

Hon. John S. Hittell, the most noted of writers on the subject of Californian history, thus described the process:—

"Hydraulic mining is that mining where a stream of "water, led down from a considerable elevation through a "hose, is thrown by the pressure with great force upon the "dirt which is thus loosened, dissolved, and washed down "into the sluice. . . . Hydraulic mining is not a pro-"cess of washing dirt, but of preparing it for washing."[3]

[1] Vol. i., American Supplement, p. 690.
[2] January 26, 1882.
[3] Bancroft's Handbook of Mining, S. F., 1861.

Mr. Aug. J. Bowie, Jr., a well-known mining engineer, in his contribution to the American Institute of Mining Engineers, on the subject of hydraulic mining in California,[1] says:—

"Hydraulic mining may be defined as the act of extract-
"ing gold from gold-bearing detritus, *i. e.* surface deposits,
"placers, or washings, by means of water under great pres-
"sure, through pipes against the auriferous material."

And in his "Practical Treatise on Hydraulic Mining
"in California,"[2] he defines it as, "that method of gold
"mining in which the ground is excavated by means of
"water discharged against it under pressure (hydraulick-
"ing)."

Dr. R. W. Raymond, in his "Glossary of Mining Terms," contributes the following:—

"HYDRAULICKING. (Pac.) Washing down a bank of
"earth or gravel by the use of pipes conveying water
"under high pressure."

Prof. J. Ross Browne, in his report to the secretary of the treasury upon the mineral resources of the west,[3] tells us that the process was invented in 1852, and describes it as one "in which a stream of water was directed under
"heavy pressure against a bank or hillside containing
"placer gold, and the earth was torn down by the fluid
"and carried into the sluice to be washed."

When we search for judicial definitions we are practically limited to the debris cases.

Judge Sawyer, in Woodruff *v.* North Bloomfield G. M. Co.,[4] gives the following:—

"Hydraulic mining, as used in this opinion, is the pro-
"cess by which a bank of gold-bearing earth and rock is
"excavated by a jet of water, discharged through a converg-
"ing nozzle of a pipe, under great pressure, the earth and
"debris being carried away by the same water through

[1] 1887. Trans. Am. Inst. M. E., vol. vi., p. 38.
[2] New York, 1885.
[3] 1867.
[4] 9 Saw. 441.

"sluices and discharged on lower levels into the natural "streams and water courses below. Where the gravel or "other material of the bank is cemented, or where the "bank is composed of masses of pipe clay, it is shattered "by blasting with powder, sometimes from fifteen to twenty "tons of powder being used to break up a bank."

In the case of United States *v.* North Bloomfield Gravel Mining Co.,[1] involving the constitutionality of the congressional act, the government alleged that,—

"Hydraulic mining as now, and for more than twenty "years last past, practiced and understood in the state of "California, is a process of gold mining by which hills, "ridges, banks, and other forms of deposits of earth which "contain gold, are mined and removed from their position "by means of large streams of water, which, by great "pressure, are forced through pipes terminating in nozzles "known as 'monitors' or 'little giants'; that the water is "discharged from such nozzles with great force, by a water "pressure of from fifty to four hundred feet per second, "against and upon the hills, ridges, banks, and other "deposits, which are usually shattered or broken up by "means of blasts of powder, and softened by running water "over and along such shattered or broken banks of earth, "and undermined by streams of water flowing at the foot "of such banks, thus caving down and washing off por-"tions thereof before water is discharged from the nozzles "against them."

Judge Ross expressed the opinion that this allegation sufficiently set forth the meaning of the terms "hydraulic "mining" and "mining by the hydraulic process" as these terms were used in the congressional law.

There can be no question but that in all of the debris cases the process under consideration involved to some degree the use of artificial methods to loosen the soil, such as blasting, undermining with a stream of water and causing natural banks to cave, before the water under pressure was applied. It was a part of the process and a material aid to rapid and efficient work. It cannot plausibly be maintained that when the "little giants" and "monitors"

[1] 81 Fed. 243.

were directed against the mass of material thus torn from the hill by blasting or caving, the miner was not engaged in "hydraulicking," and yet his efforts were not immediately directed against a *natural* bank.

The use of the term "natural bank" in the definitions given must be considered in connection with the context. We think the fair deduction from all the definitions is this: The essential feature which distinguishes hydraulic mining from other classes of mining is the substitution of the power of water, under pressure, applied through a nozzle, for manual labor, in moving the material into the sluices, whence, if not impounded, it is carried into the running streams. Whether this application is made against a bank in its perfect natural state, or against one artificially created is, in our judgment, immaterial.

If a miner turns his monitor against a mass of impounded earth, rocks, and tailings, brought down by the streams from a higher operator, would anyone familiar with "mining by the hydraulic process" say that he was not "hydraulicking"? If he was not "hydraulicking," how would his method of operating be characterized in the mining vernacular?

Whether or not a miner conducting mining operations within the district defined by the congressional act is within the purview of the act, and subject to the jurisdiction of the commission, will depend not upon the fact that he is or is not contributing to injuries to the navigable streams, but the inquiry is simply, "Is he utilizing water "under pressure, through a nozzle, directed against a bank "or mass of earth for the purpose of extracting gold there-"from?" Whether the bank or mass was brought to its present abiding place by the carrying power of water during remote geological ages, or is the result of the recent utilization of such carrying power by human agency operating on a higher level is, in our judgment, of no legal significance. It is fair to assume that the future of the great industry of hydraulic mining in California rests in a liberal administration and interpretation of the existing

law, or some law framed upon the same general lines. Insistence upon narrow rules of interpretation, which do violence to the spirit of the law, will impede rather than advance the interests of the industry.

**§ 853. Judicial interpretation of the act—Its constitutionality.**—We are aware of only one instance where the act in question was directly assailed in judicial proceedings, and that was in a case involving peculiar individual hardship, assuming the facts to have existed as alleged, and which for the purposes of the case the court accepted as true. We refer to the case of United States *v.* North Bloomfield Mining Company, recently decided by Judge Ross of the ninth circuit.[1]

Acting upon the suggestion embodied in the opinion of the United States circuit court, in Woodruff *v.* North Bloomfield,[2] the North Bloomfield company constructed extensive, complete, and expensive impounding works, which were so maintained as to "successfully, completely, "and permanently impound all of the mining debris "resulting from its mining operations, except such light "and inconsiderable portion of the debris therefrom as will "not settle in water when affected by the least motion," and which light and flocculent matter was carried by the currents to the ocean, neither injuring nor threatening to injure, either by itself or in connection with debris from other mines, any of the navigable or other waters. Shortly after work behind the dam was commenced (1888), the United States filed in the circuit court its bill seeking to enjoin the company from operating its mine. The court, Circuit Judge Gilbert presiding, held that the impounding device was sufficient, that the flocculent matter carried over the dam was innocuous, "that the danger to be appre-"hended from the operation of the North Bloomfield mine, "with its impounding reservoirs as constructed and used "and intended to be used, is so remote and improbable "that the court is not justified in enjoining the use of the

[1] 81 Fed. 243. [2] 9 Saw. 441, 544.

"property and thereby interdicting a valuable industry." The injunction prayed for was denied. Thus matters stood when congress passed the act creating the California debris commission.

Several years after the act was passed, the government commenced the action now referred to,[1] alleging the same state of facts as in the former bill, with the supplemental averments as to the passage of the act of March 1, 1893, and the failure of the North Bloomfield company to submit itself to the jurisdiction of the California debris commission and secure a permit for the conduct of mining operations behind its dam. The court, for the purpose of decision, assumed that the company's operations were being conducted in the same manner as when Judge Gilbert refused the injunction in the former action between the same parties. The government was placed in the position of asserting, that although the operations of the company at the time of the passage of the act of congress were conducted in a strictly lawful manner, and that nothing had occurred since in the conduct of such operations which injured, or tended to injure, the navigable streams, yet the act of congress, *proprio vigore*, made such operations unlawful, and compelled the North Bloomfield company to submit itself to the jurisdiction of the debris commission, or cease its operations.

This view was sustained by Judge Ross, who ordered an injunction to issue, announcing the following conclusions as to the scope and constitutionality of the act:—

(1) Until the debris commission appointed under the act should find that such mining can be carried on without causing the prohibited injury, *all* hydraulic mining within the territory drained by the Sacramento and the San Joaquin River systems, is unlawful.

(2) The fact that prior to the passage of the act the United States had filed a bill to restrain the North Bloomfield company from carrying on hydraulic mining, and

[1] 81 Fed. 243.

that a decree had been entered adjudging that impounding works erected by the company were sufficient to remove all injurious matter, and that the company could not be restrained under the then existing law, constituted no defense.

(3) That congress has absolute power, in the interest of interstate and foreign commerce, over the navigable waters of the United States, and may declare what may or may not constitute obstructions thereto. The act is therefore constitutional.

The case is now pending before the circuit court of appeals, the injunction having been suspended pending the appeal.

We are not aware that the act in question has been the subject of judicial interpretation in any other case.

# TITLE X.

## MINES AND MINING CLAIMS AS SUBJECTS OF CONTRACT BETWEEN INDIVIDUALS.

CHAPTER
I. MISCELLANEOUS CONTRACTS RELATING TO MINING VENTURES AND THEIR DISTINGUISHING FEATURES.

# CHAPTER I.

## MISCELLANEOUS CONTRACTS RELATING TO MINING VENTURES AND THEIR DISTINGUISHING FEATURES.


§ 857. Introductory.
§ 858. "Grub stake" and prospecting contracts.
§ 859. Options, working bonds, or executory contracts of sale.
§ 860. Licenses and their distinguishing attributes.
§ 861. What constitutes a lease.


**§ 857. Introductory.**— We have frequently announced that the scope of this work is limited generally to a discussion of the federal mining system. While some space has been devoted to cognate subjects, such as tenancies in common, mining partnerships, lateral and subjacent support, and the pollution of streams in the conduct of mining operations, it will be observed that these matters bore a direct relation to some of the phases of the federal system, or are subjects of peculiar interest in that section of the United States where mining tenures are based on congressional laws. When we approach the subject of contractual relations, it must be apparent that any attempt to deal with it in detail would not only destroy the unity of the treatise, but would render the author liable to the criticism of attempting to expand the work unreasonably and for no laudable purpose. The law of contracts is a special subject in itself, too vast, even in its outlines, to warrant treatment in a collateral way. The general principles governing contractual relations, where realty is the subject dealt with, the interpretation of written instruments and the manner of their execution, apply with equal force to contracts the subject-matter of which is mines.

The attempt to discuss conveyances, mortgages, or leases

of mines, involving as it does the laws and tenures peculiar to each state of the union, would result in the collection of a vast multitude of incongruous cases, most of which involve the interpretation of individual instruments, and but few of which enunciate any rule of universal application.

English authors include these subjects in their treatises; but England is not a federation of states, and the law in one part of it is the law in the other. There is no division of legislative authority. The contrast between that country and the United States in this respect is too marked to require elaboration.

Take the subject of leases. In order to make this work useful in all the states, and to give the subject any extended treatment, we should be compelled to examine the nature of the land tenures of every state in the union, note the difference in the statutory law, and analyze by states the overwhelming mass of case law found in the numerous state reports. Subjects of this character must necessarily be left to the legal encyclopedias, to the digests, or to the works of authors dealing specially with the several branches of the law involved. The utmost that can be expected of us is to briefly state the distinguishing features of the principal classes of contracts affecting mining properties. We may approximate a classification which may possibly be of some utility in a general way. Beyond this we are not permitted to go.

**§ 858. "Grub stake" and prospecting contracts.**— The early miner, in the construction of his vocabulary, did not always display a regard for euphony or the proprieties of language. He coined his terms inartistically, but avoided indirection and the suggestion of latent ambiguity. When he was called upon to characterize the relationship existing between those who furnished him with money and supplies to enable him to seek and discover mines, agreeing in return that those supplying him should share in his successes, he called the transaction "grub staking."

Hence the term "grub stake" contract. This class of contracts is common in the mining regions of the west. They are not required to be in writing, as they are not within the statute of frauds.[1] They have sometimes been called "prospecting partnerships,"[2] and are said to partake of the character of "qualified partnerships."[3] Yet, unless the agreement goes beyond the mere furnishing of supplies in consideration of a participation in the discoveries, the word *partnership* is improperly used, and is misleading. It is simply a common venture, wherein one, called the outfitter, supplies the "grub," and the other, called the prospector, performs the labor, and all discoveries inure to the benefit of the parties in the proportion fixed by the agreement.[4]

The prospector has the right to insist on the outfitter performing his part of the agreement as a condition precedent to participation in such discoveries. Should he fail to do so, the prospector may discover and locate for his own advantage, free from any obligation to the outfitter.[5]

On the other hand, where the outfitter fulfills his part of the agreement, when the prospector finds and locates a mine the relationship of tenancy in common as to such mine immediately arises,[6] with its attendant rights and obligations.[7]

Should the prospector during the life of the contract locate in his own name to the exclusion of the one supplying the capital, the title thus accruing to him would be held in trust for his associate in the joint venture to the extent of his interest,[8] not necessarily on the theory of partnership, but for the reason that his advances contributed to the acquisition of the property.

While there is no element of trust existing between

[1] Moritz *v.* Lavelle, 77 Cal. 10; Gore *v.* McBrayer, 18 Cal. 582; Meylette *v.* Brennan, 20 Colo. 242. See, also, Hirbour *v.* Reeding, 3 Mont. 13.
[2] Boucher *v.* Mulverhill, 1 Mont. 306.
[3] Berry *v.* Woodburn, 107 Cal. 504.
[4] *Id.*; Meylette *v.* Brennan, 20 Colo. 242.
[5] Murley *v.* Ennis, 2 Colo. 300.
[6] Miller *v.* Butterfield, 79 Cal. 62.
[7] *Ante*, § 788.
[8] Meylette *v.* Brennan, 20 Colo. 242.

tenants in common of mining property who are partners only for the purpose of exploration,[1] in cases of "grub "stake" or prospecting contracts where discoveries are made, the prospector may take no unfair advantage of his associate in dealing with the property. If he does, he will be held to account for the profits derived from his unfair practices. During the life of the contract, either party may, of course, purchase mining claims from his own funds and at his own risk, without enabling the other to participate in the purchase.[2]

The "grub stake" contract, properly speaking, applies to the search for and location of mines on the public domain.

There is a distinction between a "grub stake" contract and a contract where a miner is employed on wages to obtain a paying mine, with a contingent increase of wages and an interest in the property if the venture should prove successful. The latter is nothing more than a contract of hiring.[3]

We frequently encounter cases where the object of the venture is not only to search for and discover mines, but also to work and develop them and conduct a general mining business. This is something more than a "grub stake" contract. Such an agreement constitutes a partnership.[4]

We find in the reports frequent mention of this class of partnerships, formed in the Eastern states where expeditions were fitted out to prospect for gold in California, the articles of agreement being at times quite comprehensive and elaborate. The contracts thus formed had all the attributes of a partnership, and differed materially from the ordinary "grub stake" contract.[5]

[1] *Ante*, § 800.

[2] Miller *v.* Butterfield, 79 Cal. 62.

[3] Berry *v.* Woodburn, 107 Cal. 504. See Stuart *v.* Adams, 89 Cal. 367.

[4] Abbott *v.* Smith, 3 Colo. App. 284; Harris *v.* Hillegass, 54 Cal. 463; Jennings *v.* Rickard, 10 Colo. 395; Lawrence *v.* Robinson, 4 Colo. 567.

[5] Scott *v.* Clark, 1 Ohio St. 382. See, also, Hoyt *v.* Smith, 23 Conn. 177, 27 Conn. 63, where the prospector was to proceed to California and "commence digging for gold," the product to be equally divided among all contributing to the venture; Staples *v.* Wheeler, 38 Me. 372, where certain parties agreed to proceed with all possible dispatch to the gold

The line of demarcation between the ordinary "grub "stake" contract and a partnership is sometimes difficult to determine. Generally it may be said that if the agreement extends beyond the discovery and location, and contains a stipulation for exploiting and developing, a mining partnership arises when actual work commences.[1]

In the absence of such agreement, neither party is called upon to join the other in the work of development. They are at liberty to remain as tenants in common, neither party having the right to bind the interest of the other.[2]

**§ 859. Options, working bonds, or executory contracts of sale.**— There is no class of contracts connected with the mining industry more familiar to the profession than that of options to purchase, working bonds, or executory contracts of sale. Unlike other classes of real estate, the value of a mine cannot be determined by mere superficial observation. Expensive investigations, involving measurements, examination of underground geological conditions, and sampling, invariably precede the consummation of a purchase or sale of mining property. In order to justify an intending purchaser in making the requisite investigations and incurring the attendant expense, he invariably exacts some contract from the owner by which he secures the first privilege of purchasing the property in the event the examination proves satisfactory. In addition to this, a large army of "promoters," recruited from the ranks of all professions, trades, and occupations, swarm through the mining regions, seeking exclusive privileges and "options" on mining properties of all classes, for the purpose of marketing them in the moneyed centers of the world. These conditions have given rise to a class of contracts infinite in variety, from a mere letter signed by the owner, agreeing to accept a certain price for his mine if paid within a

diggings in California, there to labor with all diligence and fidelity to get gold in any honest manner for the space of one year from their arrival there, "the proceeds of said labor, whether in digging gold, laboring, or "speculating," to be divided among all the parties equally.

[1] *Ante*, § 797. [2] *Ante*, § 790, p. 987.

certain time, to a formidable working bond, which contemplates entry into possession and extensive exploitation to prove the value of the mine before the privilege of purchase must be exercised. The ultimate object of all of them, however, is to secure the exclusive privilege of purchasing at a given price, within a specified time. Such contracts must be in writing, and in the main are governed by the same rules of law applicable to executory contracts for the sale of ordinary real estate. We do not propose to deal with these general rules, nor with the local laws which prescribe the formalities by which instruments affecting real estate must be executed; but there are a few principles, however, whose application to this class of contracts should be particularly noted, on account of the peculiar character of the subject-matter.

It may be accepted as a general rule that time is not of the essence of ordinary contracts for the purchase of real estate, unless expressly so declared by the parties. An exception to this rule is well recognized where the character of the property renders it liable to fluctuations in value.

The authorities, both in England[1] and America,[2] recognize that where mines or mining properties are the subject of the contract, time is of the essence, independent of any express stipulation in that behalf inserted in the instrument.[3]

The rule is thus enunciated by the supreme court of the United States:—

"In Taylor *v.* Longworth[4] the principle was recognized "that time may become of the essence of a contract for "the sale of property, not only by the express stipulation "of the parties, but from the very nature of the property "itself. This principle is peculiarly applicable where the "property is of such character that it will likely undergo "sudden, frequent, or great fluctuations in value. In

[1] Pomeroy on Contracts, §§ 384, 385, note 4.
[2] *Id.*, §§ 383, 384.
[3] Settle *v.* Winters, 2 Idaho, 199; Durant *v.* Comegys, 2 Idaho, 936.
[4] 14 Pet. 172, 174.

"respect to mineral property, it has been said that it "requires, and of all properties perhaps the most, the "parties interested in it to be vigilant and active in assert- "ing their rights."[1]

As is said by Fry in his work on specific performance:[2]—

"The nature of all mining transactions is such as to "render time essential, for no science, foresight, or exami- "nation can afford a sure guaranty against sudden loss, "disappointment, and reverses, and a person claiming an "interest in such an undertaking ought, therefore, to show "himself in good time willing to partake of the possible "loss as well as profit."[3]

The necessity for a strict adherence to the rule that in all contracts for the purchase of mines time is of the essence, is apparent. Were the rule to be relaxed and the owner of the mine executing the option or contract of sale, which is ordinarily unilateral and not mutual, to be compelled to resort to the courts to terminate the equities of the proposed vendor, or remain in a state of uncertainty, awaiting the lapse of an indefinite period called "reasonable time," his property would remain practically unmarketable. The holder of the option would be given unreasonable opportunities to speculate, without the fear of incurring any loss. The law would place him in a position to interdict a sale to anyone else, or to exact an unearned consideration for a surrender of phantom equities.

On the other hand, the rule that contracts which do not involve mutuality cannot be specifically enforced, is modified in favor of the holder of this class of contracts. He is afforded this equitable remedy, where he fully and fairly performs, or offers to perform, the terms of his contract within the time stipulated.

[1] Waterman *v.* Banks, 144 U. S. 394 (citing Prendergast *v.* Turton, 1 Young & C. Ch. 110; Doloret *v.* Rothschild, 1 Sim. & Sut. 590, 598; Fry's Specific Performance, §§ 714, 715; Pomeroy on Contracts, §§ 384, 385; Brown *v.* Covillaud, 6 Cal. 566, 572; Green *v.* Covillaud, 10 Cal. 317, 324.

[2] § 716.

[3] See, also, Waterman on Specific Performance, § 460.

"The very purpose of an optional contract of this "nature is to extinguish this mutuality of right and vest "in one of the parties the privilege of determining whether "the contract shall be vitalized and enforced. An option "to buy or sell land, more than any other form of con- "tract, contemplates a specific performance of its terms; "and it is the right to have them specifically enforced "that imparts to them their usefulness and value."[1]

**§ 860. Licenses and their distinguishing attributes.** —A license is an authority to go upon the land of the licensor to do an act or series of acts there, but passes no estate or interest in the land.[2]

It is technically an authority to do something on the land of another without passing an estate in the land.[3]

Bainbridge says that the distinction between lease and license is, that the former is a distinct conveyance of an actual interest or estate in the lands, while the latter confers a mere incorporeal right, to be exercised in the lands of others. It is a profit *a prendre*, and, unlike an easement, may be held apart from the possession of land.[4]

"There is a broad distinction," said the supreme court of California, "between a lease of a mine under which the "lessee enters into possession and takes an estate in the "property, and a license to work the same mine. In "the latter case the licensee has no permanent estate in "the land itself, but only in the proceeds, and in such "proceeds not as realty, but as personal property, and his "possession, like that of an individual under contract "with the owner of land to cut timber or harvest a crop "of potatoes for a share of the proceeds, is the possession of "the owner."[5]

[1] Watts *v.* Kellar, 56 Fed. 1, quoted in note to § 169, Pomeroy on Contracts, where will be found a large collection of authorities in support of this doctrine.

[2] East Jersey Iron Co. *v.* Wright, 32 N. J. Eq. 248; Clute *v.* Carr, 20 Wis. 531; Mumford *v.* Whitney, 15 Wend. 380; Riddle *v.* Brown, 20 Ala. 412; Wynn *v.* Garland, 19 Ark. 23; Rhodes *v.* Otis, 33 Ala. 578.

[3] Cook *v.* Stearns, 11 Mass. 534; Fuhr *v.* Dean, 26 Mo. 116; Massot *v.* Moses, 3 S. C. 168.

[4] Bainbridge, 4th ed., p. 510. See, also, MacSwinney on Mines, p. 249.

[5] Wheeler *v.* West, 71 Cal. 126 (citing Funk *v.* Haldeman, 53 Pa. St. 229; Gillett *v.* Treganza, 6 Wis. 343; Grubb *v.* Bayard, 2 Wall. Jr. 81; Caldwell *v.* Fulton, 31 Pa. St. 475; Potter *v.* Mercer, 53 Cal. 667).

It amounts to nothing more than an excuse for an act which would otherwise be a trespass.[1]

In order to ascertain whether an instrument must be construed as a lease or a license, it is only necessary to determine whether the grantee has acquired by it any estate in the land in respect to which he might bring ejectment.[2]

A license is personal, and not capable of being assigned or transferred by the person to whom it is granted.[3]

A transfer by the licensee operates as a forfeiture,[4] unless it be coupled with an interest[5] which may be created by the instrument itself (when it is something more than a license), or grows out of expenditures made pursuant to its requirements.[6]

A mere grant of a right to take ore, no estate or interest in the land being granted, is a license only, and is not exclusive of the licensor, unless the expressed intention of the parties is otherwise, or the implication is so clear and strong as to be unavoidable.[7]

A license is revocable, and its continuance depends upon the will of the grantor.[8]

Unless it is coupled with such an interest, or the privilege is conferred in such a manner as to work an estoppel against the grantor,[9] it is none the less revocable because a consideration has been paid for it.[10]

[1] Cook *v.* Stearns, 11 Mass. 534.

[2] Bainbridge, 4th ed., p. 510; Doe *ex dem.* Hanley *v.* Wood, 2 B. & A. 182.

[3] Harris *v.* Gillingham, 6 N. H. 11; Hill *v.* Cutting, 113 Mass. 107; Jackson *v.* Babcock, 4 Johns. 418.

[4] Dark *v.* Johnson, 55 Pa. St. 164.

[5] Watson *v.* King, 4 Campb. 272; Ganssen *v.* Morton, 10 B. & C. 731; Thompson *v.* McElarney, 82 Pa. St. 174; Mumford *v.* Whitney, 15 Wend. 380.

[6] Silsby *v.* Trotter, 29 N. J. Eq. 228; Muskett *v.* Hill, 5 Bing. N. C. 694.

[7] Silsby *v.* Trotter, 29 N. J. Eq. 228.

[8] Bartlett *v.* Prescott, 41 N. H. 493; Desloge *v.* Pearce, 38 Mo. 588.

[9] Muskett *v.* Hill, 5 Bing. N. C. 694; Riddle *v.* Brown, 20 Ala. 412; Bracken *v.* Rushville, 27 Ind. 346; Beatty *v.* Gregory, 17 Ia. 109; Huff *v.* McCauley, 53 Pa. St. 206; Gillett *v.* Treganza, 6 Wis. 343; Wheeler *v.* West, 71 Cal. 126; East Jersey Iron Co. *v.* Wright, 32 N. J. Eq. 248; Funk *v.* Haldeman, 53 Pa. St. 229.

[10] Wood *v.* Leadbetter, 13 Mees. & W. 838; Huff *v.* McCauley, 53 Pa. St. 206; Dark *v.* Johnson, 55 Pa. St. 164.

It is terminated at the death of the party conferring it,[1] and a conveyance of the land revokes it.[2]

A license cannot be revoked, however, so as to make an entry under it or acts done under it trespasses;[3] but if the licensee continues work after revocation, he becomes a trespasser.[4]

A license is presumed to continue until revoked.[5]

Where parties have entered upon the enjoyment of the privileges granted by a license, upon its revocation the licensee is entitled to be compensated for his money and labor expended.[6]

Whether an instrument is a license or a lease will depend not upon what designation the parties give to it, but upon the manifest intent gleaned from a consideration of its entire contents.

A license may be given by parol,[7] and when possession is taken under it, it is such a part performance as takes it out of the statute of frauds.[8]

In the practical mining world, mere licenses are not looked upon at this day as affording to the operator that degree of security which the investment of capital for development purposes requires. It is safe to assume that where enterprises of any magnitude are contemplated, the parties will, for mutual protection, require formal instruments of broader scope than those granting mere licenses.

§ 861. **What constitutes a lease.**— A lease has been defined to be,—

[1] Carter *v.* Page, 4 Ired. 424; De Haro *v.* United States, 5 Wall. 599.
[2] Hays *v.* Richardson, 1 Gill & J. 366; Vollmer's Appeal, 61 Pa. St. 118; Cobb *v.* Fisher, 121 Mass. 169.
[3] Fuhr *v.* Dean, 26 Mo. 116.
[4] Lockwood *v.* Lunsford, 56 Mo. 68; Lunsford *v.* La Motte Lead Co., 54 Mo. 426.
[5] Keeler *v.* Green, 21 N. J. Eq. 27.
[6] Beatty *v.* Gregory, 17 Ia. 109; Harkness *v.* Burton, 39 Ia. 101; Bush *v.* Sullivan, 3 G. Greene, 344.
[7] Gesner *v.* Cairns, 2 Allen (N. B.), 595; Desloge *v.* Pearce, 38 Mo. 588; Wheeler *v.* West, 71 Cal. 126.
[8] Anderson *v.* Simpson, 21 Ia. 399.

"A contract for the possession and profits of lands and "tenements on the one side and a recompense of rent or "other income on the other; or it is a conveyance to a per- "son for life or years or at will in consideration of a return "of rent or other recompense."[1]

The line of demarcation between a license coupled with an interest and a lease, and between a lease and an absolute grant of the minerals with possessory privileges, is not clearly defined. There is considerable confusion in the adjudicated cases, rendering it difficult to draw any accurate or generally accepted conclusion. Precedents must be applied with care and discrimination. The rule in one state is not always followed in others.

The application of abstract definitions, which as a rule do not include all distinguishing elements, to instruments affecting the right of possession and working of mines, is not always productive of satisfactory results. We may best arrive at classification by a consideration of the different classes of instruments which have come before the courts, where the question as to the nature of the instruments was directly involved, and thus illustrate the current of judicial opinion in different jurisdictions as to what does and what does not constitute a lease.

As to whether an instrument is or is not a lease depends upon the intent of the parties and not upon the mere form in which it is prepared.[2]

A contract giving the right to work a mine for a certain time, the gross product to be equally divided between the parties, is not a lease. Such a contract does not create the relation of landlord and tenant, but fixes a rule of compensation for services rendered. It is in all its essential features a contract for labor to be performed and to be paid for by a share of the profits.[3]

As in the case of "cropping contracts" in the agricul-

[1] Jackson *ex dem.* Webber *v.* Harsen, 7 Cowen, 323, 326.

[2] Watson *v.* O'Hern, 6 Watts, 362; Offerman *v.* Starr, 2 Pa. St. 394; Moore *v.* Miller, 8 Pa. St. 272; Muskett *v.* Hill, 5 Bing. N. C. 694.

[3] Hudepohl *v.* Liberty Hill Cons. M. & W. Co., 80 Cal. 553, 558; Stuart *v.* Adams, 89 Cal. 367.

tural regions, the parties become tenants in common of the products.[1]

A lease of certain lands provided that the lessee should have all the coal underlying the lands for the term of ninety-nine years. The lessees were to mine a named minimum number of tons of coal each year, and pay so much a ton therefor until all the available coal was removed; and the said minimum number of tons was to be paid for annually, whether mined or not; *held*, that this was an absolute sale of the coal, conditioned on its being removed.[2]

In Gowan *v.* Christie[3] it was said that a mining lease is practically a sale of a portion of the land,[4] notwithstanding the instrument designates the parties as lessor and lessee.[5]

A "lease and demise" of "all the coal in and upon and "under certain land," which the said party of the second part can take from the same within and during twenty-five years, is a sale of the coal, and not a license to raise it.[6]

A written agreement by the owner of coal land, giving another the exclusive right to mine coal on such land for a term of years, is not a mere license, but an assignable lease.[7]

An agreement in writing purported, in consideration of stipulated royalties, to lease land for mining purposes only, and, subject to the limitation that the grantee's rights should not be interfered with, reserved the right of

[1] Hudepohl *v.* Liberty Hill Cons. M. & W. Co., 80 Cal. 553, and cases cited; Bernal *v.* Hovious, 17 Cal. 542; Putnam *v.* Wise, 1 Hill, 234. See note, 37 Am. Dec. 317, 323.

[2] Hope's Appeal (Pa. Sup.), 3 Atl. Rep. 23 (followed *In re* Lazarus' Estate, 145 Pa. St. 1; Stewart *v.* North Eastern C. & I. Co., 147 Pa. St. 612.)

[3] 5 Moak, 114.

[4] See, also, Harlan *v.* Lehigh Coal Co., 35 Pa. St. 287.

[5] Delaware, etc., R. R. Co. *v.* Sanderson, 109 Pa. St. 583; Fairchild *v.* Fairchild (Pa.), 12 Atl. Rep. 74; Tilley *v.* Moyers, 43 Pa. St. 404.

[6] Raynolds *v.* Hanna, 55 Fed. 783. But see Austin *v.* Huntaville M. Co., 72 Mo. 535; Johnston Iron Co. *v.* Cambria Iron Co., 32 Pa. St. 241.

[7] Consolidated Coal Co. of St. Louis *v.* Peers, 150 Ill. 344.

occupation for the purpose of cultivation to the grantor. It provided that it should remain in force until the mineral should be exhausted, but otherwise had no fixed term. *Held*, that the agreement was not a lease, since it had no determinate period, but that it passed title to all minerals within the land subject to the claim of the owner for royalties.[1]

The contract known as a "gas or oil lease," conveying premises for a term of years, and so long as gas or oil is produced in paying quantities, is a lease coupled with a conditional grant, dependent upon the production of gas or oil in paying quantities.[2]

A contract granting for a term of years all the gas or oil under certain land, excepting and reserving to the grantee a certain part of the minerals produced, and providing that all wells drilled on the land should be drilled within three years, was in effect a lease, and as such was governed by the same rules of law as govern leases for land.[3]

The owners of land granted to another the right to enter thereon to test and search for minerals and oil, and to mine and quarry thereon, the second party to have the right to erect buildings and machinery for work in mines, and to pay twenty-five dollars per year if minerals were not mined, and to pay a royalty on all ores shipped. The instrument was termed therein a "lease," and was to continue for ninety-nine years. *Held*, that it was a lease and not a revocable license.[4]

[1] Hobart v. Murray, 54 Mo. App. 249. But see Buchanan v. Cole, 57 Mo. App. 11.

[2] Herrington v. Wood, 6 Ohio Circ. Ct. Rep. 326; Evans v. Consumers' Gas Trust Co. (Ind. Sup.), 29 N. E. Rep. 398.

[3] Ohio Oil Co. v. Kelley, 9 Ohio Circ. Ct. Rep. 511; *Id.*, 3 Ohio Dec. 186.

[4] Young v. Ellis, 91 Va., 297.

# TITLE XI.

## ACTIONS CONCERNING MINING CLAIMS OTHER THAN SUITS UPON ADVERSE CLAIMS—AUXILIARY REMEDIES.

CHAPTER

I. TRESPASS—MEASURE OF DAMAGES.
II. AUXILIARY REMEDIES.

# CHAPTER I.

## TRESPASS—MEASURE OF DAMAGES.


§ 865. Introductory.
§ 866. Burden of proof in cases of underground trespasses.
§ 867. When the statute of limitations commences to run against underground trespasses.
§ 868. Measure of damages.


**§ 865. Introductory.**— In the mining regions of the west the action of trespass is largely utilized, not only for the purpose of recovering damages for the unlawful extraction of ore, but, as a rule, the title to the property or some portion of it is involved and is frequently litigated, so that the action, generally speaking, is one of trespass to try title. The frequency with which this class of actions is encountered in the reports of the mining states is due to that feature of the federal law which permits the owner of a mine or mining claim holding within his surface boundaries the apex of a vein, to pursue such vein under certain conditions, into and underneath the land adjoining. So the action while in form is trespass *quare clausum fregit*, the issues naturally arising are those of ownership of the segment of the vein in dispute, and title is necessarily brought into question. It is with this class of actions that we are particularly concerned. The "law of the apex" is responsible for nine tenths of the expensive litigation arising in the conduct of quartz or vein mining, and out of it have grown several interesting and novel questions.

The rules governing the action in the case of underground invasion are the same, generally speaking, as where a surface trespass is committed. There are, however, certain elements in cases of underground trespasses deserving

of special consideration. It is our purpose to briefly consider, (*a*) upon whom devolves the burden of proof in this class of actions, (*b*) the application of the statute of limitations to underground trespasses, and (*c*) the measure of damages.

**§ 866. Burden of proof in cases of underground trespasses.**—Where mines are held under tenures which confine their owners to vertical planes drawn through their surface boundaries, as in the case of coal and placers in the states subject to the federal mining laws, and in all classes of mines in the older states of the union, the burden of proof in actions of trespass rests with the plaintiff to establish his right by a preponderance of evidence, and this burden remains with him throughout the trial. But this rule, when applied to controversies arising out of the exercise of the extralateral right granted by the federal laws, has been challenged, and there is some conflict of authority upon the subject.

To explain the views of the courts and the shades of difference in their rulings, we will use a simple illustration. A. and B. are coterminous lode mining proprietors, holding title by patents from the government. B., holding the apex of a vein within his boundaries, in pursuing it on its downward course crosses the vertical planes drawn through A's surface boundaries, and extracts ore from underneath A's surface. A. brings either ejectment or trespass against B. B. justifies his presence underneath A's surface by asserting ownership of the apex of the vein and the right to pursue it throughout its entire depth, although it may enter the land adjoining. In other words, B. claims that the estate in the vein has been severed from the estate in the surface, and the estate overlying the dip of the vein is to that extent lessened.[1] The estate in the vein, assuming that the form of B's surface and the position of his apex is such as to warrant the legal conclusion that the vein has been granted throughout its entire depth, is of the same dignity as that of the surface.[2]

[1] *Ante*, §§ 568, 611.

[2] *Ante*, § 568.

What legal presumptions are indulged in favor of the respective parties? How are these presumptions to be overcome, and upon whom rests the burden of proof?

The law which is the muniment of title of both A. and B. awards to them respectively, "the exclusive right of "possession and enjoyment of all the surface included "within the lines of their locations, and of all veins, lodes, "and ledges throughout their entire depth, the top, or "apex, of which lies inside of such surface lines extended "downward vertically, although such veins, lodes, or ledges "may so far depart from a perpendicular in their course "downward as to extend outside the vertical side lines of "such surface locations."[1]

B's vein, not having its top, or apex, within A's ground, does not pass to A. by operation of the grant;[2] but A., being the owner of the surface, there is a *prima facie* presumption that he owns everything underneath such surface within the vertical planes drawn through the surface boundaries.[3] This was the rule at common law.[4]

Therefore, when A. introduces proof of title, and if the action be trespass, shows that ore has been extracted from underneath the surface and proves its quantity and value, he is, *prima facie*, entitled to judgment.

It then devolves upon B. to establish,—

(1) The existence of an apex within his boundaries;

(2) The identity and continuity of the vein from its top, or apex, within such boundaries to the point in dispute.[5]

[1] Rev. Stats., § 2322.

[2] Montana Co. Ld. *v.* Clark, 42 Fed. 626; Iron S. M. Co. *v.* Cheesman, 116 U. S. 533; Jones *v.* Prospect Mt. T. Co., 21 Nev. 339. See, also, Reynolds *v.* Iron S. M. Co., 116 U. S. 687; Iron S. M. Co. *v.* Mike & Starr G. & S. M. Co., 143 U. S. 394. *Ante*, § 364.

[3] Iron S. M. Co. *v.* Elgin M. & S. Co., 118 U. S. 196; Bell *v.* Skillicorn, 6 New. Mex. 399; Cheesman *v.* Shreve, 37 Fed. 36; Leadville M. Co. *v.* Fitzgerald, 4 Morr. Min. Rep. 380; Iron S. M. Co. *v.* Campbell, 17 Colo. 267; Cheesman *v.* Hart, 42 Fed. 98; Jones *v.* Prospect Mt. T. Co., 21 Nev. 339; Cons. Wyoming G. M. Co. *v.* Champion M. Co., 63 Fed. 540; Doe *v.* Waterloo M. Co., 54 Fed. 935; Duggan *v.* Davey, 4 Dak. 110; Stevens *v.* Gill, 1 Morr. Min. Rep. 576; Driscoll *v.* Dunwoody, 7 Mont. 394; Bluebird M. Co. *v.* Murray, 9 Mont. 468.

[4] *Ante*, § 2.

[5] *Ante*, § 615.

So far we think the courts all agree; but as to the degree of proof required of B., and as to whether the burden shifts during the trial from one to the other, there is some difference of opinion.

Judge Bigelow, speaking for the supreme court of Nevada, announced the following rule:—

"Doubtless the production of a patent to the ground in "which the ledge is found makes out a *prima facie* case for "the plaintiff; that is, in the absence of any evidence tend- "ing to prove that the ledge apexes outside of the exterior "lines of the plaintiffs' patented ground, it would be pre- "sumed to apex inside those lines; but when evidence is "produced tending to show that the ledge apexes outside "those lines, this simply tends to prove that the plaintiffs, "notwithstanding their patent, do not own that ledge, "and they must now meet this evidence and overcome it, "or they will fail in establishing their title. As the plain- "tiffs' ownership is denied, the burden of proving it, is "all along upon them. If the ownership depends upon "whether the ledge apexes inside the exterior lines of the "mine, then this fact, the same as any other fact upon "which title depends, must be established by the party "asserting it. The plaintiffs must recover upon the "strength of their own title; if they do not own the ledge "from which the ore was extracted, it matters not who "does own it.[1] Evidence showing that the ledge apexes "outside the plaintiffs' ground is not offered to establish "a fact by way of confession and avoidance of the plain- "tiffs' case, as to which the burden would be upon the "defendant, but to show that they never had any case, "because they never owned that ledge. The burden of "showing ownership being placed by the pleadings upon "the plaintiffs, it never shifts to the defendant, except in "the limited sense already spoken of. This is a universal "rule, applicable to all cases, and one that is supported by "both reason and the great weight of authority."[2]

This doctrine seems to be supported to some extent, at least, by the decision of the supreme court of the United States in Reynolds *v.* Iron Silver Mining Co., referred to in the opinion of Judge Bigelow, and also by the decision

[1] Reynolds *v.* Iron S. M. Co., 116 U. S. 687.
[2] Jones *v.* Prospect Mt. T. Co., 21 Nev. 339, 349.

of Judge Knowles in the case of Montana Co. Limited *v.* Clark;[1] but there are a number of well-considered cases wherein the doctrine is denied.

Judge Phillips, in Cheesman *v.* Hart,[2] held that one seeking to justify his presence underneath another's surface holds the laboring oar throughout on all vital issues, and that the burden of the real issue never shifts from him. This rule has received the approval of the supreme courts of Colorado,[3] Dakota,[4] and New Mexico,[5] and of Judges Hallett,[6] Ross,[7] and Hawley,[8] of the federal bench.

Judge Hallett's decision in Leadville Mining Co. *v.* Fitzgerald (*supra*) has been quoted approvingly in almost all of the cases.

"Within the lines of each location the owner shall be "regarded as having full right to all that may be found, "until some one can show a clear title to it as a part of "some lode or vein having its top, or apex, in other "territory. In other words, we may say that there is a "presumption of ownership in every locator as to the territory covered by his location, and within his own lines he "shall be regarded as the owner of all valuable deposits "until some one else shall show by preponderance of testimony that such deposits belong to another lode having "its top, or apex, elsewhere."

Judge Hawley sums up his views succinctly:—

"Hands off of any and everything within my surface "lines, extending downward vertically, until you prove "you are working upon and following a vein which has its "apex within your surface claim."[9]

These rules apply to all classes of lands which may be invaded, whether agricultural or mineral.

We do not understand, however, that in the case

[1] 42 Fed. 626.
[2] *Id.* 98.
[3] Iron S. M. Co. *v.* Campbell, 17 Colo. 267.
[4] Duggan *v.* Davey, 4 Dak. 110.
[5] Bell *v.* Skillicorn, 6 New Mex. 399.
[6] Leadville M. Co. *v.* Fitzgerald, 4 Morr. Min. Rep. 380.
[7] Doe *v.* Waterloo M. Co., 54 Fed. 935.
[8] Cons. Wyoming G. M. Co. *v.* Champion M. Co., 63 Fed. 540.
[9] *Id.*

instanced there are no presumptions to be indulged in B's favor. If he establishes the existence of an apex, he is not compelled to show that it passes through his entire claim, crossing both end lines, or that it actually crosses either of them, so long as it does not appear that it crosses the surface boundaries in such a manner as to deprive him of all extralateral right.[1] Nor is he compelled to show by drifts and actual openings connection between the apex at the surface and the locus of the alleged trespass. Conclusive proof is not required. This is left to the domain of mathematics.[2] He is certainly entitled to the benefit of all presumptions of fact which logically flow, in common mining experience, from other facts which may be proved. Nor are questions of doubtful construction of the mining laws to be resolved against him.

The rule requiring him to prove apex and identity by a preponderance of evidence is not a harsh one when rationally applied. In most cases the means of establishing them are peculiarly within his reach, and in this regard he has a large advantage over his opponent. In the progress of his work from the "grass roots" to his lower workings he is afforded daily opportunities for information and knowledge, which are denied his adversary, and we cannot see that that rule reasonably invoked works any peculiar hardship.

He is also, to some degree, compensated in the conduct of a trial by being permitted to open and close the argument.[3] That the weight of authority is in favor of Judge Hallett's decision in the Leadville-Fitzgerald case cannot, we think, be denied.

**§ 867. When the statute of limitations commences to run against underground trespasses.**— The time within which an action for trespass to real property must be commenced, is fixed by statute in the different states. When that time commences to run in the case of underground

[1] *Ante*, § 615.
[2] Silver M. Co. v. Fall, 6 Nev. 454.
[3] Cheesman v. Hart, 42 Fed. 98.

trespasses, has been the subject of discussion. In cases of surface damage, where ample opportunity of observation is afforded, the statute, of course, runs from the date the act is committed. In cases of underground or concealed trespasses, it has been urged that it should only be set in motion from the date the injured party discovers that his rights have been invaded, or from the date when the fact of trespass could have been discovered by the exercise of reasonable diligence.

An adjoining mine owner has no access to the underground works of his neighbor. It is by no means a difficult matter for such neighbor to drift across his line, following the trend of an ore body, extract the ore from an adjoining mine, and conceal the fact of the trespass for an indefinite period.

It has been contended that such a trespass is a species of fraud, and that the rule applicable to cases of fraud and fraudulent concealment should apply to these secret invasions of another's rights, and that the statute should not commence to run until the discovery.

In Montana there is a statute providing that the time does not commence to run until the discovery of the facts constituting the trespass;[1] but in the absence of such statutory declaration, the rule is to be determined from the application of general principles.

In England the rule at one time prevailed, that in actions at law the statute of limitations began to run from the date of the trespass, but in equity the plaintiff might plead concealment, lack of knowledge, or opportunity for ascertaining the facts as a bar to the running of the statute.[2]

Mr. MacSwinney deduces the following from the English cases:—

"If the injured party can show that he could not have "discovered the wrongful act earlier than a particular "period, the statute of limitations will only begin to run

[1] General Laws of Montana, 1893, p. 50.
[2] Hunter v. Gibbons, 1 Hurl. & U. 459.

"from such period, unless it appears that he neglected to "use reasonable diligence, for an abstraction of minerals "differs from a mere ordinary trespass of goods. The "injured party may frequently be ignorant, and nothing "may happen to excite his suspicion that his minerals are "being abstracted."[1]

The supreme court of Ohio, in the case of Williams *v.* Pomeroy Coal Co.,[2] said, that there is no distinction in the application of the statute of limitations between trespasses underground and upon the surface, nor whether the cause of action is known or unknown to the plaintiff within the line limited by the statute. It cites the case of Howk *v.* Minnick,[3] an action for larceny of money, and the English case of Hunter *v.* Gibbons (*supra*).

The case of Lewey *v.* H. C. Frick Co.,[4] decided by the supreme court of Pennsylvania, is the most recent case upon the subject. It reviews many of the English and American cases on analogous questions, and the results reached may be gleaned from the following extracts from the decision:—

"The law does not require impossibilities. It recognizes "natural conditions and the immutability of natural laws. "The owner of the surface cannot see, and because he can- "not see, the law does not require him to take notice of "what goes on in the subterranean estates below him, with "which he has no communication through openings within "his enclosure or under his control. . . . In the case "before us, no severance of the coal from the surface has "taken place. The title of the plaintiff extends from the "surface to the center, but actual possession is confined to "the surface.

"Upon the surface he must be held to know all that "the most careful observation by himself and his employees "could reveal, unless his ignorance is induced by the "fraudulent conduct of the wrongdoer. But in the coal

[1] MacSwinney on Mines, p. 543 (citing Eccles. Comm'rs *v.* N. E. Ry. Co., L. R. 4 Ch. D. 845, 858; Gibbs *v.* Guild, 9 Q. B. D. 67; Denys *v.* Shuckburgh, 4 Y. & C. Eq. Ex. 53; Dean *v.* Thwaite, 21 Beav. 621.

[2] 37 Ohio St. 583.

[3] 19 Ohio St. 462; National C. Co. *v.* Minnesota M. Co., 57 Mich. 83.

[4] 166 Pa. St. 536.

" veins, deep down in the earth, he cannot see. Neither in " person nor by his servants nor employees can he explore " their recesses in search for an intruder. If an adjoiner " goes beyond his own boundaries in the course of his min- " ing operations, the owner on whom he enters has no " means of knowledge within his reach. Nothing short of " an accurate survey of the interior of his neighbor's mines " would enable him to ascertain the fact. This would " require the services of a competent mining engineer and " his assistants inside the mines of another, which he would " have no right to insist upon. To require an owner under " such circumstances to take notice of a trespass upon his " underlying coal at the time it takes place, is to require " an impossibility; and to hold that the statute begins to " run at the date of the trespass, is in most cases to take " away the remedy of the injured party before he can know " that an injury has been done him. A result so absurd " and so unjust ought not to be possible. . . . We are " disposed to hold, therefore, that the statute runs against " an injury committed in or to a lower stratum from the " time of actual discovery, or the time when discovery was " reasonably possible."

If this be not the correct enunciation of the law, the conclusions reached and the reasoning employed certainly commend themselves to the legislatures of every state and territory in the union where mining is carried on, and the rule should receive express statutory sanction.

§ 868. **Measure of damages.**—The measure of damages in an action for unlawfully extracting ore from the premises of another, depends upon whether the invasion of the premises was through inadvertence or honest mistake, or was willful.

If the trespass is the result of an honest mistake, the defendant is compelled to pay only the value of the ore as it was in the mine, and can, therefore, limit the recovery, first, by the value of what is taken; second, by the cost of mining, extraction, hoisting to the surface, or delivering it at the pit's mouth.

If, on the other hand, the defendant takes out the ore, not as the result of an honest mistake, or an honest

intention, but under circumstances which show that he has knowledge of the situation, he is entitled to no deduction, and he may not reduce the recovery by proving the cost of mining.[1]

"Having been guilty of a willful trespass, they shall "reap no benefit from their own wrong, and shall pay the "value of the ore, without credit for the labor incident to "its extraction."[2]

These rules have been fully sanctioned and approved by the courts of the United States, both federal and state.[3] They are also the English rules.[4]

In some of the states it has been held that in cases of willful trespass, exemplary or punitive, damages may be recovered.[5]

In others the rule is relaxed, even in cases of willful trespass, so that the measure of damages is practically the same in cases of innocent and willful extraction and removal.[6]

In California it has been said that the proper rule for damages in cases of this character is,—

"The value of the gold-bearing earth at the time it "was separated from the surrounding soil and became a

[1] St. Clair *v.* Cash Gold M. & M. Co. (Colo. App.), 47 Pac. 466.

[2] *Id.*

[3] Woodenware Co. *v.* United States, 106 U. S. 432; Benson M. & S. Co. *v.* Alta M. & S. Co., 145 U. S. 428; Alta M. & S. Co. *v.* Benson M. & S. Co. (Ariz.), 16 Pac. 565; Cheesman *v.* Shreve, 40 Fed. 787; Cheeney *v.* Nebraska & C. Stone Co., 41 Fed. 740; Colo. Cent. Cons. M. Co. *v.* Turck, 70 Fed. 294; Aurora Hill Cons. M. Co. *v.* 85 M. Co., 12 Saw. 355; Omaha *v.* Taber, 13 Colo. 41; Waters *v.* Stevenson, 13 Nev. 157; Patchen *v.* Keeley, 19 Nev. 404; Doughberty *v.* Chestnutt, 5 S. W. Rep. 444; Fitzgerald *v.* Clark, 17 Mont. 100; Forsyth *v.* Wells, 41 Pa. St. 291; Ege *v.* Kille, 84 Pa. St. 333; State *v.* Pacific Guano Co., 22 S. C. 50; Sunnyside Coal & Coke Co. *v.* Reitz (Ind. App.), 39 N. E. Rep. 541; Austin *v.* Huntsville Coal & M. Co., 72 Mo. 535; Winchester *v.* Craig, 33 Mich. 205; Heard *v.* James, 49 Miss. 236; Baker *v.* Wheeler, 8 Wend. 505; Coal Creek M. & M. Co. *v.* Moses, 15 Lea, 300.

[4] Eccles. Comm'rs *v.* N. E. Ry. Co., L. R. 4 Ch. D. 845; Livingston *v.* Rawyards Coal Co., L. R. 5 App. Cases, 25 (cited and quoted in Woodenware Co. *v.* United States, *supra*); Wood *v.* Morewood, 3 Q. B. 440.

[5] Franklin Coal Co. *v.* McMillan, 49 Md. 549; Ill. & St. L. Ry. & Coal Co. *v.* Ogle, 92 Ill. 353; Barton Coal Co. *v.* Cox, 39 Md. 1.

[6] Single *v.* Schneider, 24 Wis. 299; Weymouth *v.* R. R. Co., 17 Wis. 550.

" chattel. . . . In estimating these damages, the expense " of extracting the gold and separating it from the earth " after it is first moved from its original location is to be " deducted from the value of the gold taken out of the min- " ing ground of plaintiffs."[1]

The supreme court of the United States, in the case of Woodenware Co. *v.* United States,[2] after reviewing the American cases, concluded that the weight of authority sustains the doctrine there announced, that in innocent or unintentional trespasses the trespasser may deduct the cost of mining and raising to the surface; but if the invasion is willful, no such deduction can be made.

Where ore has been mined and raised to the surface, and a demand is made for it and refused, the owner may recover the value in the condition it was at the time the demand was made.[3]

In all cases where there is an unlawful invasion of another's right, the law presumes at least nominal damages, and a defendant, however innocent of intentional wrongdoing, would not be permitted to avoid a judgment on the ground that the cost of mining exceeded the value of the ore.[4]

It is the duty of the owner of a mine on approaching his boundaries to make surveys to prevent encroachments on the adjoining lands, and the least evidence of bad faith on his part would make every intendment in favor of the injured party.[5]

When a party has the means of ascertaining a boundary line, he is guilty of negligence in not ascertaining its location.[6]

[1] Maye *v.* Yappen, 23 Cal. 306; Goller *v.* Fett, 30 Cal. 482; Empire G. M. Co. *v.* Bonanza G. M. Co., 67 Cal. 406.

[2] 106 U. S. 432.

[3] Maye *v.* Yappen, 23 Cal. 306; Robertson *v.* Jones, 71 Ill. 405.

[4] Attwood *v.* Fricot, 17 Cal. 38; Empire G. M. Co. *v.* Bonanza G. M. Co., 67 Cal. 406. For valuable notes citing cases on measure of damages in actions of trespass, consult 36 Am. Rep. 770; 26 *Id.* 525; 33 *Id.* 68, 282; 24 Am. Dec. 66.

[5] Coal Creek M. & M. Co. *v.* Moses, 15 Lea, 300.

[6] Maye *v.* Yappen, 23 Cal. 306.

The good faith of a trespasser is a question for the jury.[1]

In an action for damages for taking ore from a mining claim, the plaintiff labors under great difficulty in proving the exact amount of damages he has sustained, and the defendant has the means in his power of showing the correct amount of ore taken out; and if he neglects to do so, he cannot complain that the jury by their verdict have fixed a large estimate upon the damages.[2]

So in willful trespass, or where the defendant has mingled the ore, or taken any steps to prevent ultimate proof of its value, these acts are to be taken against the defendant, even so far as to throw the burden of proving the value upon the defendant.[3]

"When the nature of a wrongful act is such that it not "only inflicts an injury, but takes away the means of proving the nature and extent of a loss, the law will aid a "recovery against the wrongdoer, and supply the deficiency of proof caused by his misconduct by making "every reasonable intendment against him and in favor of "the party injured. . . . A man who willfully places "the property of others in a situation where it cannot be "recovered, or its true amount or value ascertained, by "mixing it with his own, or in any other manner, will "consequently be compelled to bear all the inconvenience "of the uncertainty or confusion which he has produced, "even to the extent of surrendering the whole if the parts "cannot be discriminated, or responding in damages for "the highest value at which the property can reasonably "be estimated."[4]

[1] St. Clair v. Cash G. M. & M. Co. (Colo. App.), 47 Pac. 406.

[2] Antoine Co. v. Ridge Co., 23 Cal. 219.

[3] Little Pittsburgh Co. v. Little Chief Co., 11 Colo. 223; Cheesman v. Shreve, 40 Fed. 787.

[4] Armory v. Delamirie, 1 Strange, 504.

## CHAPTER II.

### AUXILIARY REMEDIES.

§ 872. Injunction. § 873. Inspection and survey.

**§ 872. Injunction.**— It was formerly the practice in equity, in cases of alleged trespasses on land, not to restrain the use and enjoyment of the premises by the defendant when the title was in dispute, but to leave the complaining party to his remedy at law. A controversy as to title was deemed sufficient to exclude the jurisdiction of the court. This doctrine has been greatly modified in modern times, and it is now a common practice in cases where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber, though the title to the premises be in litigation. The authority of the court is exercised in such cases, through its preventive writ, to preserve the property from destruction, pending legal proceedings for the determination of the legal title.[1]

It comports more with substantial justice to both parties to restrain the trespass, than to leave the plaintiff to pursue his remedy at law.[2]

In all cases of this character, an injunction should be granted, pending the determination of the issue as to ownership, unless it appear that the plaintiff's title is bad, or, at least, that there is no reasonable ground for the assertion of title by the plaintiff. The mere existence of a

[1] Justice Field in Erhardt *v.* Boaro, 113 U. S. 537.

[2] Merced M. Co. *v.* Fremont, 7 Cal. 306, 317 (quoting Chancellor Johnson in Kinsler *v.* Clark, 2 Hill Ch. 618).

doubt as to the title does not of itself constitute a sufficient ground for refusing an injunction.[1]

Always, in questions of injunction against the working of mines, the doubt should be resolved in favor of granting the writ.[2]

A denial of the preventive remedy by injunction, where the injuries complained of are of a character calculated to destroy the value of the land for all useful purposes, would be tantamount to a denial of all protection.[3]

The doctrine is well settled, particularly in the mining states and territories of the west.[4]

In this class of cases the solvency or insolvency of the defendant is of no moment, therefore an allegation of insolvency is immaterial. The injury in itself is irreparable.[5]

It is irreparable *by definition*, and going, as it does, to the substance of the estate, it is a matter of indifference whether the plaintiff is in or out of possession.[6]

In some of the states the laws governing procedure permit the union of legal and equitable remedies in the same action, "the blending of an action at law with a "petition for ancillary relief to the equity side of the "court."[7]

So in an action of ejectment or trespass, plaintiff may pray for an injunction, *pendente lite*, to restrain the future extraction of ore or the continuance of the trespass.[8]

[1] Hunt v. Steese, 75 Cal. 620, 624; Hess v. Winder, 34 Cal. 270.

[2] Judge Beatty, in Gilpin v. Sierra Nevada Cons. M. Co., 2 Idaho, 662.

[3] Henshaw v. Clark, 14 Cal. 461, 465.

[4] Chapman v. Toy Long, 4 Saw. 35; Bishop v. Baisley, 28 Ore. 119; Le Roy v. Wright, 4 Saw. 530, 535; Cheesman v. Shreve, 37 Fed. 36; Derry v. Ross, 5 Colo. 295; Allen v. Dunlap, 24 Ore. 229, 232.

[5] More v. Massini, 32 Cal. 590; Merced M. Co. v. Fremont, 7 Cal. 306, 322; Hicks v. Michael, 15 Cal. 107, 116; Leach v. Day, 27 Cal. 643, 646; People v. Morrill, 26 Cal. 309; Richards v. Dower, 64 Cal. 62; Natoma W. & M. Co. v. Hancock, 101 Cal. 42, 68; 1 Beach on Injunctions, § 35.

[6] More v. Massini, 32 Cal. 590, 596.

[7] Natoma W. & M. Co. v. Clark, 14 Cal. 554.

[8] More v. Massini, 32 Cal. 590; Pfister v. Dascey, 65 Cal. 403, 405; Hughes v. Dunlap, 91 Cal. 385, 390.

In the federal courts and some of the states, the application for the preventive relief by injunction is an ancillary proceeding, and requires the institution of a separate, equitable action in aid of the action at law. In a state wherein the union of legal and equitable remedies is permitted, upon removal of the cause to the federal courts the pleadings must be recast and amended bills filed, one on the law and one on the equity side of the court.[1]

The question of pleadings and practice will therefore depend upon the rules controlling the forum whose jurisdiction is invoked. These are subjects foreign to this treatise.

**§ 873. Inspection and survey.**— We have no concern with the various state and territorial statutes which provide for the periodical inspection of mines by officials appointed for that purpose. These are in the nature of police regulations, and have for their principal object the protection of miners who are engaged in underground work.[2]

In all mining litigation, particularly in actions wherein underground trespasses are alleged, and the ownership, situation, and value of ore bodies in dispute are necessarily involved, the subject of inspection and survey for the purpose of disclosing the facts is of the greatest importance, not only to the litigants, but to enable the court to apply the law.

Some of the states have special statutes upon the subject, more or less comprehensive, all, however, based upon the same underlying principles. Ordinarily, under these statutes, the pendency of an action is necessary to enable a party to enter upon and underneath the lands in possession of others, and the proceedings necessary to obtain an

[1] Hurt *v.* Hollingsworth, 100 U. S. 100; Perkins *v.* Hendrix, 23 Fed. 418; Northern Pacific R. R. *v.* Paine, 119 U. S. 561.

[2] A reference to these statutes in the older states will be found in the notes to § 19, *ante*. In the appendix, where the legislation of each of the precious-metal-bearing states of the west is given, there will also be found a reference to cognate legislation.

order of the court to inspect, sample, and survey are defined with more or less particularity.[1]

In Montana the law[2] authorizes an inspection and survey without suit, "whenever any person shall have any "right to, or interest in, any lead, lode, or mining claim "which is in the possession of another person, and it "shall be necessary for the ascertainment, enforcement, or "protection of such right," giving the district court or judge thereof power, upon investigating the facts, to issue the necessary order. The constitutionality of this class of legislation has been upheld.[3]

Similar legislation is found in other states;[4] but independent of any state legislation, as an aid to discovery in pending actions, the power to order an inspection of real property has long existed in the courts of equity.

As was said by Judge Baldwin, sitting as circuit judge in the ninth circuit:[5]—

"Ought a court of equity in a mining case, when it has "been convinced of the importance thereof for the pur- "poses of the trial, to compel an inspection and survey "of the works of the parties, and admittance thereto by "means of the appliances in use at the mine? All the "analogies of equity jurisprudence favor the affirmation "of this proposition. The very great powers with which "a court of chancery is clothed were given it to enable it "to carry out the administration of nicer and more perfect "justice than is attainable in a court of law. . . . It "would be a denial of justice, and utterly subversive of "the objects for which courts were created, for them to "refuse to exert their power for the elucidation of the "very truth—the issue between the parties. Can a court

[1] California, C. C. P., §§ 742, 743; Colorado, Mills' Annot. Stats., §§ 3164, 3176; Nevada, Comp. Laws, § 1321; New Mexico, Laws of 1887, p. 206; North Dakota, Rev. Code 1895, § 1442; South Dakota, Rev. Stats. Dak., p. 95. See Comp. Laws Dak. 1887, § 2014.

[2] Code of Civil Proc., § 376.

[3] St. Louis M. & M. Co. v. Montana Co. Ld., 9 Mont. 228; affirmed on writ of error, 152 U. S. 160.

[4] Idaho, Rev. Stats. 1887, § 4542.

[5] Thornburgh v. Savage M. Co., Fed. Cases, No. 13,996, 7 Morr. Min. Rep. 667.

"justly decide a cause without knowing the facts? And "can it refuse to learn the facts?"[1]

The equitable jurisdiction to order such inspection and survey is well recognized in England.[2]

As to the terms under which orders for such inspection are given under the existing English rules, Mr. MacSwinney says that the applicant will usually be required to submit to the following:—

"He will usually be required to give a reasonable notice "in writing, stating the time at which he proposes that the "inspection shall take place, and then names a description "of the persons whom he proposes as his agents for that "purpose. He will not be allowed to appoint agents to "whom his neighbor may reasonably object. He will not "be allowed to inspect, except for the purpose of ascertain- "ing the fact of the encroachment. His neighbors will "usually be allowed to attend the inspection. The obstruc- "tions which he may remove will usually be confined to "such matters as rubbish, framed dams, and barriers, and "recently erected walls, and then only when the removal "can take place without danger to life and health; and "(irrespective of life or health) he will not be allowed to "do unnecessary damage to his neighbor's property or "operations. He will usually have to make good all dam- "age which his neighbor may sustain; and he may be "obliged to give security that he will do so, and he will "usually have to bear all the costs of the inspection."[3]

In America the right of the courts to grant the privilege of inspection and survey in proper cases is well settled.[4]

The privilege of sampling within reasonable limits is

[1] Quoted in Montana Co. *v.* St. Louis M. & M. Co., 152 U. S. 160.

[2] Bainbridge on Mines, 4th ed., pp. 315, 317; MacSwinney on Mines, p. 540; Lonsdale *v.* Curwen, 3 Bligh, 168; Walker *v.* Fletcher, 3 Bligh, 172; Blakesley *v.* Wheeldon, 1 Hare, 176; Lewis *v.* Marsh, 8 Hare, 97; Bennett *v.* Whitehouse, 28 Beav. 119; Bennett *v.* Griffiths, 30 L. J. Q. B. 98; Whaley *v.* Braucker, 10 L. T. N. S. 155.

[3] MacSwinney on Mines, pp. 541, 542. See, also, Stewart on Mines, p. 255.

[4] St. Louis M. & M. Co. *v.* Montana Co. Ld., 152 U. S. 160; *Id.*, 9 Mont. 258; Duggan *v.* Davey, 4 Dak. 110, 128; Stockbridge Iron Co. *v.* Cone Iron Works, 102 Mass. 80; Thomas *v.* Allentown M. Co., 28 N. J. Eq. 77; Bluebird M. Co. *v.* Murray, 9 Mont. 468.

also allowed, where the value of ore is a fact to be determined. Whether or not the cost of the inspection and survey will be allowed, the party in the event of his success in the litigation, depends upon the law of the particular state or territory. Costs are matters of statutory regulation, and no general rule may be laid down.

The extent to which the courts may grant the privilege of inspection and survey, the territorial limits within which it shall be confined, and other matters of detail, will depend upon the nature of the issues. The discretion of the court in this behalf must, of course, be reasonably exercised. The right has become so well recognized by the profession, that reciprocal privileges are usually granted by stipulation.

# APPENDIX — MISCELLANEOUS.

# TITLE XII.

## FEDERAL STATUTES RELATING TO MINES, TOGETHER WITH LAND DEPARTMENT REGULATIONS.

[The section references in the foot notes are to the text of the treatise unless otherwise specified.]


I. Lode and Water Law of July 26, 1866.

II. Placer Law of July 9, 1870.

III. General Mining Act of May 10, 1872.

IV. Title XXXII, Chap. 6, of United States Revised Statutes Embodying Existing Laws Relating to Mineral Lands.

V. Land Department Regulations upon Subject of Mineral Lands other than Coal.

VI. Coal Land Law with Regulations Thereunder.

VII. Instructions Relating to Selection of Lands by Railroads and States.

VIII. Petroleum Law of Feb. 11, 1897, and Circular Instructions Relating Thereto.

IX. Alien Act of March 2, 1897.

X. Recent Legislation and Regulations on the Subject of Mining Claims Within Forest Reservations.


### I. Lode and Water Law of July 26, 1866.

For a history of the passage of this Act, its essential features, its construction by the Land Department and the courts: see §§ 53-60.

For an analysis of the changes made by the Act of May 10, 1872: see §§ 68-73.

Its place in the present system as a muniment of existing titles: § 564.

The extralateral right under the act: §§ 567, 572, 576.

First six sections repealed by act of May 10, 1872, § 9, but repeal not to affect existing rights: §§ 9, 16. See also, Rev. Stats., § 2344.

## An Act Granting the Right of Way to Ditch and Canal Owners Over the Public Lands and for Other Purposes.

14 Stats. at Large, chap. 262, page 251.

### Who May Locate; What Laws Govern.

Be it enacted: § 1. That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States.

Repealed by Act of May 10, 1872, § 9.

### Entry and Patent; Extralateral Right.

§ 2. And be it further enacted, that whenever any person, or association of persons claim a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper, having previously occupied and improved the same according to the local customs or rules of miners in the district where the same is situated, and having expended in actual labor and improvements thereon an amount of not less than one thousand dollars, and in regard to whose possession there is no controversy or opposing claim, it shall and may be lawful for said claimant, or association of claimants, to file in the local land office a diagram of the same, so extended laterally or otherwise as to conform to the local laws, customs, and rules of miners, and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode, with its dips, angles, and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition.

Repealed by Act of May 10, 1872, § 9.

### Patent Proceedings.

§ 3. And be it further enacted, that upon the filing of the diagram as provided in the second section of this act, and post-

ing the same in a conspicuous place on the claim, together with a notice of intention to apply for a patent, the register of the land office shall publish a notice of the same in a newspaper published nearest to the location of said claim, and shall also post such notice in his office for the period of ninety days; and after the expiration of said period, if no adverse claim shall have been filed, it shall be the duty of the surveyor-general, upon application of the party, to survey the premises and make a plat thereof, indorsed with his approval, designating the number and description of the location, the value of the labor and improvements, and the character of the vein exposed; and upon the payment to the proper officer of five dollars per acre, together with the cost of such survey, plat, and notice, and giving satisfactory evidence that said diagram and notice have been posted on the claim during said period of ninety days, the register of the land office shall transmit to the general land office said plat, survey, and description; and a patent shall issue for the same thereupon. But said plat, survey, or description shall in no case cover more than one vein or lode, and no patent shall issue for more than one vein or lode, which shall be expressed in the patent issued.

Repealed by Act of May 10, 1872, § 9.

**Surveys; Length of Claim; Number of Claims to Each Locator; Extralateral Right; Surface to Accompany Lode.**

§ 4. And be it further enacted, that when such location and entry of a mine shall be upon unsurveyed lands, it shall and may be lawful, after the extension thereto of the public surveys to adjust the surveys to the limits of the premises according to the location and possession and plat aforesaid; and the surveyor-general may, in extending the surveys, vary the same from a rectangular form to suit the circumstances of the country and the local rules, laws, and customs of miners; provided, that no location hereafter made shall exceed two hundred feet in length along the vein for each locator, with an additional claim for discovery to the discoverer of the lode, with the right to follow such vein to any depth, with all its dips, variations and angles,

together with a reasonable quantity of surface for the convenient working of the same, as fixed by local rules; and provided further, that no person may make more than one location on the same lode, and not more than three thousand feet shall be taken in any one claim by any association of persons.

Repealed by Act of May 10, 1872, § 9.

**States May Supply Legislation Regulating the Working of Mines.**

§ 5. And be it further enacted, that as a further condition of sale, in the absence of necessary legislation by Congress, the local legislature of any state or territory may provide rules for working mines involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent.

Repealed by Act of May 10, 1872, § 9.

**Adverse Claim; Stay of Proceedings.**

§ 6. And be it further enacted, that whenever any adverse claimants to any mine, located and claimed as aforesaid, shall appear before the approval of the survey, as provided in the third section of this act, all proceedings shall be stayed until final settlement and adjudication, in the courts of competent jurisdiction, of the rights of possession to such claim, when a patent may issue as in other cases.

Repealed by Act of May 10, 1872, § 9.

**President Empowered to Establish Land Districts.**

§ 7. And be it further enacted, that the President of the United States be, and is hereby, authorized to establish additional land districts, and to appoint the necessary officers under existing laws, wherever he may deem the same necessary for the public convenience in executing the provisions of this act.

Preserved in Rev. Stats.: § 2343, q. v.

**Rights of Way Over Public Lands.**

§ 8. And be it further enacted, that the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

Preserved in Rev. Stats.: § 2477, q. v.

**Prior Appropriators of Water Rights Protected; Rights of Way for Ditches, etc.**

§ 9. And be it further enacted, that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing and other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed; provided, however, that whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

Preserved in Rev. Stats.: § 2339, q. v.

**Homesteads Upon Mineral Lands.**

§ 10. And be it further enacted, that wherever, prior to the passage of this act, upon the lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered, and which are properly agricultural lands, the said settlers or owners of such homesteads shall have a right of pre-emption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents per acre, and in quantity not to exceed one hundred and sixty acres; or said parties may avail themselves of

the provisions of the act of Congress approved May twenty, eighteen hundred and sixty-two, entitled "An act to secure homesteads to actual settlers on the public domain," and acts amendatory thereof.

Substantially preserved in Rev. Stats.: § 2341, q. v.

**Secretary of Interior May Set Apart Agricultural Lands.**

§ 11. And be it further enacted, that upon the survey of the lands aforesaid, the secretary of the interior may designate and set apart such portions of the said lands as are clearly agricultural lands, which lands shall thereafter be subject to pre-emption and sale as other public lands of the United States, and subject to all the laws and regulations applicable to the same.

Preserved in Rev. Stats.: § 2342.

## II. Placer Law of July 9, 1870.

For discussion of this act: see text, § 62.
Local rules and customs after the passage of this act: § 63.
Changes made by the Act of 1872: §§ 72, 447.

## An Act to Amend "An Act Granting the Right of Way to Ditch and Canal Owners Over the Public Lands, and for Other Purposes."

16 Stats. at Large, chap. 235, p. 217.

**Act of 1866 Amended.**

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the act granting the right of way to ditch and canal owners, over the public lands, and for other purposes, approved July twenty-six, eighteen hundred and sixty-six, be, and the same is hereby amended, by adding thereto the following additional sections, numbered twelve, thirteen, fourteen, fifteen, sixteen, and seventeen, respectively, which shall hereafter constitute and form a part of the aforesaid act.

**Placers Subject to Entry; Size of Claim; Group Claims.**

§ 12. And be it further enacted, that claims usually called "placers," including all forms of deposit,[1] excepting veins of quartz, or other rock in place, shall be subject to entry and patent under this act, under like circumstances and conditions, and upon similar proceedings as are provided for vein or lode claims;[2] provided, that where the lands have been previously surveyed by the United States, the entry, in its exterior limits, shall conform to the legal subdivisions of the public lands, no further survey or plat in such case being required, and the lands may be paid for at the rate of two dollars and fifty cents per acre; provided, further, that legal subdivisions of forty acres may be subdivided into ten acre tracts;[3] and that two or more persons, or association of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof;[4] and, provided further, that no location of a placer claim, hereafter made, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any bona fide pre-emption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any bona fide settler to any purchaser.

See § 2329 Rev. Stats.

[1] What substances may be located under placer laws: §§ 419-428.
[2] Location and its requirements: §§ 432, 433.
Discovery: § 437.
Marking on the ground: §§ 454, 455.
Location certificate: § 450.
[3] Form and extent of placer locations prior to Rev. Stats: § 447.
Form and extent under Rev. Stats: § 448.
[4] Placer locations by corporations: § 449.
Locations by several persons in the interest of one: § 450.
Number of locations by an individual: § 450.

**When Patent May Be Obtained; Proofs.**

§ 13. And be it further enacted, that where said persons or association, they and their grantors, shall have held and worked their said claims for a period equal to the time prescribed by the statute of limitations for mining claims of the state or territory

where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this act, in the absence of any adverse claim; provided, however, that nothing in this act shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.

See § 2332 Rev. Stats.

Proceedings to obtain patent to lode claims generally applicable to placers: § 699.
Description of placer claims upon surveyed lands: § 700.
Proof of expenditure: § 701.
Proof of mineral character of land and that no lodes within the limits of the claim exist: §§ 702, 703.
Survey of placer claim: § 672.
Surveyor-general's certificate as to expenditures: § 673.

**Verification of Affidavits.**

§ 14. And be it further enacted, that all ex-parte affidavits required to be made under this act, or the act of which it is amendatory, may be verified before any officer authorized to administer oaths within the land district where the claims may be situated.

Preserved in Rev. Stats. § 2335.

**Fees.**

§ 15. And be it further enacted, that registers and receivers shall receive the same fees for services under this act as are provided by law for like services under other acts of Congress; and that effect shall be given to the foregoing act according to such regulations as may be prescribed by the commissioner of the general land office.

See Rev. Stats. § 2238.

**Public Surveys Extended.**

§ 16. And be it further enacted, that so much of the act of March third, eighteen hundred and fifty-three, entitled "An act to provide for the survey of the public lands of California, the granting of pre-emption rights, and for other purposes," as pro-

vides that none other than township lines shall be surveyed where the lands are mineral, is hereby repealed. And the public surveys are hereby extended over all such lands; provided, that all subdividing of the surveyed lands into lots of less than one hundred and sixty acres may be done by county and local surveyors at the expense of the claimants; and provided further, that nothing herein contained shall require the survey of waste or useless land.

**Easements for Water Rights.**

§ 17. And be it further enacted, that none of the rights conferred by sections five, eight, and nine of the act of which this is amendatory shall be abrogated by this act; and the same are hereby extended to all public lands affected by this act; and all patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory. But nothing in this act shall be construed to repeal, impair, or in any way affect the provisions of the "Act granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the state of Nevada," approved July twenty-fifth, eighteen hundred and sixty-six.

See Rev. Stats. §§ 2340, 2344.

## III. General Mining Act of May 10, 1872.

For a history of the passage of this act: see §§ 68, 69.

For a discussion of the changes made in the then existing law by this act: see text, §§ 70-72.

For a statement of the new provisions embodied in this act, not contained in previous acts: see § 73.

Extra lateral rights under this act: §§ 581-594.

### An Act to Promote the Development of the Mining Resources of the United States.

17 Stats. at Large, chap. 152, p. 91.

**Valuable Mineral Deposits Open to Location; Who May Locate.**

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, § 1. That all valuable mineral deposits[1] in land belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States, and those who have declared their intention to become such,[2] under regulations prescribed by law,[3] and according to the local customs or rules of miners,[4] in the several mining districts so far as the same are applicable and not inconsistent with the laws of the United States.

Preserved in Rev. Stats. § 2319.

[1] The metallic or nonmetallic character of deposits occurring in veins as affecting the right of appropriation: § 323.

Character of deposits subject to appropriation under placer laws: §§ 419-428.

[2] Only citizens may locate, or those who have declared their intention to become such: § 223.

Who are citizens: §§ 224-226.

Citizenship, how proved: § 227.

Acquisition of title to unpatented claims by aliens: §§ 231-234.

Effect of naturalizing alien after he has located his claim: § 232.

Rights of aliens in the states: §§ 237-238.

General property rights of aliens in the territories: §§ 242-244.

[3] Limits within which state may legislate: §§ 249-250.

Subjects upon which states have enacted laws the validity of which are open to question: § 251.

[4] Permissive scope of local regulations: § 270.

Penalty for noncompliance with district rules: § 274.

Subject of district rules generally: §§ 268-275.

**Length of Lode Claim; Discovery Essential to Location; Width of Claim; End Lines Must Be Parallel.**

§ 2. That mining claims upon veins or lodes of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits heretofore located, shall be governed, as to length along the vein or lode, by the customs, regulations, and laws in force at the date of their location. A mining claim lo-

cated after the passage of this act, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode;[1] but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.[2] No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited, by any mining regulation, to less than twenty-five feet on each side of the middle of the vein at the surface,[3] except where adverse rights existing at the passage of this act shall render such limitation necessary. The end lines of each claim shall be parallel to each other.[4]

Preserved in Rev. Stats. § 2320.

[1] Length of lode claim: § 361.
Surface conflicts with prior locations: § 363.

[2] Discovery as the source of miner's title: § 335.
What constitutes a valid discovery: § 336.
Where discovery must be made: § 337.
Effect of loss of discovery upon remainder of location: § 338.
Extent of locator's rights after discovery and prior to completion of location: § 339.
Surface must include apex: § 364.

[3] Width of lode claims: § 361.

[4] End lines must be parallel: §§ 367, 582.
Side-end lines: § 367.

**Extralateral and Intralimital Rights.**

§ 3. That the locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists at the passage of this act, so long as they comply with the laws of the United States and the state, territorial, and local regulations, not in conflict with said laws of the United States, governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations and of all veins, lodes, and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend out-

side the vertical side lines of said surface locations; provided, that their right of possession to such outside parts of said veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as aforesaid, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of said veins or ledges. And provided further, that nothing in this section shall authorize the locator or possessor of a vein or lode which extends, in its downward course, beyond the vertical lines of his claim, to enter upon the surface of a claim owned or possessed by another.

Preserved in Rev. stats.: § 2322.
The "dip right" under local rules: § 566.
The right to pursue the vein in depth prior to patent, under act of 1866: § 567.
Nature of estate in the vein created by grant of "dip right": § 567.
Extralateral rights on the original lode under patents issued prior to May 10, 1872: §§ 572-574.
Parallelism of end-lines not required under act of 1866 but required by Act of 1872: §§ 576, 582.
Extralateral rights in locations made under Act of 1872: §§ 581-594.
"Broad lodes": § 583.
Vein entering and departing through same side-line: § 584.
Vein crossing two parallel side lines: §§ 586-589.
Vein crossing two opposite non-parallel side-lines: § 590.
Vein crossing one end line and a side line: § 591.
Vein with apex wholly within location but crossing no boundary: § 592.
Extralateral rights as to veins other than the one upon which the location is based: § 593.
Extralateral rights conferred by Act of 1872 on locators of other lodes located before 1872: §§ 598-600.
Legal obstacles interrupting extralateral rights: §§ 608-615.
Union of veins on the dip: § 614.
Cross lodes: §§ 557-560.
Intralimital rights: §§ 548-553.

**Tunnel Rights; Length of Tunnels.**

§ 4. That where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel,

to the same extent as if discovered from the surface; and locations on the lines of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of said tunnel.

Preserved in Rev. Stats. § 2323.
Tunnel locations prior to the enactment of federal laws: § 467.
Acts to be performed in acquiring tunnel rights: § 472.
"Line" and "face" of tunnel defined: §§ 473-474.
Marking of tunnel location on the ground: § 475.
Length upon discovered lode awarded to tunnel owner by above section: § 481.
Necessity for appropriation of discovered lode by surface location: § 482. See note to § 2323, Rev. Stats.
To what extent does the inception of a tunnel right and its perpetuation by prosecuting work with reasonable diligence operate as a withdrawal of the surface from exploration by others?: §§ 483-491. See note to § 2323, Rev. Stats., post.

**Local Rules Made by Miners; Marking Boundaries; Records; Annual Labor; Forfeiture; Resumption of Work; Forfeiture to Co-Owners.**

§ 5. That the miners of each mining district may make rules and regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the passage of this act, and until a patent shall have been issued therefor, not less than one hundred dollars' worth of labor shall be performed

or improvements made during each year. On all claims located prior to the passage of this act, ten dollars' worth of labor shall be performed or improvements made each year for each one hundred feet in length along the vein until a patent shall have been issued therefor;[1] but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be opened to relocation in the same manner as if no location of the same had ever been made; provided, that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after such failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required by this act, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if, at the expiration of ninety days after such notice in writing or by publication, such delinquent should fail or refuse to contribute his proportion to comply with this act, his interest in the claim shall become the property of his co-owners who have made the required expenditures.

[1] Amended March 3, 1873, so that the time for the first annual expenditure on claims located prior to the passage of the act of May 10, 1872, should be extended to June 10, 1875. Again amended June 6, 1874, so that the time for such expenditure on this class of claims should be extended to January 1st, 1875: 18 Stats. at Large, 61.

See Rev. Stats. § 2324.

Local rules and regulations: §§ 268-275.

What is sufficient marking under federal law: § 373; under state statutes: § 374.

Location certificate and record: §§ 379-392.

Annual labor: §§ 623-638.

Requirement as to annual labor imperative: § 624.

Work done within the limits of a group of claims: § 630.

Failure to perform labor renders claim open to relocation: §§ 642-643.

Forfeiture to co-owners: § 646.

Resumption of work: §§ 651-654.

**Patent Proceedings.**

§ 6. That a patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this act, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this act, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States surveyor general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the grounds, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted as aforesaid, and shall file a copy of said notice in such land office, and shall thereupon be entitled to a patent for said land in the manner following: The register of the land office, upon the filing of such application, plat, and field-notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to said claim; and he shall also post such notice in his office for the same period. The claimant, at the time of filing his application, or at any time thereafter within sixty days of publication, shall file with the register a certificate of the United States surveyor general that five hundred dollars' worth of labor has been expended or improvement made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication, the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during said period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon

the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with this act.

Preserved Rev. Stats. § 2325.
Survey for patent: §§ 670-673.
The survey of lodes: § 671. For placers: § 672.
Posting of notice and copy of plat: § 677.
Initiatory proceedings: § 678.
Land embraced within the claim must be clear on tract books: § 679.
Application: § 681.
Verification of application: § 682.
Proofs: §§ 683-692.
Application to purchase: § 694. Patents for placers: §§ 699-704.

**Adverse Claim, How Filed and Adjudicated; Proof of Citizenship.**

§ 7. That where an adverse claim shall be filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice, and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended, or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by

the register to the commissioner of the general land office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it shall appear from the decision of the court, that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor general, whereupon the register shall certify the proceedings and judgment roll to the commissioner of the general land office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Proof of citizenship under this act, or the acts of July twenty-sixth, eighteen hundred and sixty-six, and July ninth, eighteen hundred and seventy, in the case of an individual, may consist of his own affidavit thereof, and in case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge or upon information and belief, and in case of a corporation organized under the laws of the United States, or of any state or territory of the United States, by the filing of a certified copy of their charter or certificate of incorporation; and nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever.

See Rev. Stats. §§ 2321, 2326.
Adverse claims: §§ 712-766.
What courts have jurisdiction: §§ 746-750.
Is a suit involving an adverse claim legal or equitable in its nature: § 754.
Form of judgment: § 763.
Effect of judgment: § 765.
Citizenship, how proved: § 227.
See note to § 2326 Rev. Stats.

**Description of Claim on Surveyed and Unsurveyed Land.**

§ 8. That the description of vein or lode claims, upon surveyed lands, shall designate the location of the claim with reference to the lines of the public surveys, but need not conform therewith; but where a patent shall be issued as aforesaid for claims upon unsurveyed lands, the surveyor general, in extending the sur-

veys, shall adjust the same to the boundaries of such patented claim, according to the plat or description thereof, but so as in no case to interfere with or change the location of any such patented claim.

Preserved in Rev. Stats. § 2327.

**Patents for Claims Located Prior to 1872, but Patented Subsequently; Rights Under Patents Issued Before Act of 1872.**

§ 9. That sections one, two, three, four, and six of an act entitled, "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," approved July twenty-sixth, eighteen hundred and sixty-six, are hereby repealed, but such repeal shall not affect existing rights. Applications for patents for mining claims now pending may be prosecuted to a final decision in the general land office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this act; and all patents for mining claims heretofore issued under the act of July twenty-sixth, eighteen hundred and sixty-six, shall convey all the rights and privileges conferred by this act where no adverse rights exist at the time of the passage of this act.

See Rev. Stats. § 2328.

Extralateral rights on the original lode under patents issued prior to May 10, 1872. §§ 572-577.

Extralateral rights on other lodes conferred by Act of 1872 on owners of claims previously located: §§ 598-600.

Construction of patents applied for prior but issued subsequent to Act of 1866: § 604.

**Placer Patents; Act of 1870 Amended; Homesteads.**

§ 10. That the act entitled "An act to amend an act granting the right of way to ditch and canal owners over the public lands, and for other purposes," approved July ninth, eighteen hundred and seventy, shall be and remain in full force, except as to the proceedings to obtain a patent, which shall be similar to the proceedings prescribed by sections six and seven of this act for obtaining patents to vein or lode claims; but where said placer

claims shall be upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining claims hereafter located shall conform as near as practicable with the United States system of public land surveys and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant, but where placer claims can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; provided, that proceedings now pending may be prosecuted to their final determination under existing laws; but the provisions of this act, when not in conflict with existing laws, shall apply to such cases; and, provided also, that where by the segregation of mineral land in any legal subdivision a quantity of agricultural land less than forty acres remains, said fractional portion of agricultural land may be entered by any party qualified by law, for homestead or pre-emption purposes.

See Rev. Stats. § 2331.
Patents for placers: §§ 699-704.
Description of placers upon surveyed lands: § 700.
Proof of expenditures: § 701.
Proof of mineral character: § 702.
Proof that no known lodes exist within limits of placer claim: § 703

**Patents for Lodes Within Placers.**

§ 11. That where the same person, association, or corporation, is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case (subject to the provisions of this act and the act entitled "An act to amend an act granting the right of way to ditch and canal owners over the public lands, and for other purposes," approved July ninth, eighteen hundred and seventy) a patent shall issue for the placer claim, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is de-

scribed in the second section of this act, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or a lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof.

Preserved in Rev. Stats. § 2333.
Patents for lodes within placers: § 704.

**Deputy Mineral Surveyors; Expenses of Patent; Notices, Where Published; Designation of Newspaper; Fees of Officers.**

§ 12. That the surveyor general of the United States may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims. The expenses of the survey of vein or lode claims, and the survey and subdivision of placer claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make the survey. The commissioner of the general land office shall also have power to establish the maximum charges for surveys and publication of notices under this act; and, in case of excessive charges for publication, he may designate any newspaper published in a land district where mines are situated for the publication of mining notices in such district, and fix the rates to be charged by such paper; and, to the end that the commissioner may be fully informed on the subject, each applicant shall file with the register a sworn statement of all charges and fees paid by said applicant for publication and surveys, together with all fees and money paid the register and the receiver of the land office, which statement shall be transmitted, with the other papers in the case, to the commissioner of the general land office. The fees of the

register and the receiver shall be five dollars each for filing and acting upon each application for patent or adverse claim filed, and they shall be allowed the amount fixed by law for reducing testimony to writing, when done in the land office, such fees and allowances to be paid by the respective parties; and no other fees shall be charged by them in such cases. Nothing in this act shall be construed to enlarge or affect the rights of either party in regard to any property in controversy at the time of the passage of this act, or of the act entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes," approved July twenty-sixth, eighteen hundred and sixty-six, nor shall this act affect any right acquired under said act; and nothing in this act shall be construed to repeal, impair, or in any way affect the provisions of the act entitled "An act granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the state of Nevada," approved July twenty-fifth, eighteen hundred and sixty-six.

See Rev. Stats. §§ 2334, 2338, 2344.
Surveyors-general and deputies: § 659.
Statement of fees and charges: § 693.

**Affidavits, Before Whom To Be Made.**

§ 13. That all affidavits required to be made under this act, or the act of which it is amendatory, may be verified before any officer authorized to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the Land Office. In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided, on personal notice of at least ten days, to the opposing party; or if said party cannot be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land office as published nearest to the location of such land; and the register shall require proof that such notice has been given.

See Rev. Stats. §§ 2325, 2335.

**Cross Lodes, Uniting Veins.**

§ 14. That where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection: provided, however, that the subsequent location shall have the right of way through said space of intersection for the purposes of convenient working of the said mine: and provided, also, that where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection.

Preserved in Rev. Stats. § 2336.
Cross lodes: §§ 557-560.
Union of veins on dip: § 614.

**Millsites, Patents for.**

§ 15. That where non-mineral land, not contiguous to the vein or lode, is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface-ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable under this act to veins or lodes; provided, that no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this act for the superficies of the lode. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill-site as provided in this section.

Preserved in Rev. Stats. § 2337.
Millsites: §§ 519-524, 708.
Location of millsite with reference to lode: § 522.
Nature of use required in case of location by lode proprietor: § 523.
Right to millsite; how initiated: § 521.
Millsite used for quartz-mill or reduction works disconnected with lode ownership: § 524.

**Repealing Clauses.**

§ 16. That all acts and parts of acts inconsistent herewith are hereby repealed; provided, that nothing contained in this act

shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws.

See Rev. Stats. § 5596.

## IV. Title XXXII, Chap. 6, of United States Revised Statutes Embodying Existing Laws Relating to Mineral Lands.

### Reservation of Mineral Lands from Sale Under General Laws.

§ 2318. In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.

General policy of government as to reservation of Mineral lands: § 47.

Terms of reservation used in various grants: § 86.

Reservation of Mineral lands in grants to states: §§ 136-139, 140.

Reservation in Mexican grants under Act of 1891: § 127.

Reservation in railroad grants: §§ 152, 154, 155.

### Mineral Deposits Open to Location; Who May Locate.

§ 2319. All valuable mineral deposits[1] in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such,[2] under regulations prescribed by law,[3] and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.[4]

Same as sec. 1, Act 1872.

"Mineral Lands" and kindred terms defined: §§ 85-98.

Rules for determining mineral character of land: § 98.

A recent ruling of secretary Bliss in Pacific Coast Marble Company v. N. P. R. R., decided Sept. 9, 1897, fully supports the views of the author announced in the text as to what constitutes "Mineral Lands."

[1]The metallic or non-metallic character of deposits occurring in veins as affecting the right of appropriation: § 323.

Character of deposits subject to appropriation under placer laws: §§ 419-428.

[2]Only citizens or those who have declared their intention to become such may locate: § 223.
Who are citizens: §§ 224-226.
Citizenship how proved: § 227.
Acquisition of title to unpatented claims by aliens: §§ 231-234.
Effect upon location of naturalizing an alien after he has located his claim: § 232.
Rights of aliens in the states: §§ 237-238.
General property rights of aliens in the territories: §§ 242-244.
[3]Limits within which state may legislate: §§ 249, 250.
[4]Permissive scope of local regulations: § 270.
District regulations, generally: §§ 268-275.

**Length of Lode Claims; Discovery Essential to Location; Width of Claims; End-Lines Must Be Parallel.**

§ 2320. Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode;[1] but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.[2] No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary.[3] The end lines of each claim shall be parallel to each other.[4]

Same as § 2, Act of 1872.
[1]Length of lode claims: § 361.
Location in excess: § 362.
Surface conflicts with prior locations: § 363.
[2]Discovery as the source of miner's title: § 335.
What constitutes a valid discovery: 336.
Where discovery must be made: § 337.
Effect of loss of discovery upon remainder of location: § 338.

Extent of locator's rights after discovery and prior to completion of location: § 339.
Surface must include apex: § 364.
[3]Width of lode claims: § 361.
[4]End lines must be parallel: § 582.
Side-end lines: § 367.

**Proof of Citizenship.**

§ 2321. Proof of citizenship, under this chapter, may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge, or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any state or territory thereof, by the filing of a certified copy of their charter or certificate of incorporation.

See § 7, Act of 1872.

*Supplemented by Act of April 26, 1882, which provides as follows:*

"That applicants for mineral patents, if residing beyond the limits of the district wherein the claim is situated, may make any oath or affidavit required for proof of citizenship before the clerk of any court of record, or before any notary public of any state or territory." 22 Stats. at Large, p. 49, chap. 106.

Citizenship, how proved: § 227.

**Extralateral and Intralimital Rights.**

§ 2322. The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations,[1] and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although

such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges.[2] And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

Same as § 3, Act of 1872.

[1]Intralimital right: §§ 548-553.

[2]Right to pursue the vein in depth prior to patent under act of 1866: See § 567.

Nature of estate in vein created by grant of "dip right": § 567.

Extralateral rights on original lode under patents issued prior to May 10, 1872: §§ 572-574.

Parallelism of end lines not a condition precedent to exercise, under act of 1866, of extralateral right, but is under Rev. Statutes, discussed: §§ 576, 582.

Extralateral right under Rev. Statutes, discussed: §§ 581-594.

"Broad lodes": § 583.

Vein entering and departing through same side line: § 584.

Vein crossing two parallel side lines: §§ 586-589.

Vein crossing two opposite non-parallel side-lines: § 590.

Vein crossing one end-line and a side line: § 591.

Vein with apex wholly within location but crossing no boundary: § 592.

Extralateral rights as to veins other than the one upon which the location is based: § 593.

Extralateral rights conferred by Act of 1872 on locators of other lodes located before 1872: §§ 598-600.

Legal obstacles interrupting extralateral rights: §§ 608-615.

### Tunnels and Tunnel Rights; Length of Tunnels.

§ 2323. Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the

same extent as if discovered from the surface; and locations on the line of such tunnel or veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel.

Same as § 4, Act of 1872.

Tunnel locations prior to the enactment of federal laws: § 467.

Acts to be performed in acquiring tunnel rights: § 472.

"Line" and "face" of tunnel defined: §§ 473-474.

Marking of tunnel locations on the ground: § 475.

Length upon discovered lode awarded to tunnel owner by above section: § 481.

Necessity for appropriation of discovered lode by surface location: § 482.

To what extent does the inception of a tunnel right and its perpetuation by prosecuting work with reasonable diligence operate as a withdrawal of the surface from exploration by others? §§ 483-491.

After the chapter on Tunnel Claims (ante, §§ 467, 491) had been printed, the Supreme Court of the United States rendered its decision in two important cases discussed in the text. Campbell v. Ellet, 167 U. S., adopts the rule that a failure to mark on the surface of the ground the point of discovery and the boundaries of a tract claimed will not destroy the right of the tunnel owner to mineral veins which he has discovered in the tunnel, when he posted the proper notices at the mouth of the tunnel and filed them in the office required by the local statute. (Affirming Ellet v. Campbell, 18 Colo. 510.)

In Enterprise Mining Co. v. Rico-Aspen Cons., 167 U. S. 108, it was determined:

(1) The right of the owner of a tunnel to all veins or lodes not previously known to exist, which are within 3000 feet from its face on the line thereof, is superior to the right of one who subsequently makes a discovery and location of another claim, if the two conflict.

(2) The right to a vein discovered in a tunnel dates by relation back to the time of the location of the tunnel site.

(3) The location of a claim to a vein discovered in a tunnel may be made on its discovery by taking the full length of 1500 feet allowed by U. S. Rev. Stats., § 2320, on either side of the tunnel, or any such proportion thereof on either side as the locator may desire, and is not limited to 750 feet on each side of the tunnel on account of a failure to indicate, when the tunnel was located, what particular 1500 feet he would claim.

Thus affirming the decision of the Circuit Court of Appeals (66 Fed. 200).

These decisions clear the atmosphere to some extent, but there yet remain many questions to be settled, the embarrassments of which will be apparent, when the law as declared in these cases is applied to the subject of extralateral and conflicting underground rights.

**Local District Rules; Marking Boundaries; Records; Annual Labor; Forfeiture; Resumption of Work; Forfeiture to Co-Owners.**

§ 2324. The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required

hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures.

*Tunnel Amendment, February 11, 1875.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that section two thousand three hundred and twenty-four of the Revised Statutes be, and the same is hereby, amended so that where a person or company has or may run a tunnel for the purpose of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since the passage of said act; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by said act. 18 Stats. at Large, page 315, chap. 41.

*Amendment of January, 22, 1880.*

"Provided, that the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim, and this section shall apply to all claims located since the tenth day of May, Anno Domini eighteen hundred and seventy-two." 21 Stats. at Large, p. 61, chap. 9.

**Limits within which local regulations may be made: § 270.**
**What is sufficient marking under federal law: § 373. Under State Statutes: § 374.**
**Necessity and object of marking: § 371.**
**Time allowed for marking: § 372.**
**Perpetuation of monuments: § 375.**
**"Natural objects" and "permanent monuments" defined: § 383.**

Location certificate and record: §§ 379-392.
Annual labor: §§ 623-638.
Requirement as to annual labor imperative: § 624.
Value of annual labor, how estimated: § 635.
Circumstances under which annual labor is excused: § 634.
Failure to perform labor renders claim open to relocation: §§ 642-645.
Work done within limits of a group of claims: § 630.
Forfeiture to co-owners: § 646.
Resumption of work: §§ 651-654.

### Proceedings to Secure a Patent.

§ 2325. A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States surveyor general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is cor-

rect, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

Same as § 7, Act 1872.

*Amended January 22, 1880, by adding the following proviso:*

"Provided, that where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits; and, provided, that this section shall apply to all applications now pending for patents to mineral lands." 21 Stats. at Large, p. 61, chap. 9.

Survey for patent: §§ 670-672.
Application for Lode Patents and proceedings therein: §§ 677-695.
Application for Placer Patents and proceedings therein: §§ 699-701.
Application for Millsite Patents: § 708.
Application for patent, contents: § 680. Application by one of several co-owners, or by corporations: § 681.
Land embraced within the claim must be clear on tract books: § 679.
Verification of application and proofs: § 682.
Proof of compliance with law: §§ 683-692.
Statement of fees and charges: § 693.
Application to purchase: § 694.
Proof of five hundred dollars' expenditure on placers: § 700.
For forms used in patent proceedings, see post, "Forms."

**Adverse Claims, Filing of, and Suit Upon.**

§ 2326. Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the commissioner of the general land office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim with the proper fees, and file the certificate and description by the surveyor general, whereupon the register shall certify the proceedings and judgment roll to the commissioner of the general land office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of a title conveyed by a patent for a mining claim to any person whatever.

Substantially same as § 7, Act of 1872.

*Supplemented by Act of March 3rd, 1881, which provided as follows:*

"That if, in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land office or be entitled to a patent for the ground in controversy until he shall have perfected his title." 21 Stats. at Large, page 505, chap. 140.

*And by the Act of April 26, 1882 (22 Stats at Large 49) which provides:*

"That the adverse claim required by section twenty-three hundred and twenty-six of the Revised Statutes may be verified by the oath of any duly authorized agent or attorney in fact of the adverse claimant cognizant of the facts stated; and the adverse claimant, if residing or at the time being beyond the limits of the district wherein the claim is situated, may make oath to the adverse claim before the clerk of any court of record of the United States or the state or territory where the adverse claimant may then be, or before any notary public of such state or territory." 22 Stats at Large, p. 49, chap. 106.

What is and what is not subject of adverse claim: §§ 717-730.
How when and where adverse claim must be asserted: §§ 734-742.
Action to determine adverse claims: § 746-706.
Pleadings and Practice: § 754-758.
The judgment and its effect: § 763-766.
What courts have jurisdiction: § 746.
From whence do state courts derive their jurisdiction to try such cases? § 750.
Are suits involving adverse claims in their nature legal or equitable? § 754.

**Description of Claims Upon Surveyed and Unsurveyed Lands.**

§ 2327. The description of vein or lode claims, upon surveyed lands, shall designate the location of the claim with reference

to the lines of the public surveys, but need not conform therewith; but where a patent shall be issued for claims upon unsurveyed lands, the surveyor general, in extending the surveys, shall adjust the same to the boundaries of such patented claim, according to the plat or description thereof, but so as in no case to interfere with or change the location of any such patented claim.

Same as § 8, Act of 1872.
Description: §§ 671-672.

**Patents for Claims Located Under Former Laws; Patents Issued Under Prior Laws.**

§ 2328. Applications for patents for mining claims under former laws now pending may be prosecuted to a final decision in the general land office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this chapter; and all patents for mining claims upon veins or lodes heretofore issued shall convey all the rights and privileges conferred by this chapter, where no adverse rights existed on the tenth day of May, eighteen hundred and seventy-two.

See § 9, Act of 1872.
Extralateral rights on other lodes conferred by Act of 1872 on owners of claims previously located: §§ 598-600.
Extralateral rights on the original lode under patents issued prior to May 10, 1872: §§ 572-577.
Construction of patents applied for prior but issued subsequent to Act of 1872, § 604.

**Placers and Other Forms of Deposit not in Place May Be Entered and Patented.**

§ 2329. Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously

surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.

Substantially same as first clause of § 12, Act of 1870.
Character of deposits subject to appropriation under placer laws: §§ 419-428.
Placer patents: §§ 672, 673, 699-703.
Description of placer claims upon surveyed lands: § 700.

**Subdivisions of Claims; Group Entries; Maximum Extent of Placers.**

§ 2330. Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any bona fide pre-emption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any bona fide settler to any purchaser.

See § 12, Act of 1870.
Form and extent of placer locations prior to Rev. Statutes: § 447.
Form and extent under Rev. Stats.: § 448.
Placer locations by corporations: § 449.
Locations by several persons in the interest of one: § 450.
Number of locations by an individual: § 450.

**Placer Locations Must Conform to Public Surveys; Homesteads.**

§ 2331. Where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each indi-

vidual claimant; but where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral lands in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or pre-emption purposes.

See § 16, Act of 1870.
See § 16, Act of 1872.
Survey of placer claims: § 672.
Description of placer claims upon surveyed lands: § 700.

**Placer Patents, When and How Obtained.**

§ 2332. Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the state or territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.

Substantially same as § 13, Act of 1870.
Placer patents: §§ 699-704.
Proof of title without possession under this section: § 688.
Proof of five hundred dollars' expenditure: § 701.
Proof of mineral character of land: § 702.

**Patents for Lodes Within Placers.**

§ 2333. Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer

claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof.

Same as § 11 of Act 1872.
Right to appropriate lodes within placers: § 413.
Manner of locating lodes within placers: §414.
Width of lode locations within placers: § 415.
Patent for lodes within placers: § 704.
What is conveyed by Placer Patent: 781.
"Lodes known to exist": § 781.

**Deputy Mineral Surveyors; Expenses of Survey and Patent; Publication of Notices; Designation of Newspaper; Fees of Officers.**

§ 2334. The surveyor general of the United States may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims. The expenses of the survey of vein or lode claims, and the survey and subdivision of placer claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make the survey. The commissioner of the general land office shall also have power to establish the maximum charges for surveys and publication of notices under this chapter; and, in case of excessive charges for publication, he may designate any newspaper published in a land district where mines are situated for the publication of mining notices in such district, and fix the rates to be charged by such paper; and, to the

end that the commissioner may be fully informed on the subject, each applicant shall file with the register a sworn statement of all charges and fees paid by such applicant for publication and surveys, together with all fees and money paid the register and the receiver of the land office, which statement shall be transmitted, with the other papers in the case, to the commissioner of the general land office.

Surveyors-general and deputies: § 659.
Statement of fees and charges in patent proceedings: § 693.

### Affidavits, Before What Officers To Be Made.

§ 2335. All affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land district where the claims may be situated [see amendment to sec. 2325, ante], and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land office. In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided on personal notice of at least ten days to the opposing party; or if such party cannot be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land office as published nearest to the location of such land; and the register shall require proof that such notice has been given.

Same as § 13, Act of 1872. See also, § 14, Act of 1870.
Proof of mineral character of lands: §§ 689, 702.

### Cross Lodes and Uniting Veins.

§ 2336. Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the conven-

ient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection.

Same as § 14, Act of 1892.
Cross lodes: §§ 557-560.
Union of veins on dip, § 614.

**Millsites, Classes, Patents For.**

§ 2337. Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his millsite, as provided in this section.

Same as § 15, Act of 1872.
Millsites: §§ 519-524, 708.
Classes of millsites: § 520.
Right to millsite, how initiated: § 521.
Location with reference to lode: § 522.
Nature of use required in case of location by lode proprietor: § 523.
Millsite used for quartz mill or reduction works: § 524.
Manner of acquiring patent for millsites: § 708.

**State Legislatures May Pass Supplementary Laws.**

§ 2338. As a condition of sale, in the absence of necessary legislation by Congress, the local legislature of any state or territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent.

Same as § 5, Act 1866.
Easements, drainage, etc.: §§ 252-264, 529-531.
Limits within which state may legislate: §§ 249-250.

**Prior Rights to Water Protected; Rights of Way For Ditches.**

§ 2339. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

Same as § 9, Act of 1866.
Rights of way for ditches and canals: § 530.

**Patents Granted, Subject to Easements.**

§ 2340. All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights, as may have been acquired under or recognized by the preceding section.

See § 17, Act of 1870.
Location subject only to pre-existing easements: § 531.

**Homesteads Upon Mineral Lands.**

§ 2341. Wherever, upon the lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered, and which are properly agricultural lands, the settlers or owners of such homesteads shall have a right of pre-emption thereto, and shall be entitled to purchase the same at the price of one dollar

and twenty-five cents per acre, and in quantity not to exceed one hundred and sixty acres; or they may avail themselves of the provisions of chapter five of this title, relating to "Homesteads."

See § 10, Act of 1866.
Character of lands, when and how established: §§ 107, 207, 717.
Homestead and other agricultural lands: §§ 202-212.

**Secretary of Interior May Set Apart Agricultural Lands.**

§ 2342. Upon the survey of the lands described in the preceding section, the secretary of the interior may designate and set apart such portions of the same as are clearly agricultural lands, which lands shall thereafter be subject to pre-emption and sale as other public lands, and be subject to all the laws and regulations applicable to the same.

See § 11, Act of 1866.

**Additional Land Districts, Establishment of.**

§ 2343. The president is authorized to establish additional land-districts, and to appoint the necessary officers under existing laws, wherever he may deem the same necessary for the public convenience in executing the provisions of this chapter.

See § 7, Act of 1866.

**Construction of Act, Generally.**

§ 2344. Nothing contained in this chapter shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws; nor to affect the provisions of the act entitled "An act granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the state of Nevada," approved July twenty-five, eighteen hundred and sixty-six.

See § 8, Act 1866.
See § 16, Act 1872.
Laws of 1866 and 1870 discussed: §§ 53-64.

**Mining Laws Not Applicable to Certain States.**

§ 2345. The provisions of the preceding sections of this chapter shall not apply to the mineral lands situated in the States of Michigan, Wisconsin, and Minnesota, which are declared free and open to exploration and purchase, according to legal subdivisions, in like manner as before the tenth day of May, eighteen hundred and seventy-two. And any bona fide entries of such lands within the states named since the tenth of May, eighteen hundred and seventy-two, may be patented without reference to any of the foregoing provisions of this chapter. Such lands shall be offered for public sale in the same manner, at the same minimum price, and under the same rights of preemption as other public lands.

States wherein federal mining laws are operative: §§ 18-21.

**Mineral Lands Not Granted to States or Corporations.**

§ 2346. No act passed at the first session of the thirty-eighth Congress, granting lands to states or corporations to aid in the construction of roads or for other purposes, or to extend the time of grants made prior to the thirtieth day of January, eighteen hundred and sixty-five, shall be so construed as to embrace mineral lands, which in all cases are reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant.

Act of Jan. 30, 1865.

## V. Land Department Regulations upon Subject of Mineral Lands Other Than Coal.

Force and effect of decisions and regulations of land department: §§ 664-666.

**Mineral Lands Open to Exploration, Occupation and Purchase.**

1. It will be perceived that by the foregoing provisions of law the mineral lands in the public domain, surveyed or unsur-

veyed, are open to exploration, occupation, and purchase by all citizens of the United States and all those who have declared their intentions to become such.

**Status of Lode Claims Located Prior to May 10, 1872.**

2. By an examination of the several sections of the Revised Statutes it will be seen that the status of lode claims located previous to the 10th May, 1872, is not changed with regard to their extent along the lode or width of surface.

3. Mining rights acquired under such previous locations are, however, enlarged by such Revised Statutes in the following respect, viz: The locators of all such previously taken veins or lodes, their heirs and assigns, so long as they comply with the laws of Congress and with state, territorial, or local regulations not in conflict therewith, governing mining claims, are invested with the exclusive possessory right of all the surface included within the lines of their locations, and of all veins, lodes, or ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such locations at the surface, it being expressly provided, however, that the right of possession to such outside parts of said veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as aforesaid, through the end lines of their locations so continued in their own direction that such planes will intersect such exterior parts of such veins, lodes, or ledges; no right being granted, however, to the claimant of such outside portion of a vein or ledge to enter upon the surface location of another claimant.

4. It is to be distinctly understood, however, that the law limits the possessory rights to veins, lodes, or ledges, other than the one named in the original location, to such as were not adversely claimed on May 10, 1872, and that where such other vein or ledge was so adversely claimed at that date, the right of the party so adversely claiming is in no way impaired by the provisions of the Revised Statutes.

5. In order to hold the possessory title to a mining claim located prior to May 10, 1872, and for which a patent has not been issued, the law requires that ten dollars shall be expended annually in labor or improvements on each claim of one hundred feet on the course of the vein or lode until a patent shall have been issued therefor; but where a number of such claims are held in common upon the same vein or lode, the aggregate expenditure that would be necessary to hold all the claims, at the rate of ten dollars per hundred feet, may be made upon any one claim; a failure to comply with this requirement in any one year subjecting the claim upon which such failure occurred to relocation by other parties, the same as if no previous location thereof had ever been made, unless the claimants under the original location shall have resumed work thereon after such failure and before such relocation. The first annual expenditure upon claims of this class should have been performed subsequent to May 10, 1872, and prior to January 1, 1875. From and after January 1, 1875, the required amount must be expended annually until patent issues. By decision of the honorable secretary of the interior, dated March 4, 1879, such annual expenditures are not required subsequent to entry, the date of issuing the patent certificate being the date contemplated by statute.

6. Upon the failure of any one of several co-owners of a vein, lode, or ledge, which has not been entered, to contribute his proportion of the expenditures necessary to hold the claim or claims so held in ownership in common, the co-owners, who have performed the labor or made the improvements as required by said Revised Statutes, may, at the expiration of the year, give such delinquent co-owner personal notice in writing, or notice by publication in the newspaper published nearest the claim for at least once a week for ninety days; and if upon the expiration of ninety days after such notice in writing, or upon the expiration of one hundred and eighty days after the first newspaper publication of notice, the delinquent co-owner shall have failed to contribute his proportion to meet such expenditures or improvements, his interest in the claim by law passes to his co-owners who have made the expenditures or improvements as aforesaid. Where a claimant alleges ownership of a forfeited interest under the foregoing provision, the sworn statement of the publisher as

to the fact of publication, giving dates and a printed copy of the notice published, should be furnished, and the claimant must swear that the delinquent co-owner failed to contribute his proper proportion within the period fixed by the statute.

**Patents for Veins or Lodes Heretofore Issued.**

7. Rights under patents for veins or lodes heretofore granted under previous legislation of Congress are enlarged by the Revised Statutes so as to invest the patentee, his heirs or assigns, with title to all veins, lodes, or ledges throughout their entire depth, the top or apex of which lies within the end and side boundary lines of his claim on the surface, as patented, extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of the claim at the surface. The right of possession to such outside parts of such veins or ledges to be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of the claims at the surface, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges; it being expressly provided, however, that all veins, lodes, or ledges, the top or apex of which lies inside such surface locations, other than the one named in the patent, which were adversely claimed on the 10th May, 1872, are excluded from such conveyance by patent.

8. Applications for patents for mining-claims pending at the date of the act of May 10, 1872, may be prosecuted to final decision in the general land office, and where no adverse rights are affected thereby, patents will be issued in pursuance of the provisions of the Revised Statutes.

**Manner of Locating Claims on Veins or Lodes After May 10, 1872.**

9. From and after the 10th May, 1872, any person who is a citizen of the United States, or who has declared his intention to become a citizen, may locate, record, and hold a mining claim of fifteen hundred linear feet along the course of any mineral vein or lode subject to location; or an association of persons, severally

qualified as above, may make joint location of such claim of fifteen hundred feet, but in no event can a location of a vein or lode made subsequent to May 10, 1872, exceed fifteen hundred feet along the course thereof, whatever may be the number of persons composing the association.

10. With regard to the extent of surface-ground adjoining a vein or lode, and claimed for the convenient working thereof, the Revised Statutes provide that the lateral extent of locations of veins or lodes made after May 10, 1872, shall in no case exceed three hundred feet on each side of the middle of the vein at the surface, and that no such surface rights shall be limited by any mining regulations to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the 10th May, 1872, may render such limitation necessary; the end lines of such claims to be in all cases parallel to each other. Said lateral measurements cannot extend beyond three hundred feet on either side of the middle of the vein at the surface, or such distance as is allowed by local laws. For example: 400 feet cannot be taken on one side and 200 feet on the other. If, however, 300 feet on each side are allowed, and by reason of prior claims but 100 feet can be taken on one side, the locator will not be restricted to less than 300 feet on the other side; and when the locator does not determine by exploration where the middle of the vein at the surface is, his discovery shaft must be assumed to mark such point.

11. By the foregoing it will be perceived that no lode-claim located after the 10th May, 1872, can exceed a parallelogram fifteen hundred feet in length by six hundred feet in width, but whether surface-ground of that width can be taken, depends upon the local regulations or state or territorial laws in force in the several mining districts; and that no such local regulations or state or territorial laws shall limit a vein or lode claim to less than fifteen hundred feet along the course thereof, whether the location is made by one or more persons, nor can surface rights be limited to less than fifty feet in width, unless adverse claims existing on the 10th day of May, 1872, render such lateral limitation necessary.

12. It is provided by the Revised Statutes that the miners of each district may make rules and regulations not in conflict

with the laws of the United States, or of the state or territory in which such districts are respectively situated, governing the location, manner of recording, and amount of work necessary to hold possession of a claim. They likewise require that the location shall be so distinctly marked on the ground that its boundaries may be readily traced. This is a very important matter, and locators cannot exercise too much care in defining their locations at the outset, inasmuch as the law requires that all records of mining locations made subsequent to May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim.

13. The statutes provide that no lode-claim shall be recorded until after the discovery of a vein or lode within the limits of the claim located, the object of which provision is evidently to prevent the appropriation of presumed mineral ground for speculative purposes to the exclusion of bona fide prospectors, before sufficient work has been done to determine whether a vein or lode really exists.

14. The claimant should, therefore, prior to locating his claim, unless the vein can be traced upon the surface, sink a shaft, or run a tunnel or drift, to a sufficient depth therein to discover and develop a mineral-bearing vein, lode, or crevice; should determine, if possible, the general course of such vein in either direction from the point of discovery, by which direction he will be governed in marking the boundaries of his claim on the surface. His location notice should give the course and distance as nearly as practicable from the discovery-shaft on the claim, to some permanent, well-known points or objects, such, for instance, as stone monuments, blazed trees, the confluence of streams, point of intersection of well-known gulches, ravines, or roads, prominent buttes, hills, etc., which may be in the immediate vicinity, and which will serve to perpetuate and fix the locus of the claim and render it susceptible of identification from the description thereof given in the record of locations in the district, and should be duly recorded.

15. In addition to the foregoing data, the claimant should state the names of adjoining claims, or, if none adjoin, the rela-

tive positions of the nearest claims; should drive a post or erect a monument of stones at each corner of his surface-ground, and at the point of discovery or discovery shaft should fix a post, stake, or board, upon which should be designated the name of the lode, the name or names of the locators, the number of feet claimed, and in which direction from the point of discovery; it being essential that the location notice filed for record, in addition to the foregoing description, should state whether the entire claim of fifteen hundred feet is taken on one side of the point of discovery or whether it is partly upon one and partly upon the other side thereof, and in the latter case, how many feet are claimed upon each side of such discovery-point.

16. Within a reasonable time, say twenty days after the location shall have been marked on the ground, or such time as is allowed by the local laws, notice thereof, accurately describing the claim in manner aforesaid, should be filed for record with the proper recorder of the district, who will thereupon issue the usual certificate of location.

17. In order to hold the possessory right to a location made since May 10, 1872, not less than one hundred dollars' worth of labor must be performed, or improvements made thereon annually until entry shall have been made. Under the provisions of the act of Congress approved January 22, 1880, the first annual expenditure becomes due and must be performed during the calendar year succeeding that in which the location was made. Expenditure made or labor performed prior to the first day of January succeeding the date of location will not be considered as a part of, or applied upon the first annual expenditure required by law. Failure to make the expenditure or perform the labor required will subject the claim to relocation by any other party having the necessary qualifications, unless the original locator, his heirs, assigns, or legal representatives have resumed work thereon after such failure and before such relocation.

18. The expenditures required upon mining-claims may be made from the surface or in running a tunnel for the development of such claims, the act of February 11, 1875, providing that where a person or company has, or may, run a tunnel for the purpose of developing a lode or lodes owned by said person

or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same.

19. The importance of attending to these details in the matter of location, labor, and expenditure will be the more readily perceived when it is understood that a failure to give the subject proper attention may invalidate the claim.

**Tunnel Rights.**

20. Section 2323 provides that where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins or lodes on the line of said tunnel.

21. The effect of this is simply to give the proprietors of a mining tunnel run in good faith the possessory right to fifteen hundred feet of any blind lodes, cut, discovered, or intersected by such tunnel, which were not previously know to exist, within three thousand feet from the face or point of commencement of such tunnel, and to prohibit other parties, after the commencement of the tunnel, from prospecting for and making locations of lodes on the line thereof and within said distance of three thousand feet, unless such lodes appear upon the surface or were previously known to exist.

22. The term "face," as used in said section, is construed and held to mean the first working-face formed in the tunnel, and to signify the point at which the tunnel actually enters cover; it being from this point that the three thousand feet are to be counted, upon which prospecting is prohibited as aforesaid.

23. To avail themselves of the benefits of this provision of law, the proprietors of a mining tunnel will be required, at the time they enter cover as aforesaid, to give proper notice of their tunnel location by erecting a substantial post, board, or monument at the face or point of commencement thereof, upon which should be posted a good and sufficient notice, giving the names of the parties or company claiming the tunnel-right; the actual or proposed course or direction of the tunnel; the height and width thereof, and the course and distance from such face or point of commencement to some permanent well-known objects in the vicinity by which to fix and determine the locus in manner heretofore set forth applicable to locations of veins or lodes, and at the time of posting such notice they shall, in order that miners or prospectors may be enabled to determine whether or not they are within the lines of the tunnel, establish the boundary lines thereof, by stakes or monuments placed along such lines at proper intervals, to the terminus of the three thousand feet from the face or point of commencement of the tunnel, and the lines so marked will define and govern as to the specific boundaries within which prospecting for lodes not previously known to exist is prohibited while work on the tunnel is being prosecuted with reasonable diligence.

24. At the time of posting notice and marking out the lines of the tunnel as aforesaid, a full and correct copy of such notice of location defining the tunnel claim must be filed for record with the mining recorder of the district, to which notice must be attached the sworn statement or declaration of the owners, claimants, or projectors of such tunnel, setting forth the facts in the case; stating the amount expended by themselves and their predecessors in interest in prosecuting work thereon; the extent of the work performed, and that it is bona fide their intention to prosecute work on the tunnel so located and described with reasonable diligence for the development of a vein or lode, or for the discovery of mines, or both, as the case may be. This notice of location must be duly recorded, and, with the said sworn statement attached, kept on the recorder's files for future reference.

25. By a compliance with the foregoing much needless difficulty will be avoided, and the way for the adjustment of legal

rights acquired in virtue of said section 2323 will be made much more easy and certain.

26. This office will take particular care that no improper advantage is taken of this provison of law by parties making or professing to make tunnel locations, ostensibly for the purposes named in the statute, but really for the purpose of monopolizing the lands lying in front of their tunnels to the detriment of the mining interests and to the exclusion of bona fide prospectors or miners, but will hold such tunnel claimants to a strict compliance with the terms of the statutes; and a reasonable diligence on their part in prosecuting the work is one of the essential conditions of their implied contract. Negligence or want of due diligence will be construed as working a forfeiture of their right to all undiscovered veins on the line of such tunnel.

**Manner of Proceeding to Obtain Government Title to Vein or Lode Claims.**

27. By section 2325 authority is given for granting titles for mines by patent from the government to any person, association, or corporation having the necessary qualifications as to citizenship and holding the right of possession to a claim in compliance with law.

28. The claimant is required in the first place to have a correct survey of his claim made under authority of the surveyor-general of the state or territory in which the claim lies; such survey to show with accuracy the exterior surface boundaries of the claim, which boundaries are required to be distinctly marked by monuments on the ground. Four plats and one copy of the original field notes, in each case, will be prepared by the surveyor-general; one plat and the original field notes to be retained in the office of the surveyor-general, one copy of the plat to be given the claimant for posting upon the claim, one plat and a copy of the field notes to be given the claimant for filing with the proper register, to be finally transmitted by that officer, with other papers in the case, to this office, and one plat to be sent by the surveyor-general to the register of the proper land district to be retained on his files for future reference. As there is no resident surveyor-general for the state of Arkansas, appli-

cations for the survey of mineral claims in said state should be made to the commissioner of this office, who, under the law, is ex-officio the U. S. surveyor-general.

29. The claimant is then required to post a copy of the plat of such survey in a conspicuous place upon the claim, together with notice of his intention to apply for a patent therefor, which notice will give the date of posting, the name of the claimant, the name of the claim, mine or lode, the mining district, and county; whether or not the location is of record, and if so, where the record may be found; the number of feet claimed along the vein and the presumed direction thereof; the number of feet claimed on the lode in each direction, from the point of discovery, or other well-defined place on the claim; the name or names of all adjoining and conflicting claims, or, if none adjoin, the names of the nearest claims, etc.

**In effect June 1, 1897.**
**See Circ. Inst. Mch. 11, 1897, 24 L. D. 266.**
**See § 677, and note.**

30. After posting the said plat and notice upon the premises, the claimant will file with the proper register and receiver a copy of such plat and the field notes of survey of the claim, accompanied by the affidavit of at least two credible witnesses, that such plat and notice are posted conspicuously upon the claim, giving the date and place of such posting; a copy of the notice so posted to be attached to, and form a part of, said affidavit.

31. Accompanying the field notes so filed must be the sworn statement of the claimant that he has the possessory right to the premises therein described, in virtue of a compliance by himself (and by his grantors, if he claims by purchase) with the mining rules, regulations, and customs of the mining district, state, or territory in which the claim lies, and with the mining laws of Congress; such sworn statement to narrate briefly, but as clearly as possible, the facts constituting such compliance, the origin of his possession, and the basis of his claim to a patent.

32. This affidavit should be supported by appropriate evidence from the mining recorder's office as to his possessory right, as follows, viz: Where he claims to be the locator, or a locator in company with others who have since conveyed their interest in the location to him, a full, true, and correct copy of such loca-

tion notice should be furnished, as the same appears upon the mining records; such copy to be attested by the seal of the recorder, or if he has no seal, then he should make oath to the same being correct, as shown by his records. Where the applicant claims only as purchaser, a copy of the location record must be filed under seal or upon oath as aforesaid, with an abstract of title, under seal or oath as aforesaid, brought down to date of filing the application, tracing the right of possession by a continuous chain of conveyances from the original locators to the applicant, also certifying that no conveyances affecting the title to the claim in question appear of record other than those set forth in the accompanying abstract.

The abstracts herein required may be certified to by the proper recorder, or by any abstracter or abstract company, duly authorized by state or territorial statute, if abstracts so certified by abstracters or abstract companies are by statute receivable as evidence in the courts of such state or territory, in the same manner and to like extent that abstracts certified by the recorder are now admitted; provided, that proof be furnished that the abstracts so certified by abstracters or abstract companies are receivable as evidence in the courts as aforesaid.

33. In the event of the mining records in any case having been destroyed by fire or otherwise lost, affidavit of the fact should be made, and secondary evidence of possessory title will be received, which may consist of the affidavit of the claimant, supported by those of any other parties cognizant of the facts relative to his location, occupancy, possession, improvements, etc.; and in such case of lost records, any deeds, certificates of location or purchase, or other evidence which may be in the claimant's possession and tend to establish his claim, should be filed.

34. Upon the receipt of these papers the register will, at the expense of the claimant (who must furnish the agreement of the publisher to hold applicant for patent alone responsible for charges of publication), publish a notice of such application for the period of sixty days in a newspaper published nearest to the claim, and will post a copy of such notice in his office for the same period. When the notice is published in a weekly newspaper ten consecutive insertions are necessary; when in a daily

newspaper the notice must appear in each issue for sixty-one consecutive issues, the first day of issue being excluded in estimating the period of sixty days.

35. The notices so published and posted must be as full and complete as possible, and embrace all the data given in the notice posted upon the claim.

36. Too much care can not be exercised in the preparation of these notices, inasmuch as upon their accuracy and completeness will depend, in a great measure, the regularity and validity of the whole proceeding.

37. In the publication of final-proof notices the register has no discretion under the law to designate any other than the newspaper "nearest the land" for such purpose when such paper is a newspaper of general circulation. But he will in all cases designate the newspaper of general circulation that is published nearest the land, geographically measured. When two or more such newspapers are published in the same town, nearest the land, he may select the one which, in his honest and impartial judgment as a public officer, will best subserve the purpose of the law and the general interests of the public.

**Tomay v. Stewart, 1 L. D. 570.**
**In re Arnold, 2 L. D. 738.**
**Ante, § 685.**

38. Newspaper charges must not exceed the rates established by this office for the publication of legal notices.

39. The claimant, either at the time of filing these papers with the register or at any time during the sixty days' publication, is required to file a certificate of the surveyor-general that not less than five hundred dollars' worth of labor has been expended or improvements made upon the claim by the applicant or his grantors; that the plat filed by the claimant is correct; that the field notes of the survey, as filed, furnish such an accurate description of the claim as will, if incorporated into a patent, serve to fully identify the premises, and that such reference is made therein to natural objects or permanent monuments as will perpetuate and fix the locus thereof.

40. It will be the more convenient way to have this certificate indorsed by the surveyor-general, both upon the plat and field-notes of survey filed by the claimant as aforesaid.

41. After the sixty days' period of newspaper publication has expired the claimant will furnish from the office of publication a sworn statement that the notice was published for the statutory period, giving the first and last day of such publication, and his own affidavit showing that the plat and notice aforesaid remained conspicuously posted upon the claim sought to be patented during said sixty days' publication, giving the dates.

42. Upon the filing of this affidavit the register will, if no adverse claim was filed in his office during the period of publication, permit the claimant to pay for the land according to the area given in the plat and field notes of survey aforesaid, at the rate of five dollars for each acre and five dollars for each fractional part of an acre, the receiver issuing the usual duplicate receipt therefor. The claimant will also make a sworn statement of all charges and fees paid by him for publication and surveys, together with all fees and money paid the register and receiver of the land office; after which the whole matter will be forwarded to the commissioner of the general land office and a patent issued thereon if found regular.

43. In sending up the papers in the case the register must not omit certifying to the fact that the notice was posted in his office for the full period of sixty days, such certificate to state distinctly when such posting was done and how long continued.

44. The consecutive series of numbers of mineral entries must be continued, whether the same are of lode or placer claims or millsites.

45. The surveyors-general should designate all surveyed mineral claims by a progressive series of numbers, beginning with survey No. 37, irrespective as to whether they are situated on surveyed or unsurveyed lands, the claim to be so designated at date of issuing the order therefor, in addition to the local designation of the claim; it being required in all cases that the plat and field-notes of the survey of a claim must, in addition to the reference to permanent objects in the neighborhood, describe the locus of the claim, with reference to the lines of public surveys, by a line connecting a corner of the claim with the nearest public corner of the United States surveys, unless such claim be on unsurveyed lands at a distance of more than two miles from such public corner, in which latter case it should be connected

with a United States mineral monument. Such connecting line must not be more than two miles in length and should be measured on the ground direct between the points, or calculated from actually surveyed traverse lines if the nature of the country should not permit direct measurement. If a regularly established survey corner is within two miles of a claim situated on unsurveyed lands, the connection should be made with such corner in preference to a connection with a United States mineral monument. The connecting line must be surveyed by the deputy mineral surveyor at the time of his making the particular survey, and be made a part thereof.

46. Upon the approval of the survey of a mining claim made upon surveyed lands, the surveyor-general will prepare and transmit to the local land office and to this office a diagram tracing showing the portions of legal 40-acre subdivisions made fractional by reason of the mineral survey, designating each of such portions by the proper lot number, beginning with No. 1 in each section and giving the area of each lot.

47. The survey and plat of mineral claims, required by section 2325, Revised Statutes of the United States, to be filed in the proper land office, with application for patent, must be made subsequent to the recording of the location of the mine; and when the original location is made by survey of a United States deputy surveyor such location survey can not be substituted for that required by the statute, as above indicated.

48. The surveyor-general should derive his information upon which to base his certificate as to the value of labor expended or improvements made from his deputy who makes the actual survey and examination upon the premises, and such deputy should specify with particularity and full detail the character and extent of such improvements.

49. The following particulars should be observed in the survey of every mining claim:

(1) The exterior boundaries of the claim should be represented on the plat of survey and in the field notes.

(2) The intersection of the lines of the survey with the lines of conflicting prior surveys should be noted in the field-notes and represented upon the plat.

(3) Conflicts with unsurveyed claims, where the applicant for survey does not claim the area in conflict, should be shown by actual survey.

(4) The total area of the claim embraced by the exterior boundaries should be stated, and also the area in conflict with each intersecting survey, substantially as follows:

| | Acres. |
|---|---|
| Total area of claim | 10.50 |
| Area in conflict with survey No. 302 | 1.56 |
| Area in conflict with survey No. 948 | 2.33 |
| Area in conflict with Mountain Maid lode mining claim, unsurveyed | 1.48 |

It does not follow that because mining surveys are required to exhibit all conflicts with prior surveys the areas of conflict are to be excluded. The field-notes and plat are made a part of the application for patent, and care should be taken that the description does not inadvertently exclude portions intended to be retained. It is better that the application for patent should state the portions to be excluded in express terms. A survey executed as in the example given will enable the applicant for patent to exclude such conflicts as may seem desirable. For instance, the conflict with survey No. 302 and with the Mountain Maid lode claim might be excluded and that with survey No. 948 included.

50. The rights granted to locators under section 2322, Revised Statutes, are restricted to such locations on veins, lodes, or ledges as may be "situated on the public domain." In applications for lode claims where the survey conflicts with a prior valid lode claim and the ground in conflict is excluded, the applicant not only has no right to the excluded ground, but he has no right to that portion of any vein or lode the top or apex of which lies within such excluded ground, unless his location was prior to May 10, 1872. His right to the lode claimed terminates where the lode, in its onward course or strike, intersects the exterior boundary of such excluded ground and passes within it. The end line of his survey should not, therefore, be established beyond such intersection.

51. Where, however, the lode claim for which survey is be-

ing made was located prior to the conflicting claim, and such conflict is to be excluded, in order to include all ground not so excluded the end line of the survey may be established within the conflicting lode claim, but the line must be run so as not to extend any farther into such conflicting claim than may be necessary to make such end line parallel to the other end line and at the same time embrace the ground so held and claimed. The useless practice, in such cases, of extending both the side lines of a survey into the conflicting claim, and establishing an end line wholly within it, beyond a point necessary under the rule just stated, will be discontinued.

**Placer Claims.**

52. The proceedings to obtain patents for claims usually called placers, including all forms of deposit, excepting veins of quartz or other rock in place, are similar to the proceedings prescribed for obtaining patents for vein or lode claims; but where said placer claim shall be upon surveyed lands, and conforms to legal subdivisions, no further survey or plat will be required, and all placer mining claims located after May 10, 1872, shall conform as nearly as practicable with the United States system of public-land surveys and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands. But where such claims are located previous to the public surveys, and do not conform to legal subdivisions, survey, plat, and entry thereof may be made according to the boundaries thereof, provided the location is in all respects legal.

53. The proceedings for obtaining patents for veins or lodes having already been fully given, it will not be necessary to repeat them here, it being thought that careful attention thereto by applicants and the local officers will enable them to act understandingly in the matter and make such slight modifications in the notice, or otherwise, as may be necessary in view of the different nature of the two classes of claims, placer claims being

fixed, however, at two dollars and fifty cents per acre, or fractional part of an acre.

54. By section 2330, authority is given for the subdivision of forty-acre legal subdivisions into ten-acre lots, which is intended for the greater convenience of miners in segregating their claims both from one another and from intervening agricultural lands.

55. It is held, therefore, that under a proper construction of the law these ten-acre lots in mining districts should be considered and dealt with, to all intents and purposes, as legal subdivisions, and that an applicant having a legal claim which conforms to one or more of these ten-acre lots, either adjoining or cornering, may make entry thereof, after the usual proceedings, without further survey or plat.

56. In cases of this kind, however, the notice given of the application must be very specific and accurate in description, and as the forty-acre tracts may be subdivided into ten-acre lots, either in the form of squares of ten by ten chains, or if parallelograms five by twenty chains, so long as the lines are parallel and at right angles with the lines of the public surveys, it will be necessary that the notice and application state specifically what ten-acre lots are sought to be patented, in addition to the other data required in the notice.

57. Where the ten-acre subdivision is in the form of a square it may be described, for instance, as the "SE. ¼ of the SW. ¼ of NW. ¼," or, if in the form of a parallelogram as aforesaid, it may be described as the "W. ½ of the W. ½ of the SW. ¼ of the NW. ¼ (or the N. ½ of the S. ½ of the NE. ¼ of the SE. ¼) of section ——, township ——, range ——," as the case may be; but, in addition to this description of the land, the notice must give all the other data that is required in a mineral application, by which parties may be put on inquiry as to the premises sought to be patented. The proofs submitted with applications for claims of this kind must show clearly the character and the extent of the improvements upon the premises.

Inasmuch as the surveyor-general has no duty to perform in connection with the entry of a placer claim of legal subdivisions, the proof of improvements must show their value to be not less than five hundred dollars and that they were made by the appli-

cant for patent or his grantors. The annual expenditure to the amount of $100, required by section 2324, Revised Statutes, must be made upon placer claims as well as lode claims.

58. Applicants for patent to a placer claim, who are also in possession of a known vein or lode included therein, must state in their application that the placer includes such vein or lode. The published and posted notices must also include such statement. If veins or lodes lying within a placer location are owned by other parties, the fact should be distinctly stated in the application for patent, and in all the notices. But in all cases whether the lode is claimed or excluded, it must be surveyed and marked upon the plat; the field notes and plat giving the area of the lode claim or claims and the area of the placer separately. It should be remembered that an application which omits to include an application for a known vein or lode therein, must be construed as a conclusive declaration that the applicant has no right of possession to the vein or lode. Where there is no known lode or vein, the fact must appear by the affidavit of two or more witnesses.

59. By section 2330, it is declared that no location of a placer claim, made after July 9, 1870, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys.

60. Section 2331 provides that all placer-mining claims located after May 10, 1872, shall conform as nearly as practicable with the United States systems of public surveys and the subdivisions of such surveys, and no such locations shall include more than twenty acres for each individual claimant.

61. The foregoing provisions of law are construed to mean that after the 9th day of July, 1870, no location of a placer claim can be made to exceed one hundred and sixty acres, whatever may be the number of locators associated together, or whatever the local regulations of the district may allow; and that from and after May 10, 1872, no location made by an individual can exceed twenty acres, and no location made by an association of individuals can exceed one hundred and sixty acres, which location of one hundred and sixty acres can not be made by a less number than eight bona fide locators; and no local laws or mining regulations can restrict a placer location to less than twenty acres, although the locator is not compelled to take so much.

62. The regulations hereinbefore given as to the manner of marking locations on the ground, and placing the same on record, must be observed in the case of placer locations so far as the same are applicable, the law requiring, however, that where placer claims are upon surveyed public lands the locations must hereafter be made to conform to legal subdivisions thereof as near as practicable.

63. The first care in recognizing an application for patent upon a placer claim must be exercised in determining the exact classification of the lands. To this end the clearest evidence of which the case is capable should be presented.

(1) If the claim be all placer ground, that fact must be stated in the application and corroborated by accompanying proofs; if of mixed placers and lodes, it should be so set out, with a description of all known lodes situated within the boundaries of the claim. A specific declaration, such as is required by section 2333, Revised Statutes, must be furnished as to each lode intended to be claimed. All other known lodes are, by the silence of the applicant, excluded by law from all claim by him, of whatsoever nature, possessory or otherwise.

(2) Section 2395, Revised Statutes (subdivision 7), requires the surveyor to "note in his field books the true situation of all mines, salt licks, salt springs, and mill seats which come to his knowledge"; also "all water-courses over which the lines he runs may pass." It further requires him to "note the quality of the lands." These descriptive notes are required by subdivision 8 to be incorporated in the plat by the surveyor-general.

(3) If these duties have been performed, the public surveys will furnish a reasonable guide to the district officers and to claimants in prosecuting their applications. But experience has shown that great neglect has resulted from inattention to the law in this respect, and the regular plats are of very little value in the matter. It will, therefore, be required in the future that deputy surveyors shall, at the expense of the parties, make full examination of all placer claims surveyed by them, and duly note the facts as specified in the law, stating the quality and composition of the soil, the kind and amount of timber and other vegetation, the locus and size of streams, and such other matters as may appear upon the surface of the claim. This ex-

amination should include the character and extent of all surface and underground workings, whether placer or lode, for mining purposes.

(4) In addition to these data, which the law requires to be shown in all cases, the deputy should report with reference to the proximity of centers of trade or residence; also of well-known systems of lode deposits or of individual lodes. He should also report as to the use or adaptability of the claim for placer mining; whether water has been brought upon it in sufficient quantity to mine the same, or whether it can be procured for that purpose; and, finally, what works or expenditures have been made by the claimant or his grantors for the development of the claim, and their situation and location with respect to the same as applied for.

(5) This examination should be reported by the deputy under oath to the surveyor-general, and duly corroborated; and a copy of the same should be furnished with the application for patent to the claim, constituting a part thereof, and included in the oath of the applicant.

(6) Applications awaiting entry, whether published or not, must be made to conform to these regulations, with respect to examination as to the character of the land. Entries already made will be suspended for such additional proofs as may be deemed necessary in each case.

**Mill-Sites.**

64. Section 2337 provides that "where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such nonadjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz-mill or reduction-works, not owning a mine in connection therewith, may also receive a patent for his mill-site, as provided in this section."

65. To avail themselves of this provision of law, parties holding the possessory right to a vein or lode, and to a piece of nonmineral land not contiguous thereto, for mining or milling purposes, not exceeding the quantity allowed for such purpose by section 2337, United States Revised Statutes, or prior laws, under which the land was appropriated, the proprietors of such vein or lode may file in the proper land-office their application for a patent, under oath, in manner already set forth herein, which application, together with the plat and field-notes, may include, embrace, and describe, in addition to the vein or lode, such noncontiguous mill-site, and after due proceedings as to notice, etc., a patent will be issued conveying the same as one claim.

66. In making the survey in a case of this kind, the lode claim should be described in the plat and field-notes as "Sur. No. 37, A," and the mill-site as "Sur. No. 37, B," or whatever may be its appropriate numerical designation; the course and distance from a corner of the mill-site to a corner of the lode claim to be invariably given in such plat and field-notes, and a copy of the plat and notice of application for patent must be conspicuously posted upon the mill-site as well as upon the vein or lode for the statutory period of sixty days. In making the entry no separate receipt or certificate need be issued for the mill-site, but the whole area of both lode and mill-site will be embraced in one entry, the price being five dollars for each acre and fractional part of an acre embraced by such lode and mill-site claim.

67. In case the owner of a quartz-mill or reduction-works is not the owner or claimant of a vein or lode, the law permits him to make application therefor in the same manner prescribed herein for mining claims, and after due notice and proceedings, in the absence of a valid adverse filing, to enter and receive a patent for his mill-site at said price per acre.

68. In every case there must be satisfactory proof that the land claimed as a mill-site is not mineral in character, which proof may, where the matter is unquestioned, consist of the sworn statement of two or more persons capable from acquaintance with the land to testify understandingly.

**Possessory Right.**

69. With regard to the proofs necessary to establish the possessory right to a mining claim, section 2332 provides that "where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the state or territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim."

70. This provision of law will greatly lessen the burden of proof, more especially in the case of old claims located many years since, the records of which, in many cases, have been destroyed by fire, or lost in other ways during the lapse of time, but concerning the possessory right to which all controversy or litigation has long been settled.

71. When an applicant desires to make his proof of possessory right in accordance with this provision of law, he will not be required to produce evidence of location, copies of conveyances, or abstracts of title, as in other cases, but will be required to furnish a duly certified copy of the statute of limitation of mining claims for the state or territory, together with his sworn statement giving a clear and succinct narration of the facts as to the origin of his title, and likewise as to the continuation of his possession of the mining ground covered by his application; the area thereof; the nature and extent of the mining that has been done thereon; whether there has been any opposition to his possession, or litigation with regard to his claim, and, if so, when the same ceased; whether such cessation was caused by compromise or by judicial decree, and any additional facts within the claimant's knowledge having a direct bearing upon his possession and bona fides which he may desire to submit in support of his claim.

72. There should likewise be filed a certificate, under seal of the court having jurisdiction of mining cases within the judicial district embracing the claim, that no suit or action of any character whatever involving the right of possession to any portion of the claim applied for is pending, and that there has been

no litigation before said court affecting the title to said claim or any part thereof for a period equal to the time fixed by the statute of limitations for mining-claims in the state or territory as aforesaid, other than that which has been finally decided in favor of the claimant.

73. The claimant should support his narrative of facts relative to his possession, occupancy, and improvements by corroborative testimony of any disinterested person or persons of credibility who may be cognizant of the facts in the case and are capable of testifying understandingly in the premises.

74. As a condition for the making of application for patent according to section 2325, there must be a preliminary showing of work or expenditure upon each location, either by showing the full amount sufficient to the maintenance of possession under section 2324 for the pending year; or, if there has been failure, it should be shown that work has been resumed so as to prevent relocation by adverse parties after abandonment.

The "pending year" means the calendar year in which application is made, and has no reference to a showing of work at date of the final entry.

75. This preliminary showing may, where the matter is unquestioned, consist of the affidavit of two or more witnesses familiar with the facts.

**Proof of Citizenship of Mining Claimants.**

76. The proof necessary to establish the citizenship of applicants for mining patents must be made in the following manner: In case of an incorporated company, a certified copy of their charter or certificate of incorporation must be filed. In case of an association of persons unincorporated, the affidavit of their duly authorized agent, made upon his own knowledge or upon information and belief, setting forth the residence of each person forming such association, must be submitted. This affidavit must be accompanied by a power of attorney from the parties forming such association, authorizing the person who makes the affidavit of citizenship to act for them in the matter of their application for patent.

77. In case of an individual or an association of individuals who do not appear by their duly authorized agent, you will require the affidavit of each applicant, showing whether he is a native or naturalized citizen, when and where born, and his residence.

78. In case an applicant has declared his intention to become a citizen or has been naturalized, his affidavit must show the date, place, and the court before which he declared his intention, or from which his certificate of citizenship issued, and present residence.

79. The affidavit of the claimant as to his citizenship may be taken before the register or receiver, or any other officer authorized to administer oaths within the land district; or, if the claimant is residing beyond the limits of the district, the affidavit may be taken before the clerk of any court of record or before any notary public of any state or territory.

80. If citizenship is established by the testimony of disinterested persons, such testimony may be taken at any place before any person authorized to administer oaths, and whose official character is duly verified.

**Adverse Claims.**

81. Section 2326, and the act of April 26, 1882, provide for adverse claims, fix the time within which they shall be filed to have legal effect and prescribe the manner of their adjustment etc.

82. An adverse mining claim must be filed with the register and receiver of the land office where the application for patent was filed, or with the register and receiver of the district in which the land is situated at the time of filing the adverse claim. It must be on the oath of the adverse claimant, or it may be verified by the oath of any duly authorized agent or attorney-in-fact of the adverse claimant, cognizant of the facts stated.

83. Where an agent or attorney-in-fact verifies the adverse claim, he must distinctly swear that he is such agent or attorney, and accompany his affidavit by proof thereof.

84. The agent or attorney-in-fact must make the affidavit in verification of the adverse claim within the land district where the claim is situated.

85. The adverse notice must fully set forth the nature and extent of the interference or conflict; whether the adverse party claims as a purchaser for valuable consideration or as a locator; if the former, a certified copy of the original location, the original conveyance, a duly certified copy thereof, or an abstract of title from the office of the proper recorder should be furnished, or if the transaction was a merely verbal one he will narrate the circumstances attending the purchase, the date thereof, and the amount paid, which fact should be supported by the affidavit of one or more witnesses, if any were present at the time, and if he claims as a locator he must file a duly certified copy of the location from the office of the proper recorder.

86. In order that the "boundaries" and "extent of the claim may be shown, it will be incumbent upon the adverse claimant to file a plat showing his entire claim, its relative situation or position with the one against which he claims, and the extent of the conflict. This plat must be made from an actual survey by a United States deputy surveyor, who will officially certify thereon to its correctness; and in addition there must be attached to such plat of survey a certificate or sworn statement by the surveyor as to the proximate value of the labor performed or improvements made upon the claim by the adverse party or his predecessors in interest, and the plat must indicate the position of any shafts, tunnels or other improvements, if any such exist, upon the claim of the party opposing the application, and by which party said improvements were made; provided, however, that, if the application for patent describes the claim by legal subdivisions, the adverse claimant, if also claiming by legal subdivisions, may describe his adverse claim in the same manner without further survey or plat.

87. Upon the foregoing being filed within the sixty days as aforesaid, the register, or in his absence the receiver, will give notice in writing to both parties to the contest that such adverse claim has been filed, informing them that the party who filed the adverse claim will be required within thirty days from the date of such filing to commence proceedings in a court of competent jurisdiction to determine the question of right of possession, and to prosecute the same with reasonable diligence to final judg-

ment, and that, should such adverse claimant fail to do so, his adverse claim will be considered waived, and the application for patent be allowed to proceed upon its merits.

88. When an adverse claim is filed as aforesaid, the register or receiver will indorse upon the same the precise date of filing, and preserve a record of the date of notifications issued thereon; and thereafter all proceedings on the application for patent will be suspended, with the exception of the completion of the publication and posting of notices and plat, and the filing of the necessary proof thereof, until the controversy shall have been adjudicated in court, or the adverse claim waived or withdrawn.

89. Where an adverse claim has been filed and suit thereon commenced within the statutory period, and final judgment determining the right of possession rendered in favor of the applicant, it will not be sufficient for him to file with the register a certificate of the clerk of the court, setting forth the facts as to such judgment, but he must, before he is allowed to make entry, file a certified copy of the judgment, together with the other evidence required by section 2326, Revised Statutes.

90. Where such suit has been dismissed, a certificate of the clerk of the court to that effect, or a certified copy of the order of dismissal, will be sufficient.

91. In no case will a relinquishment of the ground in controversy, or other proof, filed with the register or receiver, be accepted in lieu of the evidence required.

92. Where an adverse claim has been filed, but no suit commenced against the applicant for patent within the statutory period, a certificate to that effect by the clerk of the state court having jurisdiction in the case, and also by the clerk of the circuit court of the United States for the district in which the claim is situated, will be required

93. A party who is not an applicant for patent under section 2325, Revised Statutes, or the assignee of such applicant, is not entitled to make entry under said section, and in no case will the name of such party be inserted in the certificate of entry. This regulation has no reference to proceedings under section 2326.

94. Any party applying to make entry as trustee must disclose fully the nature of the trust and the name of the cestui que trust; and such trustee, as well as the beneficiaries, must furnish

satisfactory proof of citizenship; and the names of beneficiaries, as well as that of the trustee, must be inserted in the final certificate of entry.

95. No entry will be allowed until the register has satisfied himself, by a careful examination, that proper proofs have been filed upon all the points indicated in official regulations in force, and that they show a sufficient bona fide compliance with the laws and such regulations.

96. The administration of the mining laws as prescribed by these regulations will be, so far as applicable, adopted for, and extended to Alaska.

(1) The ex-officio register, receiver, and surveyor-general, while acting as such, and their clerks and deputy surveyors, will be deemed subject to the laws and regulations governing the official conduct and responsibilities of similar officers and persons under general statutes of the United States.

(2) The Commissioner of the General Land Office will exercise the same general supervision over the execution of the laws as are or may be exercised by him in other mineral districts.

**Appointment of Deputy Surveyors of Mining Claims; Charges for Surveys and Publications; Fees of Registers and Receivers, etc.**

97. Section 2334 provides for the appointment of surveyors of mineral claims, authorizes the commissioners of the general land office to establish the rates to be charged for surveys and for newspaper publications.

Under this authority of law the following rates have been established as the maximum charges for newspaper publications in mining cases:

(1) Where a daily newspaper is designated, the charge shall not exceed seven dollars for each ten lines of space occupied, and where a weekly newspaper is designated as the medium of publication five dollars for the same space will be allowed. Such charge shall be accepted as full payment for publication in each issue of the newspaper for the entire period required by law.

It is expected that these notices shall not be so abbreviated as to curtail the description essential to a perfect notice, and the

said rates established upon the understanding that they are to be in the usual body-type used for advertisements.

(2) For the publication of citations in contests or hearings involving the character of lands, the charges shall not exceed eight dollars for five publications in weekly newspapers, or ten dollars for publications in daily newspapers for thirty days.

98. The surveyors-general of the several districts will, in pursuance of said law, appoint in each land district as many competent deputies for the survey of mining claims as may seek such appointment; it being distinctly understood that all expenses of these notices and surveys are to be borne by the mining claimants and not by the United States; the system of making deposits for mineral surveys, as required by previous instructions, being hereby revoked as regards field work; the claimant having the option of employing any deputy surveyor within such district to do his work in the field.

99. With regard to the platting of the claim and other office work in the surveyor-general's office, that officer will make an estimate of the cost thereof, which amount the claimant will deposit with any assistant United States treasurer or designated depository in favor of the United States treasurer, to be passed to the credit of the fund created by "individual depositors for surveys of the public lands," and file with the surveyor-general duplicate certificates of such deposit in the usual manner.

100. The surveyors-general will endeavor to appoint mineral deputy surveyors, so that one or more may be located in each mining district for the greater convenience of miners.

101. The usual oaths will be required of these deputies and their assistants as to the correctness of each survey executed by them.

The duty of the deputy mineral surveyor ceases when he has executed the survey and returned the field notes and preliminary plat thereof with his report to the surveyor-general. He will not be allowed to prepare for the mining claimant the papers in support of an application for patent, or otherwise perform the duties of an attorney before the land office in connection with a mining claim.

The surveyors-general and local land officers are expected to report any infringement of this regulation to this office.

102. The law requires that each applicant shall file with the register and receiver a sworn statement of all charges and fees paid by him for publication of notice and for survey, together with all fees and money paid the register and receiver, which sworn statement is required to be transmitted to this office for the information of the commissioner.

103. Should it appear that excessive or exorbitant charges have been made by any surveyor or any publisher, prompt action will be taken with the view of correcting the abuse.

104. The fees payable to the register and receiver for filing and acting upon applications for mineral-land patents are five dollars to each officer, to be paid by the applicant for patent at the time of filing, and the like sum of five dollars is payable to each officer by an adverse claimant at the time of filing his adverse claim. (Sec. 2238, R. S., paragraph 9.)

105. All fees or charges under this law may be paid in United States currency.

106. The register and receiver will, at the close of each month, forward to this office an abstract of mining applications filed, and a register of receipts, accompanied with an abstract of mineral lands sold and an abstract of adverse claims filed.

107. The fees and purchase money received by registers and receivers must be placed to the credit of the United States in the receiver's monthly and quarterly account, charging up in the disbursing account the sums to which the register and receiver may be respectively entitled as fees and commissions, with limitations in regard to the legal maximum.

**Proceedings Before the Register and Receiver and Surveyors-General in Contests and Hearings to Establish the Character of Lands.**

108. The "Rules of practice in cases before the United States district land offices, the general land office, and the department of the interior," approved August 13, 1885, will, as far as applicable, govern in all cases and proceedings arising in contests, and hearings to determine the mineral or nonmineral character of lands.

109. No public land shall be withheld from entry as agricultural land on account of its mineral character, except such

as is returned by the surveyor-general as mineral; and the presumption arising from such a return may be overcome by testimony taken in the manner hereinafter described.

110. Hearings to determine the character of lands are practically of two kinds, as follows:

1. When lands are returned as mineral by the surveyor-general.

When such lands are sought to be entered as agricultural under laws which require the submission of final proof after due notice by publication and posting, the filing of the proper nonmineral affidavit in the absence of allegations that the land is mineral will be deemed sufficient as a preliminary requirement. A satisfactory showing as to character of land must be made when final proof is submitted.

In case of application to enter, locate, or select such lands as agricultural, under laws in which the submission of final proof after due publication and posting is not required, notice thereof must first be given by publication for thirty days and posting in the local office during the same period, and affirmative proof as to the character of the land submitted. In the absence of allegations that the land is mineral, and upon compliance with this requirement, the entry, location, or selection will be allowed, if otherwise regular.

2. When lands which are sought to be entered as agricultural are alleged by affidavit to be mineral or when sought as mineral their nonmineral character is alleged. The proceedings in this class of cases are in the nature of a contest between two or more known parties and are provided for in the rules of practice.

111. At the hearings under either of the aforesaid classes, the claimants and witnesses will be thoroughly examined with regard to the character of the land; whether the same has been thoroughly prospected; whether or not there exists within the tract or tracts claimed any lode or vein of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or other valuable deposit which has ever been claimed, located, recorded or worked; whether such work is entirely abandoned, or whether occasionally resumed; if such lode does exist, by whom claimed, under what designation, and in which subdivision of the land it lies; whether any placer mine or mines exist upon

the land; if so, what is the character thereof—whether of the shallow-surface description, or of the deep cement, blue lead or gravel deposits; to what extent mining is carried on when water can be obtained, and what the facilities are for obtaining water for mining purposes; upon what particular ten-acre subdivisions mining has been done, and at what time the land was abandoned for mining purposes, if abandoned at all.

112. The testimony should also show the agricultural capacities of the land, what kind of crops are raised thereon, and the value thereof; the number of acres actually cultivated for crops of cereals or vegetables, and within which particular ten-acre subdivision such crops are raised; also which of these subdivisions embrace the improvements, giving in detail the extent and value of the improvements, such as house, barn, vineyard, orchard, fencing, etc., and mining improvements.

113. The testimony should be as full and complete as possible; and in addition to the leading points indicated above, where an attempt is made to prove the mineral character of lands which have been entered under the agricultural laws, it should show at what date, if at all, valuable deposits of mineral were first known to exist on the lands.

114. When the case comes before this office, such decision will be made as the law and the facts may justify; and in cases where a survey is necessary to set apart the mineral from the agricultural land, the necessary instructions will be given to enable the proper party at his own expense to have the work done, at his option, either by United States deputy, county, or other local surveyor; the survey in such case, where the claims to be segregated are vein or lode claims, must be executed in such manner as will conform to the requirements in section 2320, U. S. Revised Statutes, as to length and width and parallel end lines.

115. Such survey when executed must be properly sworn to by the surveyor, either before a notary public, officer of a court of record, or before the register or receiver, the deponent's character and credibility to be properly certified to by the officer administering the oath.

116. Upon the filing of the plat and field notes of such survey, duly sworn to as aforesaid, you will transmit the same to

the surveyor-general for his verification and approval; who, if he finds the work correctly performed, will properly mark out the same upon the original township plat in his office, and furnish authenticated copies of such plat and description both to the proper local land office and to this office, to be affixed to the duplicate and triplicate township plats respectively.

117. With the copy of plat and description furnished the local office and this office, must be a diagram tracing, verified by the surveyor-general, showing the claim or claims segregated, and designating the separate fractional agricultural tracts in each 40-acre legal subdivision by the proper lot number, beginning with No. 1 in each section, and giving the area in each lot, the same as provided in paragraph 45, in the survey of mining claims on surveyed lands.

118. The fact that a certain tract of land is decided upon testimony to be mineral in character is by no means equivalent to an award of the land to a miner. A miner is compelled by law to give sixty days' publication of notice, and posting of diagrams and notices, as a preliminary step; and then, before he can enter the land, he must show that the land yields mineral; that he is entitled to the possessory right thereto in virtue of compliance with local customs or rules of miners, or by virtue of the statute of limitations; that he or his grantors have expended, in actual labor and improvements, an amount of not less than five hundred dollars thereon, and that the claim is one in regard to which there is no controversy or opposing claim. After all these proofs are met, he is entitled to have a survey made at his own cost where a survey is required, after which he can enter and pay for the land embraced by his claim.

119. Blank forms for proofs in mineral cases are not furnished by the general land office.

## VI. Coal Land Law with Regulations Thereunder.

### Coal Lands, Who May Enter; Size of Location; Price.

§ 2347. Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified

as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal-lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

Classification of coal as mineral, and characteristics of system: § 495.
Rules for determining character of land: § 496.
Who may enter coal lands: § 501.
Different classes of entries: § 502.
Private entry: § 503.
Declaratory statement: § 505.

**Preferential Rights of Purchase.**

§ 2348. Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference-right of entry, under the preceding section, of the mines so opened and improved; provided, that when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

**Declaratory Statement, When Filed.**

§ 2349. All claims under the preceding section must be presented to the register of the proper land district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; and where the

improvements shall have been made prior to the expiration of three months from the third day of March, eighteen hundred and seventy-three, sixty days from the expiration of such three months shall be allowed for the filing of a declaratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the third day of March, eighteen hundred and seventy-three.

Declaratory statement: § 505.

**One Person Shall Make but one Entry.**

§ 2350. The three preceding sections shall be held to authorize only one entry by the same person or association of persons, and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.

Purchase price: § 507.
Final entry: § 508.

**Conflicting Claims.**

§ 2351. In case of conflicting claims upon coal lands where the improvements shall be commenced, after the third day of March, eighteen hundred and seventy-three, priority of possession and improvement, followed by proper filing and continued good faith, shall determine the preference right to purchase. And also where improvements have already been made prior to the third day of March, eighteen hundred and seventy-three, division of the land claimed may be made by legal subdivisions, to include, as near as may be, the valuable improvements of the re-

spective parties. The commissioner of the general land office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections.

**Application of Preceding Sections.**

§ 2352. Nothing in the five preceding sections shall be construed to destroy or impair any rights which may have attached prior to the third day of March, eighteen hundred and seventy-three, or to authorize the sale of lands valuable for mines of gold, silver, or copper.

**Rules and Regulations of Land Department.**

Under the authority conferred by said section 2351 the following rules and regulations are issued for carrying into effect the provisions of said law:

1. Sale of coal lands is provided for—

By ordinary private entry under section 2347.

By granting a preference right of purchase, based on priority of possession and improvement, under section 2348.

2. The land entered under either section must be by legal subdivisions, as made by the regular United States survey. Entry is confined to surveyed lands; to such as are vacant, not otherwise appropriated, reserved by competent authority, or containing valuable minerals other than coal.

3. Individuals and associations may purchase. If an individual he must be twenty-one years of age and a citizen of the United States, or have declared his intention to become such citizen.

4. If an association of persons each person must be qualified as above.

5. A person is not disqualified by the ownership of any quantity of other land, nor by having removed from his own land in the same state or territory.

6. Any individual may enter by legal subdivisions as aforesaid any area not exceeding one hundred and sixty acres.

7. Any association may enter not to exceed three hundred and twenty acres.

8. Any association of not less than four persons, duly qualified, who shall have expended not less than $5,000 in working and improving any coal mine or mines, may enter under section 2348 not exceeding six hundred and forty acres, including such mining improvements.

9. One person can have the benefit of one entry or filing only. He is disqualified by having made such entry or filing alone or as a member of an association. No entry can be allowed an association which has in it a single person thus disqualified, as the law prohibits the entry or holding of more than one claim either by an individual or an association.

10. Lands that are sufficiently valuable for gold, silver, or copper to prevent their entry as agricultural lands can not be entered as coal lands; and you will not allow any entry to be made under the above named provisions of law of lands valuable for their deposits of said minerals.

11. The present rules relative to "hearings to establish the character of lands," contained in general land office regulations of October 31, 1881, issued under the mining laws, will, as far as applicable, govern your action in determining the character of lands sought to be entered as coal land.

12. The price per acre is $10 where the land is situated more than fifteen miles from any completed railroad, and $20 per acre where the land is within fifteen miles of such road. The price of the land, however, must be determined by its distance from a completed railroad at the date of payment and entry irrespective of the preference right of entry.

13. When application is made to purchase coal land at the rate of $10 per acre you will in all cases require satisfactory proof that the land applied for is, at date of entry, situated more than fifteen miles from any completed railroad. This proof may consist of the affidavit of the applicant, or that of his duly authorized agent, corroborated by the affidavit of some disinterested credible party showing personal knowledge of the facts.

14. Where the land lies partly within fifteen miles of such road and in part outside such limit, the maximum price must be paid for all legal subdivisions the greater part of which lie within fifteen miles of such road.

15. The term "completed railroad" is held to mean one which is actually constructed on the face of the earth; and lands within fifteen miles of any point of a railroad so constructed will be held and disposed of at $20 per acre.

16. Any duly qualified person or association must be preferred as purchasers of those public lands on which they have opened and improved, or shall open and improve, any coal mine or mines, and which they shall have in actual possession.

17. Possession by agent is recognized as the possession of the principal. The clearest proof on the point of agency must, however, be required in every case, and a clearly defined possession must be established.

18. The opening and improving of a coal mine, in order to confer a preference right of purchase, must not be considered as a mere matter of form; the labor expended and improvements made must be such as to clearly indicate the good faith of the claimant.

19. These lands are intended to be sold, where there are adverse claimants therefor, to the party who, by substantial improvements, actual possession, and a reasonable industry, shows an intention to continue his development of the mines in preference to those who would purchase for speculative purposes only. With this view, you will require such proof of compliance with the law, when lands are applied for under section 2348 by adverse claimants as the circumstances of each case may justify.

20. In conflicts where improvements have been or shall hereafter be commenced, priority of possession and improvement shall govern the award when the law has been fully complied with by each party. A mere possession, however, without satisfactory improvements, will not secure the tract to the first occupant when a subsequent claimant shows his full compliance with the law.

21. After an entry has been allowed to one party, you will make no investigation concerning it at the instance of any person except on instructions from this office. You will, however, receive all affidavits concerning such case and forward the same to this office, accompanied by a statement of the facts as shown by your records.

22. Prior to entry it is competent for you to order an investigation, on sufficient grounds set forth under oath of a party in interest and substantiated by the affidavits of disinterested and credible witnesses.

**Manner of Obtaining Title.**

23. When title is sought by private entry the party will himself make oath to the following application, which must be presented to the register:

I, ——— ———, hereby apply, under the provisions of the Revised Statutes of the United States relating to the sale of coal lands of the United States, to purchase the ——— quarter of section ———, in township ———, of range ———, in the district of lands subject to sale at the land office at ———, and containing ——— acres; and I solemnly swear that no portion of said tract is in the possession of any other party; that I am twenty-one years of age, a citizen of the United States (or have declared my intention to become a citizen of the United States), and have never held nor purchased lands under said act, either as an individual or as a member of an association; and I do further swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that said land contains large deposits of coal and is chiefly valuable therefor; that there is not to my knowledge within the limits thereof any vein or lode of quartz or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposit of gold, silver, or copper. So help me God. ———.

24. Thereupon the register if the tract is vacant will so certify to the receiver, stating the price, and the applicant or his duly authorized agent must then pay the amount of purchase money.

25. The receiver will then issue to the purchaser a duplicate receipt, and at the close of the month the register and receiver will make returns of the sale to the general land office, from whence, when the proceedings are found regular, a patent or complete title will be issued; and on surrender of the duplicate re-

ceipt such patent will be delivered, at the option of the patentee, either by the commissioner at Washington or by the register at the district land office.

26. This disposition at private entry will be subject to any valid prior adverse right which may have attached to the same land and which is protected by section 2348.

27. Second. When the application to purchase is based on a priority of possession, etc., as provided for in section 2348, the claimant must, when the township plat is on file in your office, file his declaratory statement for the tract claimed sixty days from and after the first day of his actual possession and improvement. Sixty days, exclusive of the first day of possession, etc., must be allowed.

28. The declaratory statement must be substantially as follows, to-wit:

I ——— ———, do solemnly swear that I am ——— years of age, and a citizen of the United States (or have declared my intention to become a citizen of the United States), that I never have, either as an individual or as a member of an association, held or purchased any coal lands under the provisions of the Revised Statutes of the United States relating to the sale of coal lands of the United States, and I do hereby declare my intention to purchase, under the provisions aforesaid, the —— quarter of section ——, in township ——, of range ——, of lands subject to sale at the district land office at ——, and that I came into possession of said tract on the —— day of ——, A.D. 18—, and have ever since remained in actual possession continuously; that I have located and opened a valuable mine of coal thereon, and have expended in labor and improvements on said mine the sum of —— dollars, the labor and improvements being as follows: [here describe the nature and character of the improvements]; and I do furthermore solemnly swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that there is not, to my knowledge, within the limits thereof any vein or lode of quartz or other rock in place, bearing gold, silver, or copper, and

that there is not within the limits of said land, to my knowledge, any valuable deposit of gold, silver, or copper. So help me God.

———— ————.

29. When the township plat is not on file at date of claimant's first possession the declaratory statement must be filed within sixty days from the filing of such plat in your office.

30. One year from and after the expiration of the period allowed for filing the declaratory statement is given within which to make proof and payment; but you will allow no party to make final proof and payment except on notice to all others who appear on your records as claimants to the same tract.

31. A party who otherwise complies with the law may enter after the expiration of said year, provided no valid adverse right shall have intervened. He postpones his entry beyond said year at his own risk, and the government cannot thereafter protect him against another who complies with the law, and the value of his improvements can have no weight in his favor.

32. Each claimant at the time of actual purchase must make affidavit as follows:

I, ———— ————, claiming under the provisions of the Revised Statutes of the United States relating to the sale of coal lands of the United States, the right of purchase to the —— quarter of section ——, in township —— of range ——, subject to sale at ——, do solemnly swear that I have never had the right of purchase under the aforesaid provisions of law either as an individual or as a member of an association, and that I have never held any other lands under its provisions; I further swear that I have expended in developing coal mines on said tract in labor and improvements the sum of —— dollars, the nature of such improvements being as follows: ———— ———— ————; that I am now in the actual possession of said mines, and make the entry for my own use and benefit, and not directly or indirectly for the use and benefit of any other party; and I do furthermore swear that I am well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that my knowledge of said land is such as to enable me to testify understandingly with regard thereto; that the same is chiefly valuable for coal; that there is not, to my knowledge, within the limits thereof any vein or lode of quartz

or other rock in place bearing gold, silver, or copper, and that there is not within the limits of said land, to my knowledge, any valuable deposit of gold, silver, or copper. So help me God.

33. The application, declaratory statement, and the affidavit required at the time of actual purchase, the forms of which are given above under paragraphs 23, 28, and 32, may be sworn to before any officer authorized by law to administer oaths, but the authority of such officer must be properly shown.

34. Any party duly qualified under the law, after swearing to his application or declaratory statement, may, by a sufficient power of attorney duly executed under the laws of the state or territory in which such party may then be residing, empower an agent to file with the register of the proper land office the application, declaratory statement, or affidavit required at the time of actual purchase, and also authorize him to make payment for and entry of the land in the name of such qualified party; and when such power of attorney shall have been filed in your office you will permit such agent to act thereunder as above indicated.

35. Where a claimant shows by affidavit that he is not personally acquainted with the character of the land, his duly authorized agent who possesses such knowledge may make the required affidavit as to its character; but whether this affidavit is made by principal or agent it must be corroborated by the affidavits of two disinterested and credible witnesses having knowledge of its character.

36. Nothing in these regulations shall be so construed as to prevent a party from proving his citizenship or age, or establishing the status of the lands sought to be entered, in accordance with ordinary rules of evidence; and any proof regularly introduced for that purpose that would be competent in a court or before a commissioner charged with the ascertainment of facts may be considered.

37. Assignments of the right to purchase will be recognized when properly executed. Proof and payment must be made, however, within the prescribed period, which dates from the first day of the possession of the assignor who initiated the claim.

38. The "Rules of practice in cases before the United States district land offices, the general land office, and the department

of the interior," approved December 20, 1880, will, as far as applicable, govern all cases and proceedings arising under the sections of the Revised Statutes above quoted providing for the sale of coal lands of the United States.

39. You will report at the close of each month as "sales of coal lands" all filings and entries in separate abstracts, commencing with number one and thereafter proceeding consecutively in the order of their reception. Where a series of numbers has already been commenced by sale of coal lands you will continue the same without change.

## VII. Instructions Relating to Selection of Lands by Railroads and States.

### A. Railroads.

Secretary Smith to the Commissioner of the General Land Office, July 9, 1894.

In the matter of the selection, by railroad companies, of lands in satisfaction of their grants, the following rules and regulations will be observed in determining whether the lands selected are mineral or non-mineral lands:

1. Where the lands have been returned by the surveyor general as mineral, a hearing may be had to determine the character of the land, under rules 110 and 111 of Rules and Regulations issued December 10, 1891, controlling the disposal of mining claims.

2. Where the lands selected by the company are within a mineral belt, or proximate to any mining claim, the railroad company will be required to file with the local land officers an affidavit by the land agent of the company, which affidavit shall be attached to said list when returned, setting forth in substance that he has caused the lands mentioned to be carefully examined by the agents and employees of the company, as to their mineral or agricultural character, and that, to the best of his knowledge and belief, none of the lands returned in said list are mineral lands.

Upon receipt of said list you will cause it to be examined, and a clear list to be prepared of all lands embraced therein that are

not within a radius of 6 miles from any mineral entry, claim, or location, which list shall be transmitted to the department for its approval. If any of the lands embraced in said list of selections are found upon examination to be within a radius of 6 miles from any mineral entry, claim, or location, you will cause a supplemental list of such lands to be prepared, and return the same to the register and receiver of the district in which they are situated, and notify the railroad company that they have been so returned. The register and receiver will at once cause notice to be published in such newspapers as shall be designated by the commissioner of the general land office, containing a statement that the railroad company has applied for a patent for the lands, designating the same by townships, and has filed lists of the same in the local land office; that said lists are open to the public for inspection; that a copy of the same, by descriptive subdivisions, has been conspicuously posted in said land office for inspection by persons interested, and the public generally; and that the local land officers will receive protests, or contests, within the next sixty days, for any of said tracts or subdivisions of land claimed to be more valuable for mineral than for agricultural purposes.

At the expiration of said sixty days, the register and receiver will return to the commissioner of the general land office said supplemental list, noting thereon any protests, or contests, or suggestions, as to the mineral character of any of such lands, together with any information they may have received as to the mineral character of any of the lands mentioned in said list. After the same shall have been returned by the register and receiver, you will first eliminate from said supplemental list all the lands that have been protested, or contested, or claimed to be more valuable for mineral than for agricultural purposes, or concerning which any suggestion has been made as to their mineral character. The remaining lands you will certify to this department for approval and patenting as agricultural.

In regard to lands protested or contested, or claimed to be mineral, or concerning which any suggestion has been made, or report by the register and receiver, as to their mineral character, you will order a hearing to be had by the local land officers in each case, after giving due notice to the persons furnishing such information, and to the railroad company, under the existing

rules and regulations of the department concerning hearings in cases where the land has been returned as mineral land.

The railroad company shall pay to the register and receiver the cost of advertising said lands in the manner set forth.

You are further instructed that all lists which have been heretofore prepared in accordance with any rules, regulations, or instructions of the secretary of the interior, where such rules have been complied with (such as furnishing affidavits showing the nonmineral character of the lands in accordance with the instructions of the interior department), and such mineral affidavits furnished for each subdivision of 40 acres, shall be excepted from the terms of the foregoing regulations. Also, where lists of selections are now pending of lands returned by the surveyor general as mineral, where hearings have been had in accordance with rules 110 and 111 of Rules and Regulations of December 10, 1891, above referred to, and the local officers have determined that said lands are nonmineral in character, and such determination has been approved by the general land office, such lands shall be submitted to the department for approval, without further investigation, although they may be within 6 miles of any mineral claim or location, unless since said hearing mineral claims or locations have been made of any tract embraced in said lists, in which event you will eliminate said tract from said list, and hold the same for further investigation.

**B. Circular Instruction with Reference to Selections of Lands by States.**

Department of the Interior,
General Land Office,

Washington, D. C., November 27, 1896.

Registers and Receivers, U. S. Land Offices.

Sirs: Hereafter where the lands selected by the states, under their grants, are within a mineral belt or proximate to any mining claim, the state will be required to file with the local land officers, with each selection list, a satisfactory nonmineral affidavit, covering each legal subdivision of land selected. If any of the lands selected are found, upon examination, to be with-

in a township containing any mineral entry, claim or location, you will at once notify the proper state officer as to the specific tracts, and require him to at once publish notice in some newspaper of general circulation (to be designated by you) within the vicinity of said lands, setting forth that the state has applied for the lands designated, and has filed lists for the same in your office; that said lists are open to the public for inspection, and that a copy of the same by descriptive subdivisions has been conspicuously posted in your office for inspection by persons interested and the public generally; and that you will receive protests or contests within the next sixty days for any of said tracts or subdivisions of land claimed to be more valuable for mineral than for agricultural purposes.

At the expiration of the sixty days you will make full report to this office as to any protests or contests, or suggestions as to the mineral character of any of such lands, together with any information you may have received in regard thereto.

You will also notify the proper state officer that a failure to make the required publication within thirty days will result in the cancellation of the selections referred to, upon the same being reported to this office.

The notice will be published once a week for ten consecutive weeks.

The original lists, with proper notations as to the lands within mineral townships, will be duly forwarded to this office, without awaiting the publication of notice, that proper action may be taken in respect to the remaining lands.

Circular instructions of July 9, 1894 (19 L. D., 21), so far as the same are made applicable to state selections, are accordingly modified.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved:

DAVID B. FRANCIS,
Secretary.

## VIII. Petroleum Law of Feb. 11, 1897, and Circular Instructions Relating Thereto.

**Petroleum.**

Department of the Interior,
General Land Office.

Washington, D. C., February 25, 1897.

Registers and Receivers, U. S. Land Offices.

Sirs: Your attention is directed to the act of Congress, approved on February 11, 1897, as follows:

[Public No. 57.]

An act to authorize the entry and patenting of lands containing petroleum and other mineral oils under the placer mining laws of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor under the provisions of the laws relating to placer mineral claims; provided, that lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this act the same as if such filing, claim or improvement were subsequent to the date of the passage hereof.

It is to be observed that though the provisions of the placer mineral land laws are by said act extended so as to allow the location and entry thereunder of public lands chiefly valuable for petroleum or other mineral oils, yet the substances named are not expressly stated to be mineral, in view of which it would appear that the prior assertion of a legal adverse claim to land valuable for petroleum or other mineral oils would preclude the acquisition of any rights thereto under the provisions of the mineral land laws.

Claims to lands of the character mentioned, heretofore initiated under the mineral land laws are by said act expressly confirmed; but this confirmation must, of course, be construed as applying only to cases where, prior to February 11, 1897, no valid adverse claim to lands involved had been acquired under other than the mineral land laws.

In proceeding under this law, you will act in accordance with the views herein set forth.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved:

DAVID B. FRANCIS,
Secretary.

## IX. Alien Act of March 2, 1897.

An Act to better define and regulate the rights of aliens to hold and own real estate in the Territories.

### Aliens not to Hold Lands in Territories Except, etc.

An Act entitled "An Act to restrict the ownership of real estate in the Territories to American citizens, and so forth," approved March 3, 1887, except so far as it affects real estate in the District of Columbia, be, and the same is hereby, amended so as to read as follows:

1. "That no alien or person who is not a citizen of the United States, or who has not declared his intention to become a citizen of the United States in the manner provided by law, shall acquire title to or own any land in any of the territories of the United States except as hereinafter provided; provided, that the prohibition of this section shall not apply to cases in which the right to hold or dispose of lands in the United States is secured by existing treaties to citizens or subjects of foreign countries, which rights, so far as they may exist by force of any such treaty, shall continue to exist so long as such treaties are in force, and no longer.

Rights of aliens in territories prior to this act: §§ 242-244.
Power of Congress over territories: § 242.
General scope of former act: § 244.
For discussion of this act: See § 684, and note, page 863.

**Resident Aliens may Hold Lands; Aliens may Acquire and Hold Mines.**

"§ 2. That this act shall not apply to land now owned in any of the territories of the United States by aliens, which was acquired on or before March 3, 1887, so long as it is held by the then owners, their heirs or legal representatives, nor to any alien who shall become a bona fide resident of the United States, and any alien who shall become a bona fide resident of the United States or shall have declared his intention to become a citizen of the United States in the manner provided by law, shall have the right to acquire and hold lands in either of the territories of the United States upon the same terms as citizens of the United States; provided, that if any such resident alien shall cease to be a bona fide resident of the United States then such alien shall have ten years from the time he ceases to be such bona fide resident in which to alienate such lands. This act shall not be construed to prevent any persons not citizens of the United States from acquiring or holding lots or parcels of lands in any incorporated or platted city, town, or village, or in any mine or mining claim, in any of the territories of the United States.

**Aliens may Acquire Lands by Descent and Mortgage, but Must Dispose of Them.**

"§ 3. That this act shall not prevent aliens from acquiring lands or any interests therein by inheritance or in the ordinary course of justice in the collection of debts, nor from acquiring liens on real estate or any interest therein, nor from lending money and securing the same upon real estate or any interest therein; nor from enforcing any such lien, nor from acquiring and holding title to such real estate, or any interest therein, upon which a lien may have heretofore or may hereafter be fixed, or upon which a loan of money may have been heretofore or hereafter may be made and secured; provided, however, that all lands so acquired shall be sold within ten years after the title shall be perfected in him under said sale or the same shall escheat to the United States and be forfeited as hereinafter provided.

**Conveyances in Evasion of this Act Are Void.**

"§ 4. That any alien who shall hereafter hold lands in any of the territories of the United States in contravention of the provisions of this act may nevertheless convey his title thereto at any time before the institution of escheat proceedings as hereinafter provided; provided, however, that if any such conveyance shall be made by such alien, either to an alien or to a citizen of the United States, in trust and for the purpose and with the intention of evading the provisions of this act, such conveyance shall be null and void, and any such lands so conveyed shall be forfeited and escheat to the United States.

**Escheat Proceedings; Notice.**

"§ 5. That it shall be the duty of the attorney general of the United States, when he shall be informed or have reason to believe that lands in any of the territories of the United States are being held contrary to the provision of this act, to institute or cause to be instituted suit in behalf of the United States in the district court of the territory in the district where such land or a part thereof may be situated, praying for the escheat of the same on behalf of the United States to the United States; provided, that before any such suit is instituted the Attorney General shall give or cause to be given ninety days' notice by registered letter of his intention to sue, or by personal notice directed to or delivered to the owner of said land, or the person who last rendered the same for taxation, or his agent, and to all other persons having an interest in such lands of which he may have actual or constructive notice. In the event personal notice can not be obtained in some one of the modes above provided, then said notice shall be given by publication in some newspaper published in the county where the land is situate, and if no newspaper is published in said county then the said notice shall be published in some newspaper nearest said county.

**Sale of Land; Disposal of Proceeds; Alien Becoming Qualified.**

"§ 6. That if it shall be determined upon the trial of any such escheat proceedings that the lands are held contrary to the provisions of this act, the court trying said case shall render judg-

ment condemning such lands and shall order the same to be sold as under execution; and the proceeds of such sale, after deducting costs of such suit, shall be paid to the clerk of such court so rendering judgment, and said fund shall remain in the hands of such clerk for one year from the date of such payment, subject to the order of the alien owner of such lands, or his heirs or legal representatives; and if not claimed within the period of one year, such clerk shall pay the same into the treasury of the territory in which the lands may be situated, for the benefit of the available school fund of said territory; provided, that the defendant in any such escheat proceedings may, at any time before final judgment, suggest and show to the court that he has conformed with the law, either becoming a bona fide resident of the United States, or by declaring his intention of becoming a citizen of the United States, or by the doing or happening of any other act which, under the provisions of this act, would entitle him to hold or own real estate, which being admitted or proved, such suit shall be dismissed on payment of costs and a reasonable attorney fee to be fixed by the court.

**General Application of the Act.**

"§ 7. That this act shall not in any manner be construed to refer to the District of Columbia, nor to authorize aliens to acquire title from the United States to any public lands in the United States or to in any manner affect or change the laws regulating the disposal of the public lands of the United States. And the act of which this act is an amendment shall remain in force and unchanged by this act so far as it refers to or affects real estate in the District of Columbia.

"§ 8. That all laws and parts of laws so far as they conflict with the provisions of this act are hereby repealed."

## X. Recent Legislation and Regulations on Subject of Mining Claims within Forest Reservations.

Since the portion of the text relating to forest reservations (ante, secs. 196, 198) was written, Congress passed an act making appropriations for sundry civil expenses of the government, ap-

proved June 4, 1897, and embodied therein, certain regulations relating to forest reservations among which were the following:

"It is not the purpose or intent of these provisions, or of the act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes. . . . .

"The secretary of the interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by bona fide settlers, miners, residents, and prospectors for minerals, for firewood, fencing buildings, mining, prospecting and other domestic purposes, as may be needed by such persons for such purposes. . . . .

"Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: Provided, that such persons comply with the rules and regulations covering such forest reservations. . . .

"All waters on such reservations may be used for domestic, mining, milling or irrigation purposes, under the laws of the state wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder.

"Upon the recommendation of the secretary of the interior with the approval of the president, after sixty days' notice thereof published in two papers of general circulation in the state or territory wherein any forest reservation is situated, and near the said reservation, any public lands embraced within the limits of any forest reservation, which after due examination by personal inspection of a competent person appointed for that purpose by the secretary of the interior, shall be found better adapted for mining or for agricultural purposes than for forest usage, may be restored to the public domain. And any mineral lands in any forest reservation which have been or which may be shown to be such and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained."

Under the authority vested in the secretary of the interior by the act to insure the objects for which forest reservations are cre-

ated, rules and regulations were prescribed June 30, 1897, by the commissioner (24 L. D. 589), among which the following are important:

"3. It is the intention to exclude from these reservations, as far as possible, lands that are more valuable for the mineral therein, or for agriculture, than for forest purposes; and where such lands are embraced with the boundaries of a reservation, they may be restored to settlement, location and entry.

"19. The law provides that 'any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding the reservation. This makes mineral lands in the forest reserves subject to location and entry under the general mining laws in the usual manner.

"20. Owners of valid mining locations made and held in good faith under the mining laws of the United States and the regulations thereunder, are authorized and permitted to fell and remove from such mining claims any timber growing thereon, for actual mining purposes in connection with the particular claim from which the timber is felled or removed."

# TITLE XIII.

## STATE AND TERRITORIAL LEGISLATION ON MINING SUBJECTS.

(The sections referred to in the notes are those of the text of this treatise unless otherwise expressed.)

## ARIZONA.

I. ACT OF 1895 RELATING TO THE LOCATION AND DEVELOPMENT OF MINING CLAIMS.
II. ACT OF 1891 RELATING TO FORFEITURE OF MINING CLAIMS.
III. REFERENCE TO MISCELLANEOUS LEGISLATION ON MINING SUBJECTS.

### I. ACT OF 1895 RELATING TO THE LOCATION AND DEVELOPMENT OF MINING CLAIMS.

[In effect July 1, 1895; Laws of 1895, pp. 53-55.]

#### Contents of Location Notice.

§ 1. Every notice of location of mining claim shall contain: First, the name of the claim located; second, the name of the locator; third, the date of location; fourth, the number of feet in length of said claim and the number of feet claimed on each side of the center of the discovery shaft, lengthwise of the claim; fifth, the general course of the lode deposit or premises located; sixth, the locality of the claim with reference to some natural object, or permanent monument, as will identify the claim.

Referred to in text: §§ 353, 379.
Requirements of Federal Law as to contents of recorded notices: § 2324, Rev. Stats. ante, p. 1168 and note.
Purpose of location certificate: § 379.
Rules of construction applied: § 381.

**Location Certificates Void unless They Contain Necessary Recitals.**

§ 2. All mining locations hereafter located, the certificate of location of which shall not contain: First, the name of the lode or premises; second, the name of the locator or locators; third, the date of location; fourth, the number of feet in length of said claim and the number of feet claimed on each side of the center of the discovery shaft, lengthwise of the claim; fifth, the general course of the lode, or premises, as near as may be; sixth, the locality of the claim with reference to some natural object or permanent monument, as will identify the claim, shall be void.

Effect of failure to comply with the law as to contents of certificate: § 384.

Time allowed for recording in absence of State law fixing it: § 389.

Effect of failure to record: § 390.

The record as evidence: § 392.

**Lode Claim, How Located; Discovery Shaft; Posting Notice.**

§ 3. Before filing such location certificate with the county recorder of the proper county, the discoverer shall locate his claim by: First, sinking a discovery shaft upon the premises, so claimed, to a depth of at least ten feet from the lowest part of the rim of such shaft at the surface, and deeper if necessary, until there is shown by such work a lode deposit or mineral in place;[1] second, by posting at the point of discovery, on the surface, a plain sign or notice substantially conforming to the location certificate;[2] third, by marking such claim or premises on the ground so that its boundaries can be readily traced.[3]

[1]Statute referred to in the text: § 343.

Relationship of discovery to discovery shaft: § 345.

Object of requirement as to development work: § 344.

Extent of development work: § 346.

May such preliminary work be credited on account of first year's representation? § 632.

[2]The preliminary notice and its posting described: §§ 350-356.

[3]Marking of the location on the surface, necessity for and object of: §§ 371-375.

**Marking of Boundaries.**

§ 4. Such surface boundaries shall be marked by eight substantial posts, projecting at least three feet above the surface of the ground, or by substantial stone monuments at least three feet high, to wit: One at each corner of said claim, and one at the center of each end and side line thereof.

Statute referred to in the text: § 374, p. 486.
Necessity for and object of marking: §§ 371-375.

**Equivalent of Discovery Shaft.**

§ 5. Any open-cut, cross-cut, adit or tunnel, which shall be made as above provided for, as a part of, the location of a mining claim, and which shall be equal in amount of work to a shaft ten feet deep and four feet wide by six feet long, and which shall cut a lode or mineral in place at the depth of ten feet from the surface, shall be equivalent, as a discovery work, to a shaft sunk from the surface.

See note to § 3 of this act.

**Time Within Discovery Work Must Be Performed.**

§ 6. The discoverer shall have ninety days from the date of discovering the lode and the posting of the notice thereon, to perform said discovery work thereon.

See note to § 3 of this act.

**Relocation by Owner; Amended Location Certificate; Change of Boundaries.**

§ 7. If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall learn that his original certificate was defective, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing his surface boundaries, or of taking in any additional ground which is subject to location, or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefits of this act, such locator or his

assigns may file an amended certificate of location subject to the provisions of this act, regarding the making of new locations.

Statute referred to in text: § 397, p. 506.
Object and functions of amended location certificates: § 398, p. 507.
Circumstances justifying change of boundaries: § 396, p. 504.
Privilege of changing boundaries exists in the absence of intervening rights, independent of state legislation: § 397, p. 506.

**Amount of Annual Work Governed by the Laws of the United States.**

§ 8. The amount of assessment, or representation, work or improvements, to be done or made during each year, after the completion of the location as heretofore provided, and the time for doing the same, shall be as provided by the laws of the United States.

Effect of above section discussed: § 626.
Statute referred to in text: § 626.
Provision of federal law on subject discussed: § 623.
Requirement as to annual labor imperative: § 624.
Subject discussed generally: §§ 623-638.

**Affidavit of Performance of Annual Labor.**

§ 9. Within three months after the expiration of the period of time fixed for the performance of annual labor or the making of improvements upon any mining claim or premises, the person on whose behalf such work or improvement was made, or some person for him, knowing the facts, may make and record in the office of the county recorder of the county wherein such claim is situate an affidavit in substance as follows:

Territory of Arizona, }
——— County. } ss.

———— ————, being duly sworn, deposes and says, that he is a citizen of the United States and more than 21 years of age, and resides at —— in —— county, Arizona Territory, and is personally acquainted with the mining claim and premises located and known as —— mining claim or lode, situate in —— mining district, county of ——, Arizona Territory, the notice of location

of which premises is recorded in the office of the county recorder of said county, in book —— of records of mines, at page ——; that between the — day of ——, A. D. 189—, and the — day of ——, A. D. 189—, at least —— dollars' worth of work and improvements were done and performed upon said premises or lode, not including the location work of said claim. Such work and improvements were made by and at the expense of —— owners of said premises for the purpose of complying with the law of the United States pertaining to assessments or annual work, and (here name the miners or men who worked upon the claim in doing the work) were the men employed by said owner and who labored upon said premises and who did said work and improvements, and said work so done upon said premises is described as follows, to wit: (here describe the work done).

Signature.

Subscribed and sworn to before —— me, this —— day of ——, 189—. Notary Public.

Laws of 1895, p. 54.
Statute referred to in text: § 636, p. 800.
Object and purpose of the affidavit: § 636.
Effect of failure to file affidavit, discussed: § 636, p. 800.

**Such Affidavits as Evidence.**

§ 10. Such affidavit when so recorded shall be prima facie evidence of the performance of such labor or the making of such improvements, and said original affidavit after it has been recorded, or a certified copy of record of same, shall be received as evidence accordingly by all the courts of this territory.

Affidavits as evidence: § 636.

**Relocation of Forfeited and Abandoned Lode Claims.**

§ 11. The relocation of forfeited or abandoned lode claims shall only be made by sinking a new discovery shaft and fixing new boundaries in the same manner and to the same extent as is required in making a new location; or the relocator may sink the original discovery shaft ten feet deeper than it was at date of commencement of such relocation, and shall erect new, or make the old, monuments the same as originally required. In either case a new location monument shall be erected and the location

certificate shall state if the whole or any part of the new location is located as abandoned property.

Circumstances under which relocations may be made: § 402, p. 511.
New discovery not essential as basis of relocation: § 403, p. 512.
Relocation admits validity of original: § 404, p. 512.
Relocation by original locator: § 405, p. 513.
Relocation by one of several original locators in hostility to the others: § 406, p. 517.
Relocation by agent or others occupying contractual or fiduciary relations with original locator: § 407, p. 518.
Manner of perfecting relocations: § 408, p. 519.
Rights of second locator to improvements made by the first: § 409, p. 522.

## II. Act of 1891 Relating to Forfeiture of Mining Claims.

[In effect March 19, 1891; Stats. of 1891, pp. 140, 141.]

### Forfeiture to Co-owners, How Effected.

§ 1. Whenever a co-owner or co-owners shall give to a delinquent co-owner or co-owners the notice in writing or notice by publication provided for in section twenty-three hundred and twenty-four (2324) of the Revised Statutes of the United States, an affidavit of the person giving such notice, stating the time, place, manner of service, and by whom and upon whom such service was made, shall be attached to a true copy of such notice, and such notice and affidavit must be recorded in the office of the county recorder of the county in which the mining claim is situate, within ninety (90) days after the giving of such notice, or, if such notice is given by publication in a newspaper, there shall be attached to a printed copy of such notice an affidavit of the editor, publisher or foreman of such paper an affidavit stating the date of the first, last and each insertion of such notice therein, and when and where the newspaper was published during that time, and the name of such newspaper. Such affidavit and notice shall be recorded as aforesaid within one hundred and eighty days after the first publication thereof.

Validity of this class of laws questioned: §§ 251, 646.
Forfeiture to co-owners under Federal law discussed: § 646.
For Departmental Regulations on this subject: See Appendix, page 1184, par. 6.

**Failure of Co-owner to Contribute, How Proved.**

§ 2. The original of such notice and affidavits or the records thereof, shall be evidence that the delinquent mentioned in said section 2324 has failed or refused to contribute his proportion of the expenditure required by that section, and of the services or publication of said notice; provided, the writing or affidavit hereinafter provided for is not of record.

See note to preceding section.

**Certificate of Contribution by Co-owner Within Ninety Days After Notice.**

§ 3. If such delinquent shall, within the ninety days required by section 2324 aforesaid, contribute to his co-owner or co-owners his proportion of such expenditures, such co-owner or co-owners shall sign and deliver to the delinquent or delinquents a writing, stating that the delinquent or delinquents by name, has within the time required by section 2324 of the Revised Statutes of the United States, contributed his share for the year —— upon the —— mine, and further stating therein the districts, county and territory where the same is situated, and the book and page where the location notice is recorded. Such writing shall be recorded in the office of the county recorder of said county.

See note to § 1.

**Penalty for Failure to Deliver Certificate of Contribution.**

§ 4. If such co-owner or co-owners shall fail to sign and deliver such writing to the delinquent or delinquents within twenty days after such contribution, the co-owner or co-owners so failing as aforesaid, shall be liable to a penalty of one hundred dollars, to be recovered by any person for the use of the delinquent or delinquents, in any court of competent jurisdiction. If such co-owner or co-owners fail to deliver such writing within said twenty days, then the delinquent, with two disinterested persons having personal knowledge of such contribution, may make an affidavit, setting forth in what manner, the amount of, to whom and upon

what mine, such contribution was made. Such affidavit or a record thereof in the office of the county recorder of the county in which said mine is situate, shall be prima facie evidence of such contribution.

See note to § 1.

**Description of Mining Claims in Notices and Proceedings for Forfeiture to Co-owner.**

§ 5. In all actions, proceedings, judgments, grants, notices, conveyances or writings it shall be a sufficient description of a mining claim, if it can be intelligently learned therefrom the name of the claim, the district, county and territory where same is situate, and the book and page where the notice thereof is recorded.

See note to § 1.

## III. Reference to Miscellaneous Legislation on Mining Subjects.

1. Providing that destruction of notices of location shall be punished as a misdemeanor. Rev. Stat. 1887, p. 746, par. 947.

2. Empowering mining districts to make regulations and providing for recording notices. Rev. Stat. 1887, p. 412, par. 2349-2351.

3. Concerning drainage of mines. Rev. Stats. 1887, p. 412, par., 2352.

4. Providing for condemnation of rights of way for roads, ditches, tunnels, flumes and other easements for mining purposes. Rev. Stat. 1887, p. 314.

5. Providing for miners' liens. Rev. Stats. 1887, p. 402, par. 2276.

6. Providing a penalty for "salting" ores. Laws of 1895, p. 34.

7. Relating to optional sales of mining property when belonging to estates. Laws of 1897, p. 111.

## CALIFORNIA.

I. Act of 1897 Relating to Location and Development of Mining Claims.
II. Act of 1891 Relating to Performance and Proof of Labor.
III. Regulating the Sale of Mineral Lands Belonging to the State.
IV. Congressional Act Regulating Hydraulic Mining in California.
V. Reference to Miscellaneous Legislation on Mining Subjects.

### I. Act of 1897 Relating to Location and Development of Mining Claims.

[In effect May 26, 1897; Stats. 1897, p. 215.]

This act was passed after the early chapters of the work had been printed. This accounts for the absence of a proper classification in the text of the legislation of this state. e. g. §§ 339, 343, 351. The passage of the act shortly after these sections had been printed, enabled the author to note it in the text in subsequent sections, e. g. §§ 380, 385, etc.

#### Provisions of the Act to Govern Location of Mining Claims.

§ 1. The location of mining claims upon the public domain of the United States shall be made and perfected as provided in this act.

#### Lode Claims, Preliminary Notice and its Posting.

§ 2. The discoverer of any vein or lode shall immediately, upon making a discovery, erect at the point of discovery a substantial monument or mound of rocks, and post thereon a preliminary notice, which shall contain:

First—The name of the lode or claim;

Second—The name of the locator or locators;

Third—The date of the discovery;

Fourth—The number of linear feet claimed in length along the course of the vein each way from the point of discovery;

Fifth—The width claimed on each side of the center of the vein;

Sixth—The general course of the vein or lode, as near as may be;

Seventh—That such notice is a first or preliminary notice.

Such notice shall be recorded in the office of the county recorder of the county in which the same is posted within twenty days after the posting thereof. Upon the erection of said monument and posting such notice, the discoverer shall be allowed the period of time specified in section three of this act to enable him to perfect his location as hereinafter provided.

See note to preceding section.

The object of this enactment was evidently to allow the discoverer an opportunity after discovery to trace the course of his vein before being compelled to mark his boundaries. While in the Circuit Court of Appeals, Ninth Circuit, it was determined that in the absence of State legislation fixing a period the locator had a reasonable time to mark his boundaries, the Supreme Court of California announced the rule that no time was allowed for this purpose. To remedy the difficulty arising from the conflict of decision as well as for other reasons suggested in § 339 of the text, the act was passed which gives the locator sixty days from discovery to perfect his location. (See next section.)

The provision for the recording of this preliminary notice, has led to a criticism that such notice in form as prescribed by the section, does not comply with the federal law, which provides that: "All records of mining claims hereafter made shall contain . . . . a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim." (Rev. Stats. § 2324.)

If by this is meant that the boundaries of the claim are to be marked and connected with some natural object or permanent monument and such marking is required before a lawful record of the preliminary notice may be made, the object of the California law is defeated.

We suggest two solutions of the difficulty:

(1) The preliminary notice is not the one contemplated by Congress. The final certificate of location provided for by section 2 of the act being the notice of perfected location which defines the boundaries, and is required to contain everything contemplated by the federal law, is the notice which Congress had in view. (See text § 379.) The provision for recording the preliminary notice is a mere local regulation concerning an act of location within the permissive sanction of the federal law.

(2) A reference to a natural object or permanent monument, in close proximity to the discovery monument, will satisfy the law, not

as to marking the boundaries of the location which follows within sixty days thereafter, but as identifying the claim.

In the Title on Forms and Precedents (post), we have presented forms of the two classes of notices, preliminary and final, required by this act, which we think will obviate the difficulty, and are in harmony with the letter and spirit of both laws.

Utah has passed a law somewhat similar to the California Statute, omitting the element of recording. (See post p. 1331.) For distinction between this class of preliminary posted notices and those required in Arizona and New Mexico, see § 379 of the text.

Posting not required by Federal Law: § 350, p. 456.

State legislation requiring posting of notices, states grouped: §§ 351, 354, p. 457.

Liberal rules of construction applied to notices: § 355, p. 460.

Place and manner of posting discussed: §§ 356, p. 461.

**Lode Claims; Development Work; Marking Boundaries, Location Certificate.**

§ 3. Within sixty days from the date of the discovery of a vein or lode, the discoverer must perform fifty dollars' worth of labor in developing his discovery,[1] and distinctly mark his location on the ground so that its boundaries can be readily traced, and must file in the office of the county recorder of the county in which the claim is situated, a certificate of location, which said certificate shall state:

1. The name of the lode or claim;

2. The name of the locator or locators;

3. The date of discovery and posting of the notice provided for in section two of this act, which shall be considered as the date of the location;

4. A description of the claim, defining the exterior boundaries as they are marked upon the ground, and such additional description by reference to some natural objects, or permanent monument, as will identify the claim.

5. A statement that such certificate is the final or completed notice of location, and that he has performed the aforesaid fifty dollars' worth of labor in development work thereon within the aforesaid sixty day period, stating generally the nature thereof.[2] Said certificate shall be dated and signed by or on behalf of the locator or locators, and verified by them or by some one in their behalf, and when filed for record shall be deemed and considered

as prima facie evidence of the facts therein recited.[3] A copy of such certificate of location, certified by the county recorder, shall be admitted in evidence in all actions or proceedings with the same effect as the original.[4] The performance of such labor shall be deemed a necessary act in completing such location and a part thereof, and no part thereof shall inure to the benefit of any subsequent location.

See note to preceding section.

[1]Object of requirement as to development work: § 344.
Validity of such laws upheld: § 250 (15).
Value of labor and improvements, how estimated: § 635.
May development work be credited on first year's work: § 632.
[2]Act referred to in text: § 380.
Purpose of location certificate: § 379.
Rules of construction applied: § 381.
[3]Verification of certificates: § 385.
[4]Right of second locator to improvements made by first: § 409.

**Placers; Manner of Locating; Certificate of Location; Record; Development Work; Affidavit of Performance.**

§ 4. The discoverer of placers or other forms of deposit, subject to location and appropriation, under mining laws applicable to placers, shall locate his claim in the following manner:

First—He must immediately post in a conspicuous place at the point of discovery thereon a notice or certificate of location thereof, containing:

(a) The name of the claim.

(b) The name of the locator or locators.

(c) The date of the discovery and posting of the notice, hereinbefore provided for, which shall be considered as the date of the location.

(d) A description of the claim by reference to legal subdivisions of sections, if the location is made in conformity with the public surveys; otherwise, a description with reference to some natural object or permanent monument as will identify the claim, and where such claim is located by legal subdivisions of the public surveys, such location shall, notwithstanding that fact, be marked by the locator upon the ground, the same as other locations.[1]

Second—Within thirty days from the date of such discovery he must record such notice or certificate of location in the office of the county recorder of the county in which such discovery is made, and so distinctly mark his location on the ground that its boundaries can be readily traced.[2]

Third—Within sixty days from the date of the discovery the discoverer shall perform labor upon such location or claim in developing the same to an amount which shall be equivalent in the aggregate to at least ten dollars' ($10) worth of such labor for each twenty acres, or fractional part thereof, contained in such location or claim.[3]

Fourth—A failure to perform such labor within said time, shall cause all rights under such location to be forfeited and the land covered thereby shall at once be open to location by qualified locators other than the preceding locators, but shall not in any event be open to location by such preceding locators, and any labor performed by them thereon shall not inure to the benefit of any subsequent locator thereof.

Fifth—Such locator shall, upon the performance of such labor, file with the recorder of the county an affidavit, showing such performance, and generally the nature and kind of work so done.

[1]Location of placer claims under U. S. laws in absence of supplementary state legislation: § 432.
Location of placers where State Legislation exisits: § 433.
Character of deposits subject to appropriation under laws applicable to placers: §§ 419-428.
Section referred to in text: §§ 443, 459.
[2]Preliminary development work required by state laws upon placer locations: § 443.
General principles applicable to lode claims govern placers: § 463.

**Records as Evidence.**

§ 5. The affidavit provided for in the last section, and the aforesaid placer notice or certificate of location when filed for record, shall be deemed and considered as prima facie evidence of the facts therein recited. A copy of such certificate, notice, or affidavit, certified by the county recorder, shall be admitted in

evidence in all actions or proceedings with the same effect as the original.

The record as evidence: § 392.
Proof of annual labor under state laws: § 636.

**Locations Void Unless Conforming to Requirements.**

§ 6. All locations of quartz or placer formations or deposits, hereafter made, which do not conform to the requirements of this act, in so far as the same are respectively applicable thereto, shall be void.

Effect of failure to comply with the law as to contents of certificate: § 384.

**Records of Mining Claims not to be Made in District Records; Records so Made before the Passage of the Act are Valid; Transmission of Records.**

§ 7. No record of a mining claim or millsite, made after the passage of this act, in the records of any mining district, shall be valid. All notices of location of mining claims, millsites, and other notices, heretofore recorded in such district records, if such notices conform to the local rules and regulations in force in such district, are hereby declared valid. Within thirty days after the passage of this act the district recorder or custodian of the records of the several mining districts in this state shall transmit to the county recorders of the respective counties wherein the respective districts are situated, all the records of said respective districts, and henceforward such county recorder shall be deemed and considered the legal custodian of such records. Thereafter copies of such records, certified by the county recorder, may be received in evidence with the same effect as the originals.

Some controversy has arisen over this section. We think it is a proper and valid law. It has been our view throughout this treatise that when the state legislates upon these subjects the districts are powerless: §§ 248, 268, 270.

Local regulations cannot contravene state laws: Erhardt v. Boaro, 113 U. S. 527.

See, also, Cal. Code, C. P. 748.

Place of record in California before the above section went into effect: § 389, p. 501.

## II. An Act Entitled an Act Relating to the Working, Rights of Way, Easement and Drainage of Mines in the State of California.

[In effect March 31, 1891. Laws of 1891, pp. 219-221.]

**Proof of Labor; Forfeiture for Failure to Perform Labor; Presumption of Work; Forfeiture to Co-owners.**

§ 1. Whenever any mine owner, company, or corporation shall have performed the labor and made the improvements required by law for the location and ownership of mining claims or lodes, such owner, company, or corporation shall file or cause to be filed, within thirty days after the time limited for performing such labor or making such improvements, with the county recorder of deeds of the county in which the mine or claim is situated, particularly describing the labor performed and improvements made, and the value thereof, which affidavit shall be prima facie evidence of the facts therein stated.[1] Upon the failure of any claimant or mine owner to comply with the conditions of this act in the performance of labor, or making of improvements upon any claim, mine or mining ground, the claim or mine upon which such failure occurred shall be opened to relocation in the same manner as if no location of the same had ever been made.[2] But if, previous to relocation, the original locators, their heirs, assigns, or legal representatives, resume work upon such claim, and continue the same with reasonable diligence until the required amount of labor has been performed or improvements made, and the required statement of accounts and affidavits filed with the county recorder, then the claim shall not be subject to relocation because of previous failure to file accounts.[3] Upon the failure of any one of the several co-owners to contribute his portion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice, in writing, or by publication in the newspaper published nearest the claim, for at least once a week for ninety days; and if, at the expiration of ninety days after such notice in writing or publication, such delinquent shall fail or refuse to contribute his portion of the

expenditures required by this section, his interest in the claim shall become the property of his co-owners who made the required expenditures. A copy of such notice, together with an affidavit showing personal service or publication, as the case may be, of such notice, when filed or recorded with the recorder of deeds of the county in which such mining claim is situated, shall be evidence of the acquisition of title of such co-owners. Where a person or company has or may run a tunnel or cuts, in good faith, for the purpose of developing a lode, lodes, or claims owned by said person, or company, or corporation, the money so expended in running said tunnel shall be taken and considered as expended on said lodes or claims; provided, further, that said lode, claim, or claims shall be distinctly marked on the surface as provided by law.

[1]For discussion of this subject: See § 636.

[2]See similar provision in Federal Statutes: Rev. Stats., § 2324: ante, p. 1168.

For discussion of subject of forfeiture for failure to perform annual labor: See § 645.

[3]Restoration of estate by resumption of work discussed: §§ 651-654.

[4]Validity of this class of laws questioned: § 251.

Forfeiture to co-owners: § 646.

For departmental regulations on this subject: See Appendix, page 1184, par. 6.

## III. Regulating Sale of Mineral Lands Belonging to the State.

A law was passed in 1874 providing for the disposal of 16th and 36th sections belonging to the state which were found to be mineral in character. Stats. 1873-74, p. 766; Amended Stats. 1875-76, p. 20; Amended Stats. 1880, p. 26.

This act and those amendatory thereof were repealed by the Act of April 1, 1897 (Stats. of 1897, p. 438). The repealing act contained the following provisions:

§ 2. When it shall be shown by affidavits or otherwise, to the satisfaction of the surveyor-general that any portion of a sixteenth or thirty-sixth section belonging to the state is valuable for its mineral deposits, the surveyor-general shall not approve any application to purchase the same, nor shall the register of the state land office issue a certificate of purchase therefor until the ques-

tion of the character of the land has been referred, for determination, to a court of competent jurisdiction, in the manner provided by section thirty-four hundred and fourteen of the Political Code, and adjudged not to be valuable as mining land.

§ 3. The sixteenth and thirty-sixth sections belonging to the state, in which there may be found valuable mineral deposits, are hereby declared to be free and open to exploration, occupation, and purchase of the United States, under the laws, rules, and regulations passed and prescribed by the United States for the sale of mineral lands.

§ 4. This act shall take effect from and after its passage.

**The peculiarity of these provisions deserves notice. Formerly mineral lands within 16th and 36th sections were sold by the state under special laws, which are repealed by this act. Title of the state to these sections vests upon approval of the survey if at that date the lands were not known to be mineral (ante, § 142). If they were then known to be mineral the state received no title. The act therefore can have no possible application to any lands except 16th or 36th sections wherein mineral has been discovered subsequent to the approval of the survey and vesting of title in the state. What is the object of the act? The title gives no clue. It does not purport to revest title in the federal government. If it did it would not be effectual for any such purpose, without the consent of Congress. States have no power to compel the United States to resume sovereignty over such lands nor impose upon the national government the obligation to include such lands within its public land system without some concurrent Congressional legislation, accepting the burden.**

**If the intent of the act is to provide a method of location upon the theory of the retention of the title by the state, it is open to several constitutional objections. No act of a state legislature which should declare that the law of another state, without re-enacting it, should be the rule of civil conduct on a certain subject, could be upheld. We see no difference in principle when a federal statute is named. Nevada has a similar law (see post, Nevada) which is open to the same objection.**

## IV. Congressional Act Regulating Hydraulic Mining in California.

**Causes leading up to the passage by Congress of the Act creating the Debris Commission: § 848.**

**Hydraulic mining not a nuisance per se—Principles established by the debris cases: § 849.**

**Essential features of the congressional act creating the California**

Debris Commission and regulating hydraulic mining in the State of California: § 850.

Necessity for definition of term "hydraulic mining": § 851.

What constitutes "hydraulic mining" or "mining by the hydraulic process" within the meaning of the act: § 852.

Judicial interpretation of the act—its constitutionality: § 853.

**California Debris Commission, How Composed.**

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that a commission is hereby created, to be known as the California Debris Commission, consisting of three members. The President of the United States shall, by and with the advice and consent of the Senate, appoint the commission from officers of the corps of engineers, United States army. Vacancies occurring therein shall be filled in like manner. It shall have the authority, and exercise the powers hereinafter set forth, under the supervision of the chief of engineers and direction of the secretary of war.

**Organization of Commission; Compensation; Adoption of Rules.**

§ 2. That said commission shall organize within thirty days after its appointment by the selection of such officers as may be required in the performance of its duties, the same to be selected from the members thereof. The members of said commission shall receive no greater compensation than is now allowed by law to each, respectively, as an officer of said corps of engineers. It shall also adopt rules and regulations, not inconsistent with law, to govern its deliberations and prescribe the method of procedure under the provisions of this act.

**Territorial Jurisdiction of Commission; Hydraulic Mining Prohibited.**

§ 3. That the jurisdiction of said commission, in so far as the same affects mining carried on by the hydraulic process, shall extend to all such mining in the territory drained by the Sacramento and San Joaquin river systems in the state of California. Hydraulic mining, as defined in section eight hereof, directly or

indirectly injuring the navigability of said river systems, carried on in said territory other than as permitted under the provisions of this act is hereby prohibited and declared unlawful.

**Duty of Commission to Adopt Plans to Restore Navigability of Rivers, and Permit Hydraulic Mining Under Proper Restrictions.**

§ 4. That it shall be the duty of said commission to mature and adopt such plan or plans, from examinations and surveys already made and from such additional examinations and surveys as it may deem necessary, as will improve the navigability of all the rivers comprising said systems, deepen their channels, and protect their banks. Such plan or plans shall be matured with a view of making the same effective as against the encroachment of and damage from debris resulting from mining operations, natural erosion, or other causes, with a view of restoring, as near as practicable and the necessities of commerce and navigation demand, the navigability of said rivers to the condition existing in eighteen hundred and sixty, and permitting mining by the hydraulic process, as the term is understood in said state, to be carried on, provided the same can be accomplished without injury to the navigability of said rivers or the lands adjacent thereto.

**Duty of Commission to Investigate Practicability of Storage Sites and of Settling Reservoirs.**

§ 5. That it shall further examine, survey, and determine the utility and practicability, for the purposes hereinafter indicated, of storage sites in the tributaries of said rivers and in the respective branches of said tributaries, or in the plains, basins, sloughs, and tule and swamp lands adjacent to or along the course of said rivers, for the storage of debris or water or as settling reservoirs, with the object of using the same by either or all of these methods to aid in the improvement and protection of said navigable rivers by preventing deposits therein of debris resulting from mining operations, natural erosion, or other causes, or for affording relief thereto in flood time and providing sufficient water to maintain scouring force therein in the summer season; and in connection therewith to investigate such hydraulic and

other mines as are now or may have been worked by methods intended to restrain the debris and material moved in operating such mines by impounding dams, settling reservoirs, or otherwise, and in general to make such study of and researches in the hydraulic mining industry as science, experience, and engineering skill may suggest as practicable and useful in devising a method or methods whereby such mining may be carried on as aforesaid.

**Duty to Note the Effect on Streams of Such Mining as the Commission may Permit.**

§ 6. That the said commission shall from time to time note the conditions of the navigable channels of said river systems, by cross-section surveys or otherwise, in order to ascertain the effect therein of such hydraulic mining operations as may be permitted by its orders and such as is caused by erosion, natural or otherwise.

**Annual Report of Commission.**

§ 7. That said commission shall submit to the chief of engineers, for the information of the secretary of war, on or before the fifteenth day of November of each year, a report of its labors and transactions, with plans for the construction, completion, and preservation of the public works outlined in this act, together with the estimates of the cost thereof, stating what amounts can be profitably expended thereon each year. The secretary of war shall thereupon submit same to Congress on or before the meeting thereof.

**"Hydraulic Mining" Defined.**

§ 8. That for the purposes of this act "hydraulic mining" and "mining by the hydraulic process," are hereby declared to have the meaning and application given to said terms in said state.

What constitutes "hydraulic mining" or "mining by the hydraulic process": §§ 851, 852.

**Permit to Mine, How Obtained; Petition.**

§ 9. That the individual proprietor or proprietors, or in case of a corporation, its manager or agent appointed for that purpose,

owning mining ground in the territory in the state of California, mentioned in section three hereof, which it is desired to work by the hydraulic process, must file with said commission a verified petition, setting forth such facts as will comply with law and the rules prescribed by said commission.

**Right to Regulate the Restraining of the Debris to be Surrendered by Petitioner.**

§ 10. That said petition shall be accompanied by an instrument duly executed and acknowledged, as required by the law of the said state, whereby the owner or owners of such mine or mines surrender to the United States the right and privilege to regulate by law, as provided in this act, or any law that may hereafter be enacted, or by such rules and regulations as may be prescribed by virtue thereof, the manner and method in which the debris resulting from the working of said mine or mines shall be restrained, and what amount shall be produced therefrom; it being understood that the surrender aforesaid shall not be construed as in any way affecting the right of such owner or owners to operate said mine or mines by any other process or method now in use in said state; provided, that they shall not interfere with the navigability of the aforesaid rivers.

**Joint Petition by Adjoining Owners.**

§ 11. That the owners of several mining claims situated so as to require a common dumping ground or dam or other restraining works for the debris issuing therefrom in one or more sites may file a joint petition setting forth such facts in addition to the requirements of section nine hereof; and where the owner of a hydraulic mine or owners of several such mines have and use common dumping sites for impounding debris or as settling reservoirs, which sites are located below the mine of an applicant not entitled to use same, such fact shall also be stated in said petition. Thereupon the same proceedings shall be had as provided for herein.

**Notice of Petition to be Published; Examination of Mine; Plans may be filed; Further Hearings.**

§ 12. A notice specifying briefly the contents of said petition and fixing a time previous to which all proofs are to be submitted shall be published by said commission in some newspaper or newspapers of general circulation in the communities interested in the matter set forth therein. If published in a daily paper such publication shall continue for at least ten days; if in a weekly paper in at least three issues of the same. Pending publication thereof said commission, or a committee thereof, shall examine the mine and premises described in such petition. On or before the time so fixed all parties interested, either as petitioners or contestants, whether miners or agriculturalists, may file affidavits, plans and maps in support of their respective claims. Further hearings, upon notice to all parties of record may be granted by the commission when necessary.

**Decision of Commission; Order Directing Manner of Construction of Dam and Condition Under which Operations may be Carried on.**

§ 13. That in case a majority of the members of said commission, within thirty days after the time so fixed, concur in a decision in favor of the petitioner or petitioners, the said commission shall thereupon make an order directing the methods and specifying in detail the manner in which operations shall proceed in such mine or mines; what restraining or impounding works, if facilities therefor can be found, shall be built and maintained; how and of what material; where to be located; and in general set forth such further requirements and safeguards as will protect the public interests and prevent injury to the said navigable rivers, and the lands adjacent thereto, with such further conditions and limitations as will observe all the provisions of this act in relation to the working thereof and the payment of taxes on the gross proceeds of same; provided, that all expenses incurred in complying with said order shall be borne by the owner or owners of such mine or mines.

**Submission of Plans for Correction; Construction of Works.**

§ 14. That such petitioner or petitioners must within a reasonable time present plans and specifications of all works required to be built in pursuance of said order for examination, correction and approval by said commission; and thereupon work may immediately commence thereon under the supervision of said commission or representative thereof attached thereto from said corps of engineers, who shall inspect same from time to time. Upon completion thereof, if found in every respect to meet the requirements of said order and said approved plans and specifications, permission shall thereupon be granted to the owner or owners of such mine or mines to commence mining operations, subject to the conditions of said order and the provisions of this act.

**When Mine Owner may Commence Mining.**

§ 15. That no permission granted to a mine owner or owners under this act shall take effect, so far as regards the working of a mine, until all impounding dams or other restraining works, if any are prescribed by the order granting such permission, have been completed and until the impounding dams or other restraining works or settling reservoirs provided by said commission have reached such a stage, as, in the opinion of said commission, it is safe to use the same; provided, however, that if said commission shall be of the opinion that the restraining and other works already constructed at the mine or mines shall be sufficient to protect the navigable rivers of said systems and the work of said commission, then the owner or owners of such mine or mines may be permitted to commence operations.

**Joint Construction and Use by Adjoining Owners; Expense, how Divided; Where Dams must be Constructed.**

§ 16. That in case the joint petition referred to in section eleven hereof is granted, the commission shall fix the respective amounts to be paid by each owner of such mines toward providing and building necessary impounding dams or other restraining works. In the event of a petition being filed after the entry

of such order, or in case the impounding dam or dams or other restraining works have already been constructed and accepted by said commission, the commission shall fix such amount as may be reasonable for the privilege of dumping therein, which amount shall be divided between the original owners of such impounding dams or other restraining works in proportion to the amount respectively paid by each party owning same. The expense of maintaining and protecting such joint dam or works shall be divided among mine-owners using the same in such proportion as the commission shall determine. In all cases where it is practicable, restraining and impounding works are to be provided, constructed, and maintained by mine-owners near or below the mine or mines before reaching the main tributaries of said navigable waters.

**No Mining to be Allowed where Debris cannot be Impounded.**

§ 17. That at no time shall any more debris be permitted to be washed away from any hydraulic mine or mines situated on the tributaries of said rivers, and the respective branches of each, worked under the provisions of this act, than can be impounded within the restraining works erected.

**Commission may Revoke or Modify the Order Allowing Owner to Operate.**

§ 18. That the said commission may at any time, when the condition of the navigable rivers or when the capacities of all impounding and settling facilities erected by mine-owners or such as may be provided by government authority require same, modify the order granting the privilege to mine by the hydraulic mining process so as to reduce amount thereof to meet the capacities of the facilities then in use, or if actually required in order to protect the navigable rivers from damage, may revoke same until further notice of the commission.

**Intentional Violation of Order Works a Forfeiture of Right to Mine.**

§ 19. That an intentional violation on the part of a mine owner or owners, company, or corporation, or the agents or em-

ployees of either, of the conditions of the order granted pursuant to section thirteen, or such modifications thereof as may have been made by said commission, shall work a forfeiture of the privileges thereby conferred, and upon notice being served by the order of said commission upon such owner or owners, company, or corporation, or agent in charge, work shall immediately cease. Said commission shall take necessary steps to enforce its orders in case of the failure, neglect, or refusal of such owner or owners, company, or corporation, or agents thereof to comply therewith, or in the event of any person or persons, company, or corporation working by said process in said territory contrary to law.

**Duty of Commission to Visit Mines in Operation.**

§ 20. That said commission or a committee therefor or officer of said corps assigned to duty under its orders, shall, whenever deemed necessary, visit said territory and all mines operating under the provisions of this act. A report of such examination shall be placed on file.

**Public Lands and Timber and Stone thereon may be Used by the Commission.**

§ 21. That the said commission is hereby granted the right to use any of the public lands of the United States, or any rock, stone, timber, trees, brush, or material thereon or therein, for any of the purposes of this act; and the secretary of the interior is hereby authorized and requested, after notice has been filed with the commissioner of the general land office by said commission, setting forth what public lands are required by it under the authority of this section, that such land or lands shall be withdrawn from sale and entry under the laws of the United States.

**Penalty for Willfully Injuring Dams, and for Working by Hydraulic Process Contrary to Law.**

§ 22. That any person or persons who willfully or maliciously injure, damage, or destroy, or attempt to injure, damage, or destroy, any dam or other work erected under the provisions of this act for restraining, impounding, or settling purposes, or for use in connection therewith, shall be guilty of a misdemeanor, and

upon conviction thereof shall be fined not to exceed the sum of five thousand dollars or be imprisoned not to exceed five years, or of both such fine and imprisonment, in the discretion of the court. And any person or persons, company, or corporation, their agents or employees, who shall mine by the hydraulic process, directly or indirectly, injuring the navigable waters of the United States, in violation of the provisions of this act, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both such fine and imprisonment, in the discretion of the court; provided, that this section shall take effect on the first day of May, eighteen hundred and ninety-three.

**Tax of Three Per Cent on Gross Proceeds of Mine to be Paid into Treasury of United States; Debris Fund.**

§ 23. That upon the construction by the said commission of dams or other works for the detention of debris from hydraulic mines and the issuing of the order provided for by this act to any individual, company, or corporation, to work any mine or mines by hydraulic process, the individual, company, or corporation operating thereunder working any mine or mines by hydraulic process, the debris from which flows into or is in whole or in part restrained by such dams or other works erected by said commission, shall pay a tax of three per centum on the gross proceeds of his, their, or its mine so worked; which tax of three percentum shall be ascertained and paid in accordance with regulations to be adopted by the secretary of the treasury, and the treasurer of the United States is hereby authorized to receive the same. All sums of money paid into the treasury under this section shall be set apart and credited to a fund to be known as the "Debris Fund," and shall be expended by said commission under the supervision of the chief of engineers and direction of the secretary of war, in addition to the appropriations made by law in the construction and maintenance of such restraining works and settling reservoirs as may be proper and necessary; provided, that said commission is hereby authorized to receive and pay into the treasury from the owner or owners of mines worked by the hydraulic process, to whom permission may have been granted so to work under the provisions hereof, such money advances as may be offered to aid

in the construction of such impounding dams or other restraining works, or settling reservoirs, or sites therefor, as may be deemed necessary by said commission to protect the navigable channels of said river systems, on condition that all moneys so advanced shall be refunded as the said tax is paid into the said debris fund; and provided further, that in no event shall the government of the United States be held liable to refund same except as directed by this section.

**Commission may Consult with a Commission of Engineers Authorized by the State to Act.**

Sec. 24. That for the purpose of securing harmony of action and economy in expenditures in the work to be done by the United States and the state of California, respectively, the former in its plans for the improvement and protection of the navigable streams and to prevent the depositing of mining debris or other materials within the same, and the latter in its plans authorized by law for the reclamation, drainage, and protection of its lands, or relating to the working of hydraulic mines, the said commission is empowered to consult thereon with a commission of engineers of said state, if authorized by said state for said purpose, the result of such conference to be reported to the chief of engineers of the United States Army, and if by him approved shall be followed by said commission.

**Commission may Construct Dams to Restrain Debris Already Lodged in Tributaries of Main Rivers—Certain Recommendations Adopted and Made Basis of Operations—Appropriation.**

"Sec. 25. That said commission, in order that such material as is now or may hereafter be lodged in the tributaries of the Sacramento and San Joaquin river systems resulting from mining operations, natural erosions, or other causes, shall be prevented from injuring the said navigable rivers, or such of the tributaries of either as may be navigable and the land adjacent thereto, is hereby directed and empowered, when appropriations are made therefor by law, or sufficient money is deposited for that purpose in said debris fund, to build at such points above the head of navigation in said rivers and on the main tributaries thereof, or

branches of such tributaries, or at any place adjacent to the same, which in the judgment of said commission, will effect said object (the same to be of such material as will insure safety and permanency), restraining or impounding dams and settling reservoirs, with canals, locks, or other works adapted and required to complete same. The recommendations contained in executive document numbered two hundred and sixty-seven, fifty-first Congress, second session, and executive document numbered ninety-eight, forty-seventh Congress, first session, as far as they refer to impounding dams, or other restraining works, are hereby adopted, and the same are directed to be made the basis of operations. The sum of fifteen thousand dollars is hereby appropriated, from moneys in the treasury not otherwise appropriated, to be immediately available to defray the expenses of said commission.

## V. Reference to Miscellaneous Legislation on Mining Subjects.

**For the rulings of the Supreme Court on this subject and a general discussion of this class of legislation. See §§ 252-264.**

1. Rights of way for roads, tunnels, ditches, flumes, and other easements for mining purposes. Stats. 1895, p. 89; amending § 1238 C. C. P., "Eminent Domain."

2. Act establishing a uniform system of mine bell signals. Stats. 1893, p. 82.

3. An act for the protection of stockholders in mining companies. Laws of 1873-74; amended Feb. 26, 1897, Stats. 1897, p. 38; Laws of 1880, p. 130, amended Stats. 1897, p. 96.

4. Providing for the maintenance and establishment of a state mining bureau. Stats. 1893, p. 203.

5. Mining partnerships. Civil Code, §§ 2510-2516.

6. Providing for egress from mines (escape shafts). Stats. 1871-2, p. 413.

7. Defining hydraulic mining. Civil Code, §§ 1425-6.

8. Providing for appointment of debris commissioner. Stats. 1893, p. 339; amended March 17, 1897. Stats. 1897, p. 169; Code Civ. Proc. §§ 742, 743.

9. Reserving rights of way over mining claims for purpose of working other mines: Mill's Ann. Stats., §§ 3164, 3176; Gen. Stats. 1883, pp. 725, 726.

10. Mining corporations. Civil Code, §§ 584-587.

# COLORADO.

I. Provisions Relating to Lode Claims.
II. Provisions Relating to Placer Claims.
III. Provisions Relating to Tunnels and Tunnel Claims.
IV. Reference to Miscellaneous Legislation on Mining Subjects.

## I. Legislation Relating to Lode Claims.

### 1. Lode Claims; Length.

The length of any lode claim hereafter located may equal, but not exceed fifteen hundred feet along the vein. Mills' Ann. Stats. 3148; Gen. Stats. 1883, p. 722.

The above regulation is merely a re-enactment of the Federal rule as to length.

Subject discussed in text: § 361.

### 2. Lode Claims; Width.

The width of lode claims hereafter located in Gilpin, Clear Creek, Boulder, and Summit counties, shall be seventy-five feet on each side of the center of the vein or crevice; and in all other counties the width of the same shall be one hundred and fifty feet on each side of the center of the vein or crevice; provided, that hereafter any county may, at any general election, determine upon a greater width, not exceeding three hundred feet on each side of the center of the vein or lode, by a majority of the legal votes cast at said election, and any county, by such vote at such election, may determine upon a less width than above specified. Mills' Ann. Stats., § 3149; Gen. Stats. 1883, p. 722.

Subject discussed in text: § 361.
Location covering excessive area: § 362.

### 3. Location Certificate, Contents and Record.

The discoverer of a lode shall, within three months from the date of discovery, record his claim in the office of the recorder of the county in which such lode is situated, by a location certificate, which shall contain: 1st, the name of the lode; 2d, the name

of the locator; 3rd, the date of location; 4th, the number of feet in length claimed on each side of the center of the discovery shaft; 5th, the general course of the lode as near as may be. Mills' Ann. Stats. § 3150; Gen. Stats. 1883, p. 722.

Section referred to in text: § 380.
Purpose of location certificate: § 379.
Rules of construction applied: § 381.
Effect of failure to comply with the law as to contents of certificate: § 384.
Time and place of record, and effect of failure to record within time limited: §§ 389-390.

**4. Location Certificate Void Unless Containing the Proper Elements.**

§ 4. Any location certificate of a lode claim which shall not contain the name of the lode, the name of the locator, the date of location, the number of lineal feet claimed on each side of the discovery shaft, the general course of the lode, and such description as shall identify the claim with reasonable certainty, shall be void. Mills' Ann. Stats. § 3151; Gen. Stats. 1883, p. 722.

Effect of failure to comply with the law as to contents of certificate: § 384.
See note to next paragraph.

**5. Lode Claim; Discovery Shaft; Preliminary Notice.**

Before filing such location certificate, the discoverer shall locate his claim by: first sinking a discovery shaft upon the lode, to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary to show a well-defined crevice;[1] second, by posting at the point of discovery on the surface a plain sign or notice, containing the name of the lode, the name of the locator, and the date of discovery;[2] third, by marking the surface boundaries of the claim. Mills' Ann. Stats. § 3152; Gen. Stats. 1883, p. 723.

[1]Statute referred to in text: § 343, p. 448.
Object of requirement as to development work: § 344.
Relationship of discovery shaft to discovery: § 345.
Extent of development work: § 346.
Can preliminary development work be credited on first year's work? § 632.
[2]Preliminary notice and its posting discussed in text: §§ 350-356.
Place and manner of posting: § 356.
Liberal rules of construction applied to notices: § 355.

**6. Marking the Boundaries.**

Such surface boundaries shall be marked by six substantial posts, hewed or marked on the side or sides which are in toward the claim, and sunk in the ground, to wit: One at each corner and one at the center of each side line. Where it is practically impossible on account of bedrock to sink such posts, they may be placed on a pile of stones, and where, in marking the surface boundaries of a claim, any one or more of such posts shall fall by right upon precipitous ground, where the proper placing of it is impracticable or dangerous to life or limb, it shall be legal and valid to place any such post at the nearest practicable point, suitably marked to designate the proper place. Mills' Ann. Stats. 3153; Gen. Stats. 1883, p. 723.

Section referred to in text: § 374, p. 485.
Time allowed for marking: § 372.
Necessity for, and object of, marking: § 371.
What is sufficient marking under the Federal law: § 373.
Perpetuation of monuments: § 375.

**7. Equivalent of Discovery Shaft.**

Any open cut, cross cut, or tunnel, which shall cut a lode at the depth of ten feet below the surface, shall hold such lode, the same as if a discovery shaft were sunk thereon, or an adit of at least ten feet in along the lode, from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft. Mills' Ann. Stats. § 3154; Gen. Stats. 1883, p. 723.

Subject of discovery shaft and its equivalent discussed in text: §§ 343-346.

**8. Discovery Shaft, Time Within Which it Must be Sunk.**

The discoverer shall have sixty days from the time of uncovering or disclosing a lode to sink a discovery shaft thereon. Mills' Ann. Stats. 3155; Gen. Stats. 1883, p. 723.

See note to preceding section.

**9. Extralateral Rights; Intralimital Rights.**

The location, or location certificate, of any lode claim shall be construed to include all surface ground within the surface lines

thereof, and all lodes and ledges throughout their entire depth, the top or apex of which lies inside of such lines extended downward, vertically, with such parts of all lodes or ledges as continue by dip beyond the side lines of the claim, but shall not include any portion of such lodes or ledges beyond the end lines of the claim or the end lines continued, whether by dip or otherwise, or beyond the side lines in any other manner than by the dip of the lode. Mills' Ann. Stats. 3156; Gen. Stats. 1883, p. 723.

**10. Same.**

If the top or apex of a lode in its longitudinal course extends beyond the exterior lines of the claim at any point on the surface, or as extended vertically downward, such lode may not be followed in its longitudinal course beyond the point where it is intersected by the exterior lines. Mills' Ann. Stats. § 3157; Gen. Stats. 1883, p. 724.

**The above sections conform substantially to the provisions of § 2322 of the U. S. Rev. Stats. as interpreted by the courts: See ante, p. 1165, where the Federal Statute is given with notes referring to discussion in text.**

**That such legislation by a state is of questionable validity: See text, § 251.**

**11. Cross and Uniting Lodes.**

When it shall appear that one lode crosses, runs into, or unites with any other lode, the priority of record shall determine the rights of claimants; provided, that in no case where it appears that two lodes have crossed one another, shall the priority of record give any person the privilege of turning off from the crevice or lode which continues in the same direction of the main lode upon which he or they may have recorded their claim or claims; but such person or persons shall, at all times, follow the crevice running nearest in the general direction of the main lode upon which he or they may have recorded their claim or claims. Mills' Ann. Stats. § 3142; Gen. Stats. 1883, p. 721.

**See § 2336 of Rev. Statutes of United States.**
**Subject discussed in text: §§ 557-560.**
**Validity of above section questioned: § 251.**

**12. Two Lodes Found to be the Same; Rights of Locators.**

Where two crevices are discovered at a distance from each other and known by different names, and it shall appear that the two are one and the same lode, the persons having recorded on the first discovered lode shall be the legal owners. Mills' Ann. Stats. § 3143; Gen. Stats. 1883, p. 721.

Entire width of apex must be included in location: § 583.

**13. Amended Location Certificate; Change of Boundaries.**

If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing his surface boundaries, or of taking in any part of an overlapping claim which has been abandoned; or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefits of this act, such locator or his assigns may file an additional certificate, subject to the provisions of this act; provided, that such relocation does not interfere with the existing rights of others at the time of such relocation, and no such relocation or other record thereof shall preclude the claimant or claimants from proving any such title or titles as he or they may have held under previous location. Mills' Ann. Stats. § 3160; Gen. Stats. 1883, p. 724.

Objects and functions of amended certificates discussed in text: § 398.

Circumstances justifying change of boundaries: § 396.

Privilege of changing boundaries exists in absence of intervening rights, independent of state legislation: § 397, p. 506.

**14. Proof of Labor.**

Within six months after any set time, or annual period allowed for the performance of labor, or making improvements upon any lode claim or placer claim, the person on whose behalf such outlay was made, or some person for him, may make and record in

the office of the recorder of the county wherein such claim is situate an affidavit, in substance as follows;

State of Colorado, }
County of ——. } ss.

Before me, the subscriber, personally appeared ———, who, being duly sworn, said that at least ——— dollars' worth of work or improvements were performed or made upon (here describe claim or part of claim) situate in —— mining district, county of ——, State of Colorado, between the —— day of —— A. D., ——, and the —— day of —— A D., ——. Such expenditure was made by or at the expense of ——, owners of said claim, for the purpose of complying with the law and holding said claim.

(Jurat) (Signature)

And such affidavit when so recorded shall be prima facie evidence of the performance of such labor or the making of such improvements; provided, that all affidavits of labor or improvements upon placer claims heretofore filed and recorded within the period prescribed in this section, or within the period prescribed in section 2410 of the General Statutes, which shall contain in substance the requirements of the affidavit prescribed by this section or said section 2410, shall be prima facie evidence of the performance of such labor or the making of such improvements; and the original thereof, or a certified copy of the record of the same, shall be received as evidence accordingly by the courts of this state, and this class of evidence shall be receivable, where relevant or material, in all cases, whether now pending or hereafter brought. (As amended Sess. L. 1889, p. 261-2.) Mills' Ann. Stats. § 3161.

Proof of annual labor discussed in text: § 636.

**15. Relocation of Abandoned Claims.**

The relocation of abandoned lode claims shall be by sinking a new discovery shaft and fixing new boundaries in the same manner as if it were the location of a new claim: or the relocator may sink the original discovery shaft ten feet deeper than it was at the time of abandonment, and erect new or adopt the old bound-

aries, renewing the posts, if removed or destroyed. In either case a new location stake shall be erected. In any case, whether the whole or part of an abandoned claim is taken, the location certificate may state that the whole or any part of the new location is located as abandoned property. Mills' Ann. Stats. § 3162; Gen. Stats. 1883, p. 725.

Statute referred to in text: § 408.
Circumstances under which relocation may be made: § 402, p. 511.
New discovery not essential as a basis of relocation: § 403, p. 512.
Relocation admits the validity of the original: § 404, p. 512.
Relocation by original locator: § 405, p. 513.
Relocation by one of several original locators in hostility to others: § 406, p. 517.
Relocation by agent or others occupying fiduciary or contractual relationship with original locator: § 407, p. 518.
Right of second locator to improvements made by first: § 409, p. 522.

**16. Location Certificate Must Claim but One Location.** No location certificate shall claim more than one location, whether the location be made by one or several locators. And if it purport to claim more than one location, it shall be absolutely void, except as to the first location therein described, and if they are described together, or so that it cannot be told which location is first described, the certificate shall be void as to all. Mills' Ann. Stats. § 3163; Gen. Stats. 1883, p. 725.

Location certificate and its contents discussed in text: §§ 379-385.

## II. Legislation Relating to Placers.

**1. Placer Claims; Posting Notice; Marking Boundaries; Location Certificates.**

The discoverer of a placer claim shall, within thirty days from the date of discovery, record his claim in the office of the recorder of the county in which said claim is situated, by a location certificate, which shall contain: First, the name of the claim, designating it as a placer claim. Second, the name of the locator. Third, the date of location. Fourth, the number of acres or feet claimed. And Fifth, a description of the claim by such reference to natural objects or permanent monuments as shall identify the claim.[1] Before filing such location certificate, the discoverer shall lo-

cate his claim: First, by posting upon such claim a plain sign or notice, containing the name of the claim, the name of the locator, the date of discovery, and the number of acres or feet claimed.[2] Second, by marking the surface boundaries with substantial posts, and sunk in the ground, to wit: One at each angle of the claim.[3] Mills' Ann. Stats. § 3136; Gen. Stats. 1883, p. 718.

What constitutes discovery: See text, § 437, and §§ 335-337.
Character of deposits subject to location under placer laws: See text, §§ 419-428, §§ 85-98.
[1]Statute referred to in text: § 459.
Purpose of location certificate: § 379, p. 490.
Rules of construction applied: § 381, p. 494.
Effect of failure to comply with the law as to the contents: § 384, p. 498.
[2]Posting notices: See § 442.
[3]Statute referred to in text: § 455.
Rule as to marking boundaries in absence of state legislation: § 454.

**2. Placer Claims; Annual Labor; Forfeiture to Co-owners.**

On each placer claim of one hundred and sixty acres or more, heretofore or hereafter located, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made by the first day of August, 1879, and by the first day of August of each year thereafter. On all placer claims containing less than one hundred and sixty acres, the expenditure during each year shall be such proportion of one hundred dollars, as the number of acres bears to one hundred and sixty. On all placer claims containing less than twenty acres, the expenditures during each year shall not be less than twelve dollars; but when two or more claims lie contiguous, and are owned by the same person, the expenditure hereby required for each claim may be made on any one claim; and upon a failure to comply with these conditions, the claim or claims upon which such failure occurred shall be open to relocation, in the same manner as if no location of the same had ever been made; provided, that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location; provided, the aforesaid expenditures may be made in building or repairing ditches to conduct water upon such

ground or in making other mining improvements necessary for the working of such claim.[1]

Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may at the expiration of the year, to wit: The first of August, 1879, for the locations heretofore made, and one year from the date of locations hereafter made, give such delinquent co-owner personal notice in writing, or if he be a nonresident of the state, a notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and mailing him a copy of such newspaper if his address be known; and if at the expiration of ninety days after such notice in writing, or after the first publication of such notice, such delinquent shall fail or refuse to contribute his proportion of the expenditure required by this action (section), his interest in the claim shall become the property of his co-owners who have made the required expenditures.[2]

(The foregoing was filed in the office of the secretary of state by the governor March 12, 1879, without his signature, and became a law under section 11, article iv, constitution of Colorado.)-Mills' Ann. Stats. § 3137; Gen. Stats. 1883, p. 719.

[1]A portion of this section was declared invalid by the Supreme Court of Colorado because it contravenes the Federal Law: Sweet v. Webber, 7 Colo. 443: See discussion in text: § 626, p. 780.

Annual labor on placers in absence of state legislation: See text, § 625, p. 778.

[2]Validity of such legislation questioned: § 646, page 814, and § 251, p. 320.

**3. Amended Location Certificate.**

See same title under "Lode Claims."

**4. Proof of Labor.**

See same title under "Lode Claims."

**5. Location Certificate Must Claim but One Location.**

See same title under "Lode Claims."

## III. Legislation Relating to Tunnels.

### *A. Tunnel Act of April 17, 1897.*

[Laws of 1897, pp. 181, 182.]

**Owner of Tunnel may Continue it Through Claim of Another.**

§ 1. Any person or company who has, or hereafter may have, a tunnel or cross cut, the mouth of which is located upon his own ground or upon ground in his lawful occupation, shall have the right to drive and continue the same through and across any located or patented claim in front of the mouth of such tunnel, but not to follow or drive upon any vein belonging to the owner of such claim.

Discussion of constitutionality of statutes granting rights of way through property of others for mining purposes: §§ 252-264.

Provision of Federal Law on subject of tunnel rights: U. S. Rev. Stats., § 2323; ante p. 1166.

Manner of perfecting tunnel locations discussed: §§ 472-475.

Length upon the discovered lode awarded to the tunnel discoverer: § 481.

To what extent does the inception of a tunnel right and its perpetuation by prosecuting work with reasonable diligence operate as a withdrawal of the surface from exploration by others? §§ 483-491, pp. 586-609.

For recent decisions in Supreme Court of United States on subject of tunnels, see note to § 2323 of the Revised Statutes, ante p. 1167.

**Right of Owner of Intersected Vein or Claim Intersected to Enter and Inspect; Forfeiture of Right to Continue Tunnel.**

§ 2. Such tunnel or cross cut may be driven and worked for the purpose of drainage and for the purpose of reaching and working mining ground of the tunnel owner beyond the intersected claim. The owner or owners of any vein or any claim or claims so intersected or his duly authorized agent shall have the right to enter such tunnel upon application to the owner or owners of said tunnel without resorting to any process of law for the purpose of making a survey and inspecting such vein or veins as may be

crossed within the boundary lines of such intersected claim, and if the owner or owners of such tunnel shall, by bulkheading, damming back, or in any manner prevent the inspection or survey herein provided for, or if such owner or owners shall in any manner prevent the inspection or survey herein provided for, or if such owner or owners shall in any manner prevent the natural drainage of water from such intersected claim or claims without the consent of the owner or owners thereof, it shall work a forfeiture of all rights granted under section one of this act.

See note to preceding section.

Validity of statutes authorizing inspection and survey without suit: § 873.

**Ownership of Ore of Intersected Claim at Point of Intersection; Damage.**

§ 3. If any ore, the property of the owner of the claim intersected or crossed, be extracted in driving such tunnel, it shall be the property of the owner of the vein from which it was taken and the owner of the tunnel shall be liable for all actual damages or injury done to the owner of the claim crossed by his tunnel.

See note to § 1 of this act.

**Ownership of Vein in Tunnel; Burden of Proof.**

§ 4. In all actions between the tunnel owner and others involving the right to any vein discovered in such tunnel the burden of proving that the vein so discovered is not the property of the adverse claimant in such action shall be on the tunnel owner.

Tunnel proprietor when not called upon to adverse mineral applicant for patent: § 725.

*B. Tunnel Claims.*

**Tunnel Claim; Record.**

If any person or persons shall locate a tunnel claim for the purpose of discovery, he shall record the same, specifying the place of commencement and termination thereof, with the names of the parties interested therein. Mills' Ann. Stats. 3140; Gen. Stats. 1883, p. 720.

Acts to be performed in acquiring tunnel rights: See text, § 472.

Regulations of the department concerning tunnel locations: ante p. 1189, pars. 20-26.

**Tunnel Claims; Length.**

Any person or persons engaged in working a tunnel, within the provisions of this chapter, shall be entitled to two hundred and fifty feet each way from said tunnel, on each lode so discovered; provided, they do not interfere with any vested rights. If it shall appear that claims have been staked off and recorded prior to the record of said tunnel, on the line thereof, so that the required number of feet cannot be taken near said tunnel, they may be taken upon any part thereof where the same may be found vacant; and persons working said tunnel shall have the right of way through all lodes which may lie in its course. Mills' Ann. Stats. § 3141.

The above section is referred to and its provisions discussed in § 481, p. 578.

See, also, note to § 2323: Rev. Stats., ante p. 1167.

## IV. Reference to Miscellaneous Legislation on Mining Subjects.

1. Providing that all mining claims shall be subject to a right of way for ditches or flumes, or tramway or packtrail; and providing means of enforcing the easement. Mills' Ann. Stats. § 3158; Gen. Stats. 1883, p. 724.

See text, §§ 530-531.

2. Requiring miners to take care of the tailings from their mines. Mills' Ann. Stats. § 3144; Gen. Stats. 1883, p. 721.

3. Provisions relating to the right of a party to an action for the recovery of the possession of a mining claim to enter the mine with consent of the court for the purpose of inspection. Mills' Ann. Stats. §§ 3164, 3176; Gen. Stats. 1883, pp. 725-726.

4. Regulating mining under buildings belonging to others. Mills' Ann. Stats. § 3139; Gen. Stats. 1883, p. 720.

5. Providing for security to the owner of the surface when the ownership of the surface is separate from the right to mine. Mills' Ann. Stats. § 3159; Gen. Stats. 1883, p. 724.

See similar statute Idaho: post 1282. See, also, § 822 of the text.

6. Governing right of way for water brought to a mining claim. Mills' Ann. Stats. § 3138; Gen. Stats. 1883, p. 720; Rev. Stats. p. 465, § 2.

7. Governing right of way for hauling quartz. Mills' Ann. Stats. § 3145; Gen. Stats. 1883, p. 721; Rev. Stats., p. 466, § 9.

8. Providing that claims of enlisted men not to be forfeited for two years. Mills' Ann. Stats. § 3146; Gen. Stats. 1883, p. 721.

9. Penalty for unlawful entry. Gen. Stats. 1883, pp. 726, 727; Mills' Ann. Stats. §§ 3165, 3166.

10. Relating to the drainage of mines. Mills' Ann. Stats. §§ 3172-3180; Gen. Stats. 1883, p. 727-729.

11. Relating to ores, including the requirement that persons engaged in reducing, shipping, or purchasing ores keep records, and providing a punishment for stealing ores or knowingly purchasing stolen ores. Mills' Ann. Stats., §§ 3227-3234; Gen. Stats. 1883, pp. 747-749.

12. Defining a miner's inch. Mills' Ann. Stats., § 4643; Gen. Stats. 1883, p. 1015.

13. Punishing the use of false weights for weighing gold or gold dust. Mills' Ann. Stats., § 1380; Gen. Stats. 1883, p. 343.

14. Punishing millowners for failure to turn over the proceeds extracted from ore to the rightful owner. Mills' Ann. Stats. § 1381; Gen. Stats. 1883, p. 343.

15. Passing counterfeit gold dust. Mills' Ann. Stats. §§ 1262, 1263; Gen. Stats. 1883, p. 314.

16. Punishing the salting of ores. Mills' Ann. Stats., § 1391; Gen. Stats. 1883, p. 346.

17. Punishing the destruction or carrying away boundary marks or timber in a mine. Mills' Ann. Stats. § 3171.

18. An act to create a bureau of mines, to define the duties of the commissioner of mines and provide for the government thereof; and to repeal an act entitled "An act dividing the state of Colorado into metalliferous mining districts," approved April 1, 1889. Laws of 1895, p. 206. Mills' Ann. Stats. [Sup.], p. 875.

19. Providing that defendants in any successful action to recover possession of any lode, vein, or mining claim shall not be entitled to any offset for any timbering, cribbing, improvement, or development made upon the same. Part of chap. 62, Laws of 1895, p. 142.

20. Regulating the working of coal mines. Laws of 1893, pp. 347-349, amending an act approved February 24, 1883. Mills' Ann. Stats. [Sup.], p. 871.

21. Providing for recovery of value of ore wrongfully mined, extracted, or taken out from the ground of another. Laws of 1893, p. 349. Mills' Ann. Stats. [Sup.], p. 869.

22. Relating to the duties of county assessors in assessing mining claims entered or patented. Laws of 1891, p. 113. Mills' Ann. Stats. [Sup.], p. 883.

23. Relating to lode mines, lode mining claims, or mining property that cannot be partitioned. Laws of 1893, p. 358. Mills' Ann. Stats. [Sup.], p. 892.

24. Providing that in certain cases verdict shall be entered against both parties to an action. Mills' Ann. Stats. [Supp.], p. 1224.

**See special act of Congress relating to school lands in Colorado: Supp. to Rev. Stats. U. S., chap. 20, p. 424.**

# IDAHO.

I. Act of 1895, Relating to the Location and Development of Lodes and Placers.
II. Act of 1897, Relating to the Location and Development of Placers.
III. Reference to Miscellaneous Legislation on Mining Subjects.

## I. Act of 1895 Relating to Location and Development of Lode and Placer Claims.

[Approved March 5, 1895. Session Laws of 1895, pp. 25-31.]

**Width of Lode Claims; Line of Vein not to be Changed.**

§ 1. Section 3100, Rev. Stats., is amended to read as follows:

Mining claims hereafter located upon veins or lodes of quartz or other rock in place bearing any of the metals or other valuable deposits, mentioned in section 2320 of the Revised Statutes of the United States, may extend to three hundred feet on each side of the middle of the vein or lode; provided, that when the locators have set stakes, posts, or monuments described in section 2 hereof, to indicate the line of the vein, ledge, or lode, such stakes, posts, or monuments must be taken for the purpose of such location, to mark correctly the line thereof, and such line must not afterward be changed so as to affect rights acquired or interfere with any locations made subsequent thereto.

Width of lode claims generally: § 361.

**Preliminary Notice; Marking Boundaries; Location Monuments; Second Notice.**

§ 2. Section 3101 of the Revised Statutes of Idaho is amended to read as follows:

The locator, at the time of making the discovery of such vein or lode must erect a monument at such place of discovery, upon which he must place his name, the name of the claim, the date of discovery, and the distance claimed along the vein each way from

such monument. Within three days from the date of discovery, he must mark the boundaries of his claim by establishing at each corner thereof and at any angle in the side lines, a monument marked with the name of the claim and the corner or angle it represents; also at the time of so marking his boundaries, he must post at his discovery monument his notice of location in which must be stated: First, the name of the locator; second, the name of the claim; third, the date of discovery; fourth, the direction and distance claimed along the ledge from the discovery; fifth, the distance claimed on each side of the middle of the ledge; sixth, the distance and direction from the discovery monument to such natural object or permanent monument, if any such there be, as will fix and describe in the notice itself the location of the claim; and seventh, the name of the mining district, county, and state.[1] Where, from any cause, a monument cannot be safely planted at the true corner or angle it may be placed as near thereto as practicable, and so marked as to indicate the place of such corner or angle. Monuments may be made of any such material or form as will readily give notice, and when of posts or trees, they must be hewn and marked upon the side facing toward the discovery, and must be at least four inches square or in diameter.[2]

Monuments must be at least four feet high above the ground, and trees must be so hewn as to readily attract attention. At the time the locator so marks the boundaries of his claim he may do so in any direction that will not interfere with rights or claims which existed prior to his discovery.

[1]Statute referred to: § 354.
Liberal rules of construction applied to notices: § 355.
Place and manner of posting: § 356.
[2]Object of and necessity for, marking: § 371.
Time allowed for marking: § 372, p. 480, § 339.
What is sufficient marking under Federal law discussed: § 373.
Statute referred to in text: § 374.
Perpetuation of monuments discussed: § 375.

**Discovery Shaft and Equivalent Claim not Subject to Relocation, when Discovery Work has been Performed, until Ninety Days after Location.**

§ 3. Within sixty days after such location, the locator or his assigns must sink a shaft upon the lode to the depth of at least

ten feet from the lowest part of the rim of such shaft at the surface, and of not less than sixteen square feet area. Any excavation which shall cut such vein ten feet from the lowest part of the rim of such shaft and which shall measure one hundred and sixty cubic feet in extent shall be considered a compliance with this provision. Any located claim upon which work has been done in compliance with the above requirements is not, unless abandoned, subject to relocation for a period of ninety days from after the date of location.

Section referred to in text: § 343.
Object of requirement as to development work discussed: § 344.
Relationship of discovery to discovery shaft: § 345.
Extent of development work: § 346.

**Copy of Notice of Location to be Recorded.**

§ 4. Within ninety days after the location of the claim, the locator or his assigns must file for record in the office of the county recorder of the county or of the deputy recorder of the mining district in which the claim is situated, a substantial copy of his notice of location.

Certificate must be verified, see post, § 13 of this act.
Statute referred to in text: § 380.
Purpose of location certificate: § 379.
Rules of construction of location notices: § 381.
Effect of failure to comply with the law as to contents of certificate: § 384.
Time and place of record: § 389.
Effect of failure to record within time limited: § 390.
Proof of record: § 391.
Record as evidence: § 392.

**Amended Location Certificates; Change of Boundaries.**

§ 5. If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing the surface boundaries, or of taking any part of an overlapping claim which has been abandoned, or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefits of this act, such loca-

tor or his assigns may file an additional certificate subject to the conditions of this act and to contain all that this act required an original certificate to contain; provided, that such amended location does not interfere with the existing rights of others at the time when such amendment is made. Laws of 1895, p. 27, § 5.

Section referred to in text: § 397.
Objects and functions of amended certificates discussed: § 398.

**Proof of Performance of Labor.**

§ 6. Within sixty days after any time set or period allowed for the performance of labor, or making improvements upon any lode or placer claim, the person in whose behalf such work or improvement is performed or some person for him must make and record an affidavit in substance as follows:

State of Idaho, }
County of ——. } ss.

Before me, the subscribed, personally appeared ———, who, being first duly sworn, says that at least ——— dollars worth of work or improvements were performed or made upon ——— claim, situate in ——— mining district, county of ———, state of Idaho; that such expenditure was made by, for, or at the expense of ———, owners of said claim, for the purpose of holding said claim. (Signature)

Subscribed and sworn to before me this ——— day of ———, 189—. ———.

The fee for administering the oath and recording the foregoing affidavit, when taken before the county recorder, shall be fifty cents; the fee for recording the same when the oath is taken before any other officer authorized to administer oaths shall be fifty cents.

Such affidavit, or a certified copy thereof, in case the original is lost, shall be prima facie evidence of the performance of such labor. The failure to file such affidavit shall be considered prima facie evidence that such labor has not been done.

Proof of annual labor discussed: § 636.

**Abandoned Claims, How Located.**

§ 7. The location of abandoned claims shall be done in the same manner as if the location were a new claim; but the locator may, instead of sinking a new discovery shaft, sink the original discovery shaft ten feet deeper than it was at the time of his location, or he may drive the open cut or tunnel ten feet further along the course of the lead, lode, or vein, and must erect new posts or monuments.

Section referred to in text: § 408.
Circumstances under which relocations may be made: § 402.
New discovery not essential: § 403.
Relocation by original locator: § 405.
Relocation by agent or others occupying contractual or fiduciary relations with original locator: § 407.
Relocation by one of several co-owners in hostility to others: § 406.
Right of second locator to improvements made by first: § 409.

**Location Notice Claiming More than One Location is Void.**

§ 8. No location notice shall claim more than one location, whether the location is made by one or several locators, and if it purport to claim more than one location it is absolutely void.

**Deputy Recorders, When and How Chosen.**

§ 9. Section 3103 of the Revised Statutes of Idaho is amended to read as follows:

For the convenience of prospectors and locators, the county recorders of the several counties must appoint a deputy at any place where he may deem it necessary; and at all places more than twenty miles distant from existing office whenever ten or more mining locators interested petition for the appointment of a deputy. Upon failure of recorder to appoint a deputy for ten days after the petition in writing has been presented to him, the resident miners in such district may appoint temporarily one of their number to act as the recorder for the district, whose record shall be as valid as if made by the deputy, and must be entered by the recorder as hereinafter required; provided, that whenever at any time afterward the recorder has appointed a deputy for such district or place, the authority of the person elected by the resident miners ceases.

**Security Must be Given to Surface Owner.**

§ 10. When the right to mine is in any case separate from the ownership or right of occupancy of the surface ground, the owners or rightful occupants of the surface ground may demand satisfactory security from the miners, and if it be refused or not given, may enjoin such miners from working such ground until such security is given. The court granting the writ of injunction shall fix the amount and nature of the security.

Subjacent support: §§ 818-822.
Legislation of this character discussed: § 822.

**Placer Claims May Be Located.**

§ 11. Placer claims as mentioned in section 2329 of the Revised Statutes of the United States may be located for the purpose of mining deposits and precious stones after the discovery of such deposits.

What deposits are subject to location under placer laws? See text, §§ 419-428.

**Placer Claims, How Located; Location Notices; Recording.**

§ 12. The locator of any placer mining claim, located for the purpose of mining placer deposits or precious stones, must at the time of making the location comply with all the requirements of sections 2 and 3 of this act. Every placer claim must be recorded within thirty days from the time of the location thereof, in the district in which the same is situated or in the office of the county recorder of the county wherein the claim is situated. The location notice must contain the date of the location, the name of the locator, the name and dimensions of the claim, and must also give such a description of the locality thereof by reference to natural landmarks or fixed objects and contiguous claims, if any, as to render the situation of the same reasonably certain from the letter of the notice itself.

The above section is no longer in force, it having been amended by an act approved March 2, 1897: See post, "Act of 1897," p. 1284. The above section is inserted for convenience of persons having located claims under it prior to enactment of the statute of 1897.

**Certificate That Claim is Open to Location.**

§ 13. Section 3104 of the Revised Statutes of Idaho is amended to read as follows:

At or before the time of presenting a location notice for record, whether it be for a quartz or placer claim, one of the locators named in the same must make and subscribe an affidavit in writing on or attached to the notice, substantially as follows, to wit:

State of Idaho, }
County of ———. } ss.

I, ———, do solemnly swear that I am a citizen of the United States of America (or have declared my intentions to become such) and that I am acquainted with the mining ground described in this notice of location, and herewith called the ——— ledge, lode, or claim; that the ground and claim therein described, or any part thereof has not, to the best of my knowledge and belief, been located according to the laws of the United States and of this state, or if so located, that the same has been abandoned or forfeited by reason of the failure of such former locators to comply in respect thereto with the requirements of said laws, and (in the case of quartz claims) that I have opened new ground to the extent or depth of ten feet as required by the laws of Idaho.

(Signature.)

Subscribed and sworn to before me this ——— day of ———, A. D. 189—.

Section referred to in text: §§ 251, 385.

**Location Notice, How Recorded.**

§ 14. Section 3105 of the Revised Statutes of Idaho is amended to read as follows:

The location notice herein required to be recorded must be recorded by the deputy appointed for the district, or the person appointed for that purpose as above provided (when the legal fee therefor is tendered) in a book to be kept for that purpose. Said book must be indexed, with the names of all the locators arranged in alphabetical order, according to the family or surname of each. The fee to be tendered for making such record, administering the oath to the locator and certifying the same, for indexing

the names appearing on the notice and to include recording the notice by the recorder as hereinafter required, and the indexing by said recorder is two dollars, which fee must be equally divided between the recorder and the deputy or the person acting under an election as hereinbefore provided, and no other additional sum of money must be demanded or received by either of them for any services connected with the recording of any location notice made pursuant to the requirements of this chapter.

As to records of running claims generally, see §§ 389-392.

§ 15. [Sections 3102, 3120, 3121, and 3122 of the Revised Statutes repealed.]

## II. Act of March 2, 1897, Relating to Location of Placers.

**[Amending sec. 12 of the Act of March 5, 1895. Session Laws of 1897, p. 12.]**

**This act was passed after the early chapters of this treatise had been printed. This accounts for the absence of any mention of it in the text.**

**Placer Claims; Marking Boundaries; Preliminary Notice; Development Work; Location Certificate.**

That section 12 of the Act of March 5th, 1895, is amended to read as follows:

§ 12. The locator of any placer mining claim located for the purpose of mining placer deposits or precious stones must, at the time of making the location, place a substantial post or monument as is required in the location of quartz claims at each corner of the location,[1] and must also place on one of the same a notice of location containing the date of the location, the name of the locator, the name and dimensions of the claim, the mining district (if any) and county in which the same is situated; and must also give the distance and direction from said post or monument to such natural object or permanent monument, if any such there be, as will fix and describe in the notice itself, the location of the claim.[2]

Within fifteen days after making the location, the locator must make an excavation on the claim of not less than one hundred cubic feet, for the purpose of prospecting the same.[3]

Within thirty days after the location, the locator must file for record in the office of the county recorder of the county, or of the deputy recorder of the mining district in which the claim is situated, a substantial copy of his copy of notice of location, to which must be attached an affidavit such as is required in the case of quartz claims.

For original section of which this is amendatory, see ante p. 1282.

What deposits subject to appropriation under placer laws: See text, §§ 419-428.

Form and extent of placers: §§ 447-448.

[1]Marking location on ground in absence of state legislation: § 454.

[2]See text: § 442.

[3]See text: § 443.

## III. Reference to Miscellaneous Legislation on Mining Subjects.

1. Providing that deputy recorder must transmit records to county recorder. Rev. Stats. 1887, § 3106.

2. Defining powers and duties of deputy recorders. Rev. Stats Idaho, 1887, § 3107.

3. Providing that destruction or defacement of location notice shall be punishable as a misdemeanor. Rev. Stats. of Idaho, 1887, § 7172.

4. Tools of a miner not exceeding in value the sum of $200 are exempt from taxation. Mining claims are also exempt, but property and improvements upon, or appurtenant to mining claims are not exempt. Rev. Stats of 1887, § 1401, subd. 7.

5. An act creating the office of inspector of mines and defining the duties of the inspector. Laws of 1893, pp. 152-155.

Act amended: Laws of 1895, p. 160.

6. Laws relating to mining partnerships. Rev. Stats. 1887, §§ 3300-3309.

7. Rights of way and easements for development of mines. Rev. Stats. 1887, §§ 3130-3142.

See text: § 252.

## MONTANA.

I. Laws Relating to the Location and Development of Mining Claims.
II. Reference to Miscellaneous Legislation on Mining Subjects.

### I. Laws Relating to the Location of Mining Claims.

**1. Location of Mining Claims; Notice of Location, What to Contain.**

Any person a citizen of the United States or one who has declared his intention to become such, who discovers a vein or lode bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, or who discovers or locates a placer deposit of gold or other deposit of minerals, including building stone, limestone, marble, clay, sand or other mineral substance having a commercial value, may locate a claim upon such vein, lode or deposit by defining the boundaries of the claim in the manner hereinafter described, and by posting a notice of such location at the point of discovery, which notice must contain: First, the name of the lode or claim; second, the name of the locator or locators; third, the date of the location; fourth, if a lode claim, the number of lineal feet claimed in length along the course of the vein, each way from the point of discovery, with the width on each side of the center of the vein and the general course of the vein or lode as near as may be; fifth, if a placer or millsite claim, the number of acres or superficial feet claimed. Rev. Pol. Code of 1895, § 3610.

Statute referred to: §§ 352, 442.
Purpose of location certificate: § 379.
Rules of construction applied: § 381. See, also, § 351.
Place and manner of posting: § 356.

**2. Discovery Shaft; Boundaries, How Made and of What to Consist.**

Before the expiration of ninety days from the date of posting such notice upon the claim the locator or locators must sink a dis-

covery shaft upon the lode or claim (millsite claims excepted) to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper, if necessary, to show a well-defined crevice or valuable deposit. Its equivalent in work must be done upon placer claims. A cut, a crosscut, or a tunnel which cuts a lode at the depth of ten feet below the surface, or an open cut of at least ten feet in length along the lode from the point where the lode may be in any manner discovered, is equivalent to a discovery shaft.[1] The locator or locators must define the boundaries of his or their claim by marking a tree or rock in place, or by setting a post or stone at each corner or angle of the claim. When a post is used it must be at least four inches square by four feet six inches in length, set one foot in the ground, with a mound of earth or stone four feet in diameter by two feet in height around the post. When a stone is used, not a rock in place, it must be at least six inches square, and eighteen inches in length, set two-thirds of its length in the ground, which trees, stakes, or monuments must be so marked as to designate the corners.[2] Rev. Pol. Code 1895, § 3611.

[1]Statute referred to in text: §§ 343, 443.
Object of requirement as to development work: § 344.
Relationship of the discovery to the discovery shaft: § 345.
Extent of development work: § 346.
[2]Section referred to in text: §§ 374, 455.
Time allowed for marking: § 372.
Necessity for, and object of, marking: § 371.
What is sufficient marking under the Federal law: § 373.
What is sufficient marking under the Federal law in case of placers: § 454.
Perpetuation of monuments: § 375.

### 3. Declaratory Statement, When and Where Filed; Contents.

Within ninety days of the date of posting the location notice upon the claim, there must be filed in the office of the county clerk of the county in which the lode or claim is situated, a declaratory statement, which must contain: First, the name of the lode or claim; second, the name of the locator or locators; third, the date of location, and such description of the location of said claim with reference to some natural object or permanent monu-

ment as will identify the claim; fourth, if a lode claim, the number of lineal feet claimed in length along the course of the vein each way from the point of discovery, with the width on each side of the center of the vein, and the general course of the lode or vein as near as may be; fifth, if a placer or millsite claim, the number of acres or superficial feet claimed; sixth, the dimensions and location of the discovery shaft, or its equivalent, sunk upon lode or placer claims; seventh, the location and description of each corner, with the markings thereon.

Such declaratory statement must be verified by the oath of the locator, or one of the locators, and in case of a corporation by an officer thereof, duly authorized to act. Rev. Pol. Code 1895, § 3612.

Section referred to in text: §§ 380, 459.
Purpose of location certificate: § 379.
Rules of construction: § 381.
Effect of failure to comply with the law as to contents of certificate: § 384.
Verification of certificates: § 385, and § 251, where the validity of the requirement is questioned.
Time and place of record and effect of failure to record within time limited: §§ 389-390.

### 4. Placer Locations Made Prior to 1895 and Recorded; Effect of.

All placer mining locations or locations of valuable mineral deposits, which have heretofore been recorded in the office of the county clerk or recorder, have the same force and effect as though such records had been authorized by law; except in cases where the rights of third persons had been acquired before the passage of this code; and such record is entitled to be admitted in evidence in any court. Rev. Pol. Code 1895, § 3613.

The record as evidence: § 392.

### 5. Annual Work, Proof of.

The owner of a lode or placer claim who performs or causes to be performed the annual work or makes the improvements required by the laws of the United States in order to prevent the forfeiture of the claim, may, within twenty days after the annual work, file

in the office of the county clerk of the county in which such claim is situated, an affidavit of his own, or an affidavit of the person who performed such work or made the improvements, showing: First, the name of the mining claim and where situated; second, the number of days' work done, and the character and value of the improvements placed thereon; third, the date of performing such work and of making the improvements; fourth, at whose instance the work was done or the improvements made; fifth, the actual amount paid for work and improvements, by whom paid, when the same was not done by the owner.

Such affidavits, or a certified copy thereof, are prima facie evidence of the facts therein stated. Rev. Pol. Code 1895, § 3614.

Proof of annual labor: § 636.

Can preliminary work required by state laws as an act of location be credited on the first year's work? See § 636.

Annual labor, generally, discussed in text: §§ 623-638.

**6. Relocation of Abandoned Lode or Placer.**

The relocation of an abandoned lode or placer claim must be made by sinking a new discovery shaft, and fixing new boundaries in the same manner as if it were an original location made under this chapter; or the relocator may sink the original discovery shaft ten feet deeper, in which case the declaratory statement must give the depth and dimensions of the original discovery shaft at the date of such relocation. In any case, whether the whole or a part of an abandoned claim is taken, the declaratory statement may state that the whole or any part of the new location is located as abandoned property. If it is not known to the locator that his location is on an abandoned claim, then the provisions of this section do not apply. Rev. Pol. Code 1895, § 3615.

Section referred to in text: § 408.

Circumstances under which relocation may be made: § 402, p. 511.

New discovery not essential as a basis of relocation: § 403, p. 512.

Relocation admits the validity of the original: § 404.

Relocation by original locator: § 405.

Relocation by one of several original locators in hostility to others: § 406.

Relocation by agent of original locator: § 407.

Right of second locator to improvements made by first: § 409.

**7. Official Survey, Field Notes, and Certificate as Part of Declaratory Statement.**

Where a locator or owner of a mining claim has the boundaries and corners of his claim established by a United States deputy mineral surveyor, and his claim connected with a corner of the public or minor surveys, or an established initial point, and incorporates into the declaratory statement the field notes of such survey, and attaches to and files with such declaratory statement, a certificate by the surveyor setting forth: First, that such survey was actually made by him, giving the date thereof; second, the name of the claim surveyed and the locators thereof; third, that the description incorporated in the declaratory statement is sufficient to identify the claim.

Such survey and certificate becomes a part of the declaratory statement and such declaratory statement is prima facie evidence of the facts therein contained. Rev. Pol. Code 1895, § 3616.

## II. Reference to Miscellaneous Legislation on Mining Subjects.

1. Providing that the owner of a mining claim shall have right of way over adjoining property and providing proceedings to obtain right of way; damages to be assessed, appeal, etc. Rev. Pol. Code 1895, §§ 3630-3641.

See text: §§ 530-531.

2. Mining claims properly located not to be affected by townsite patents for unincorporated towns. Rev. Pol. Code 1895, § 5112.

3. Regulations governing safety apparatus and signals in mines. Rev. Pol. Code 1895, §§ 3650-3654.

4. Regulations governing the taxation of mines and exemptions of property from execution. Rev. Pol. Code 1895, §§ 3672, 3760-3768; Rev. Code Civ. Proc. 1895, § 1222.

5. Provisions regulating mining partnerships. Rev. Civ. Code 1895, §§ 3350-3359.

6. Provisions defining fixtures and determining what things are deemed affixed to mining claims. Rev. Civ. Code 1895, § 1077.

7. Customs and usages of particular districts as evidence in actions to determine conflicting claims to mining property. Rev. Code Civ. Proc. 1895, § 1321.

**Local district regulations as evidence: See text, § 272.**

8. Provisions regulating the summary sales of mines and mining interests. Rev. Code Civ. Proc. 1895, §§ 2660-2664.

9. Provisions creating the office of inspector of mines and defining the powers and duties of the inspector. Rev. Pol. Code 1895, §§ 580-590.

**As amended by act of March 4, 1897; Laws of 1897.**

10. Provisions regulating the working of coal mines. Rev. Pol. Code 1895, §§ 3350-3365.

11. Provisions governing the employment of children in mines. Rev. Pen. Code 1895, § 474.

12. Provisions regulating the storage of explosives in mines. Rev. Pen. Code 1895, § 708.

13. Provisions regulating punishment for malicious mischief in destroying or tearing down notices. Rev. Pen. Code 1895, § 1062.

14. An act regulating the hours of labor of hoisting engineers and fixing the penalties for violation thereof. Approved Feb. 19, 1897, Laws 1897, p. 67.

15. An act to further protect underground miners. Approved March 1, 1897. Laws of 1897, p. 66.

16. An act relating to the casing in of cages in mines, amending section 705 of the Revised Penal Code of 1895. Approved March 1, 1897. Laws of 1897, p. 245.

17. Regulating the right of a party to an action concerning a mining claim to an order for inspection and survey. Code Civ. Proc., § 376.

## NEVADA.

I. Act of 1897 Regulating the Location and Development of Lode, Placer, Tunnel, and Millsite Claims.
II. Act Regulating the Disposition of Certain State Mineral Lands.
III. Reference to Miscellaneous Legislation on Mining Subjects.

### I. Act of 1897 Regulating Location and Development of Mineral and Millsite Claims.

[Approved March 16, 1897. Statutes of 1897, pp. 103-109.]

This act was passed after the early chapters of the work had been printed. This accounts for the absence of a proper classification in the text of the legislation of this state, e. g. §§ 251, 343, 351, 380, 443, etc.

**Lode Claim; Who may Locate; Posting Notice.**

§ 1. Any person, a citizen of the United States, or one who has declared his intention to become such, who discovers a vein or lode may locate a claim upon such vein or lode by defining the boundaries of the claim in the manner hereinafter described and by posting a notice of such location at the point of discovery, which notice must contain: First, the name of the lode or claim; second, the name of the locator or locators; third, the date of the location; fourth, the number of the linear feet claimed in length along the course of the vein, each way from the point of discovery, with the width on each side of the center of the vein, and the general course of the vein or lode as near as may be.

Liberal rules of construction applied to notices: § 355.
Place and manner of posting: § 356.
What constitutes discovery: § 336.

**Discovery Shaft and Equivalent; Marking Boundaries.**

§ 2. Before the expiration of ninety days from the posting of such notice upon the claim the locator must sink a discovery shaft upon the claim located to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper if

necessary to show by such work a lode deposit of mineral in place. A cut, or crosscut, or tunnel which cuts the lode at a depth of ten feet, or an open cut of at least ten feet in length along the lode from the point where the lode may be in any manner discovered, is equivalent to a discovery shaft. The locator must define the boundaries of his claim by marking a tree or rock in place, or by setting a post or stone, one at each corner and one at the center of each side line. When a post is used it must be at least four inches square, by four feet six inches in length, set one foot in the ground, with a mound of stone or earth four feet in diameter by two feet in height around the post. When it is practically impossible on account of bedrock or precipitous ground to sink such posts, they may be placed in a pile of stones; or where the proper placing of such posts or monuments of stone is impracticable or dangerous to life or limb, it shall be lawful to place such post or monument of stone at the nearest point, properly marked to designate its right place. When a stone is used, not a rock in place, it must be at least six inches square and eighteen inches in length, set two-thirds of its length in the ground, which trees, stakes, or monuments must be so marked as to designate the corners of the claim located.

Object of requirement as to development work: § 344.
Relationship of discovery to discovery shaft: § 345.
Extent of development work: § 346.
Form and size of the claim: § 361.
Necessity for, and object of, marking: § 371.
Time allowed for marking: § 372.
What is sufficient marking under the Federal law: § 373.
Perpetuation of monuments: § 375.

**Location Notice; Record; Records made Prior to Passage of Act.**

§ 3. Within ninety days of the date of posting the location notice upon the claim, the locator shall record his claim with the mining district recorder and the county recorder of the mining district or county in which such claim is situated by a location certificate which must contain: First, the name of the lode or vein; second, the name of the locator or locators; third, the date of the location and such description of the location of the said claim, with reference to some natural object or permanent monument, as will iden-

tify the claim; fourth, the number of linear feet claimed in length along the course of the vein each way from the point of discovery, with a width on each side of the center of the vein, and the general course of the lode or vein as near as may be; fifth, the dimensions and location of the discovery shaft, or its equivalent, sunk upon the claim; sixth, the location and description of each corner, with the markings thereon. Any record of the location of a lode mining claim which shall not contain all the requirements named in this section shall be void. All records of lode or placer mining claims, millsites or tunnel rights heretofore made by any recorder of any mining district or any county recorder are hereby declared to be valid and to have the same force and effect as records made in pursuance of the provisions of this act. And any such record, or a copy thereof, duly verified by a mining recorder or duly certified by a county recorder shall be prima facie evidence of the facts therein stated.

Purpose of location certificate: § 379.
Rules of construction applied: § 381.
Effect of failure to comply with the law as to contents of certificate: § 384.
Time and place of record and failure to record within time limited: §§ 389-390.

**Extralateral Rights; Intralimital Rights.**

§ 4. The location or record of any vein or lode claim shall be construed to include all surface ground within the surface lines thereof, and all lodes and ledges throughout their entire depth, the top or apex of which lies inside of such lines extended downward vertically, with all parts of such lodes or veins as continue to dip beyond the side lines of the claim, but shall not include any portion of such lodes, veins, or ledges, beyond the end lines of the claim, or the end lines continued, whether by dip or otherwise, or beyond the side lines in any other manner than by the dip of the lode.

Validity and effect of such legislation questioned: § 251.

**Lode Not to be Pursued on Strike beyond End Lines.**

§ 5. If the top or apex of the lode in its longitudinal course extends beyond the exterior lines of the claim at any point on the

surface, or as extended vertically downward, such lode may not be followed in its longitudinal course where it is intersected by the exterior lines.

**See note to preceding section.**

**Amended Location Certificate; Change of Boundaries.**

§ 6. If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing; or shall be desirous of changing his surface boundaries or of taking in any part of an overlapping claim which has been abandoned; or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefits of this act, such locator or his assigns may file an additional certificate, subject to the provisions of this act; provided, that such relocation does not interfere with the existing rights of others at the time of such relocation, and no such relocation or the record thereof shall preclude the claimant or claimants from proving any such titles as he or they may have held under previous location.

**Objects and functions of amended location certificates discussed in text: § 398.**

**Circumstances justifying change of boundaries: § 396.**

**Privilege of changing boundaries exists in absence of intervening rights, independent of State legislation: § 397.**

**Relocation of Abandoned Claims.**

§ 7. The relocation of abandoned lode claims shall be by sinking a new discovery shaft and fixing new boundaries in the same manner as if it were the location of a new claim; or the relocator may sink the original discovery shaft ten feet deeper than it was at the time of abandonment, in which case the record must give the depth and dimensions of the original discovery shaft at the date of such relocation and erect new or adopt the old boundaries, renewing the posts or monuments if removed or destroyed. In either case a new location stake shall be erected. In any case, whether the whole or part of an abandoned claim is taken the record may state that the whole or any part of the new location is

located as abandoned property. If it is not known to the relocator that his location is on an abandoned claim, then the provisions of this section do not apply.

Circumstances under which relocation may be made: § 402.
New discovery not essential as a basis of relocation: § 403.
Relocation admits the validity of the original: § 404, p. 512.
Relocation by original locator: § 405.
Relocation by one of several original locators in hostility to others: § 406.
Relocation by agent or others occupying fiduciary or contractual relationship with original locator: § 407.
Manner of perfecting relocations: § 408.
Right of second locator to improvements made by first: § 409.

**Location Certificate; Description by Reference to Surveyed Field Notes.**

§ 8. Where a locator, or his assigns, has the boundaries and corners of his claim established by a United States deputy mineral surveyor, or a licensed surveyor of this state, and his claim connected with a corner of the public or minor surveys of an established initial point, and incorporates into the record of the claim the field notes of such survey, and attaches to and files with such location certificate a certificate of the surveyor, setting forth: First, that said survey was actually made by him, giving the date thereof; second, the name of the claim surveyed and the location thereof; third, that the description incorporated in the declaratory statement is sufficient to identify. Such survey and certificate becomes a part of the record, and such record is prima facie evidence of the facts therein contained.

**Annual Labor; Amount Required; Value of a Day's Labor.**

§ 9. The amount of work done or improvements made during each year to hold possession of a mining claim shall be that prescribed by the laws of the United States, to-wit: One hundred dollars annually. In estimating the worth of labor required to be performed upon any mining claim, to hold the same under the laws of the United States, the value of a day's labor is hereby fixed at the sum of four dollars; provided, however, that in the

sense of this statute eight hours of labor actually performed upon the mining claim shall constitute a day's labor.

For discussion of the subject of annual labor: See §§ 623-638.
Requirement as to annual labor imperative: § 624.
By whom labor must be performed: § 633.
Circumstances under which performance of annual labor is excused: § 624.
Value of labor and improvements, how estimated: § 635.
When obligation to perform annual labor ceases: § 637.
Validity of legislation fixing the value of a day's labor questioned: § 635.

**Proof of Annual Labor.**

§ 10. Within sixty days after the performance of labor or making of improvements, required by law to be annually performed or made upon any mining claim, the person in whose behalf such labor was performed, or improvements made, or someone in his behalf shall make and have recorded by the mining district recorder or the county recorder in books kept for that purpose in the mining district or county in which such mining claim is situated, an affidavit setting forth the amount of money expended, or value of labor or improvements made, or both, the character of expenditures or labor, or improvements, a description of the claim or part of the claim affected by such expenditures, or labor or improvements, for what year and the name of the owner or claimant of said claim at whose expense the same was made or performed. Such affidavit or a copy thereof, duly certified by the county recorder, shall be prima facie evidence of the performance of such labor or the making of such improvements, or both.

See note to preceding section.
Proof of annual labor discussed: § 636.

**Forfeiture to Co-owners.**

§ 11. Whenever a co-owner or co-owners shall give to a delinquent co-owner or co-owners the notice in writing or notice by publication provided for in section 2324, Revised Statutes of the United States, an affidavit of the person giving such notice, stating the time, place, manner of service, and by whom and upon whom such service was made, shall be attached to a true copy of such notice, and such notice and affidavit must be recorded by

the mining district recorder or the county recorder, in books kept for that purpose, in the mining district or county in which the mining claim is situated; within ninety days after the giving of such notice, or if such notice is given by publication in a newspaper, there shall be attached to a printed copy of such notice an affidavit of the printer or his foreman or principal clerk of such paper, stating the date of the first, last and each insertion of such notice therein, and when and where the newspaper was published during that time, and the name of such newspaper. Such affidavit and notice shall be recorded as aforesaid within one hundred and eighty days after the first publication thereof. The original of such notice and affidavits, or a duly certified copy of the record thereof, shall be evidence that the delinquent mentioned in section 2324 has failed or refused to contribute his proportion of the expenditure required by that section and of the service or publication of said notice; provided, the writing or affidavit hereinafter provided for is not of record. If such delinquent shall, within the ninety days required by section 2324 aforesaid, contribute to his co-owner or co-owners his proportion of such expenditures, such co-owner or co-owners shall sign and deliver to the delinquent or delinquents a writing, stating that the delinquent or delinquents by name, has within the time required by section 2324 of the Revised Statutes of the United States, contributed his share for the year ——, upon the —— mine, and further stating therein the district, county and state where the same is situate and the book and page where the location notice is recorded; such writing shall be recorded in the office of the county recorder of said county. If such co-owner or co-owners shall fail to sign and deliver such writing to the delinquent or delinquents within twenty days after such contribution, the co-owner or co-owners so failing as aforesaid shall be liable to a penalty of one hundred dollars, to be recovered by any person for the use of the delinquent or delinquents in any court of competent jurisdiction. If such co-owner or co-owners fail to deliver such writing within said twenty days, then the delinquent with two disinterested persons having personal knowledge of such contribution, may make affidavit setting forth in what manner, the amount of, to whom and upon what mine, such contribution was made. Such affidavit, or a record thereof in the office of the coun-

ty recorder of the county in which said mine is situate, shall be prima facie evidence of such contribution.

Validity of such legislation questioned: §§ 251, 646.
Forfeiture to co-owners discussed: § 646.

**Notice of Location Claiming More Than One Location is Void.**

§ 12. No notice of location of a lode claim shall claim more than one location, whether the location be made by one or several persons. And if such notice purport to claim more than one location it shall be absolutely void, except as to the first location therein described. And if they are described together, or so that it can not be told which location is first described, the notice of location shall be void as to all.

The location certificate and its contents discussed: §§ 379-385.

**Placer Claims, How Located; Posting Notices; Marking Boundaries.**

§ 13. The locator of a placer-claim shall locate his claim in the following manner: First, by posting a notice of location thereon containing the name of the claim, the name of the locator or locators, the date of location and the number of feet or acres claimed; second, by marking the boundaries of his claim with a post, tree or rock in place, or by setting a post or stone, one at each angle of the claim located. When a post is used it must be at least four inches square by four feet six inches in length, set one foot in the ground, with a mound of stone or earth four feet in diameter, by two feet in height around the post. Where it is practically impossible on account of bedrock or precipitous ground to sink such posts, they may be placed in a pile of stones. When a stone is used not rock in place, it must be at least six inches square and eighteen in length, set two-thirds of its length in the ground, which tree, stake or monument must be so marked as to designate the corner of the claim located; provided, that if the United States survey has been extended over said land then the claim may be taken by legal subdivision, and no other monument, ex-

cept that upon which the location notice is posted, shall be required than the United States corners.

Requirements for locating placers in absence of state legislation: §§ 432, 454.
Same where state legislation exists: § 433.
Liberal rules of construction applied to notices: § 355.
Place and manner of posting: § 356.

**Placers; Location Certificate; Record.**

§ 14. The locator of any placer claim shall, within sixty days from the date of the location of such claim have the same recorded by the mining district recorder and the county recorder, in books kept for that purpose, in the mining district or county in which such claim is situated, which record must contain: First, the name of the claim, designating it as a placer claim; second, the name of the locator or locators; third, the date of such location; fourth, the number of feet or acres thus claimed; fifth, a description of the claim, with reference to some natural object or permanent monument as will identify the claim. Any record of the location of a placer mining claim which shall not contain all the requirements of this section shall be void.

Purpose of location certificate: § 379.
Rules of construction applied: § 381.
Effect of failure to comply with law as to contents of certificate: § 384.

**Millsite may Be Located.**

§ 15. The proprietor of a vein or lode claim or mine, or the owner of a quartz mill or reduction works, may locate five acres of non-mineral land as a millsite.

Law relating to millsites generally: § 519.
Different classes of millsites: § 520.
Location of millsite with reference to lode: § 522.
Nature of use required in case of location by lode proprietor: § 523.
Millsites used for quartz mill or reduction works disconnected with lode ownership: § 524.
Right to millsite, how initiated: § 521.
Manner of acquiring patent to: § 708.

**Millsite, How Located; Posting Notice; Marking Boundaries.**

§ 16. The locator of a millsite location shall locate his claim by posting a notice of location thereon, which must contain: First, the name of the locator or locators; second, the name of the vein or lode claim, or mine, of which he is the proprietor, or the name of the quartz mill or reduction works of which he is the owner; third, the date of the location; fourth, the number of feet or acres claimed; fifth, a description of the claim by such reference to a natural object or permanent monument as shall identify the claim or millsite. And by marking the boundaries of his claim in the same manner as provided in this act for the marking of the boundaries of a placer mining claim, so far as the same may be applicable thereto.

See note to preceding section.

**Millsite; Location Notice and Record.**

§ 17. The locator of a millsite claim or location shall within thirty days from the date of his location record his location with the mining district recorder and the county recorder of the district or county in which such location is situated, by a location certificate which must be similar in all respects to the one posted on the location.

See notes to § 15 of this act.

**Millsite; Notice of Location, When Void.**

§ 18. Any record of a millsite location which shall not contain the name of the locator or locators, the name of the vein or lode claim or mine of which the locator is the proprietor, or the name of the quartz mill or reduction works of which the locator is the owner, the number of feet or acres claimed, and such description as shall identify the claim with reasonable certainty, shall be void.

See notes to § 15 of this act.

**Tunnel Right or Location, How Located; Posting.**

§ 19. The locator of a tunnel right or location shall locate his tunnel right or location by posting a notice of location at the face

or point of commencement of the tunnel which must contain: First, the name of the locator or locators; second, the date of the location; third, the proposed course or direction of the tunnel; fourth, the height and width thereof; fifth, the position and character of the boundary monuments; sixth, a description of the tunnel by such reference to a natural object or permanent monument as shall identify the claim or tunnel right.

See Regulations of land department concerning tunnel locations: ante, p. 1189, pars. 20-26.
Acts to be performed in acquiring tunnel rights: § 472, p. 573.
"Line" of tunnel defined: § 473.
"Face" of tunnel defined: § 474.
For reference to recent decisions of the Supreme Court of the United States, see note to § 2323, Rev. Stats., ante, p. 1067.

**Tunnel, Boundary Lines, How Established.**

§ 20. The boundary lines of the tunnel shall be established by stakes or monuments placed along such lines at an interval of not more than three hundred feet from the face or point of commencement of the tunnel to the terminus of three thousand feet therefrom. The stakes or monuments shall be of the same size and character as those provided for lode or placer claims in this act.

See note to preceding section.
Marking of the tunnel location on the ground: § 475, p. 576.

**Tunnel Location; Record.**

§ 21. The locator of a tunnel right or location shall within sixty days from the date of the location record his location with the mining district recorder and the county recorder of the county or district in which such location is situated, which must be similar in all respects to the one posted on the location. Any record of a tunnel right or location which shall not contain all the requirements named in this section shall be void.

See notes to two preceding sections.
Acts to be performed in acquiring tunnel rights: §§ 472, 475.

**Blind Lodes, Discovered in Tunnel, How Located.**

§ 22. All blind lodes, or veins or lodes not previously known to exist, discovered in a tunnel run for the development of a vein or

lode, or for the discovery of mines, and within three thousand feet from the face of such tunnel, shall be located upon the surface and held in like manner as other lode claims under the provisions of this act.

Necessity for appropriation of discovered lode by surface location: § 482, p. 580.

Acts to be performed in acquiring tunnel rights: §§ 472, 475.

To what extent does the inception of a tunnel right and its perpetuation by prosecuting work with reasonable diligence operate as a withdrawal of the surface from exploration by others: § 483, p. 586.

See generally upon the subject of tunnels: §§ 472, 491 of text.

For recent decisions of Supreme Court of United States on subject of tunnel rights, see note to § 2323 Rev. Stats., p. 1167, ante.

**Provisions of Act, to What Claims Applicable.**

§ 23. The provisions of this act shall be construed as equally applicable to all classes of locations except where the requirement as to any one class is manifestly inapplicable to any other class or classes.

**Repealing Clause.**

§ 24. All acts or parts of acts in conflict with this act are hereby repealed.

## II. Regulating the Disposition of State Lands Containing Mineral.

**State Disclaims All Title to Lands Containing Mineral; How Such Lands are to be Located; Mining a Public Use.**

§ 1. The several grants made by the United States to the state of Nevada reserved the mineral lands. Sales of such lands made by the state were made subject to such reservations. Any citizen of the United States or person having declared his intention to become such, may enter upon any mineral lands in this state, notwithstanding the state's selection, and explore for gold, silver, copper, lead, cinnabar, or other valuable mineral, and upon the discovery of such valuable mineral may work and mine the same

in pursuance of the local rules and regulations of the miners and the laws of the United States; provided, that after a person who has purchased land from the state has made valuable improvements thereon, such improvements shall not be taken or injured without full compensation. But such improvement may be condemned for the uses and purposes of mining in like manner as private property is by law condemned and taken for public use. Mining for gold, silver, copper, lead, cinnabar, and other valuable mineral, is the paramount interest of this state, and is hereby declared to be a public use. Stats. 1887, pp. 102-3, sec. 1.

See similar act in California and note thereto: ante p. 1251.
Mining as a public use in Nevada: § 256.

**Deeds from State to Contain Clause Reserving Minerals.**

§ 2. Every contract, patent or deed hereafter made by this state, or the authorized agents thereof, shall contain a provision expressly reserving all mines of gold, silver, copper, lead, cinnabar and other valuable minerals that may exist in such land, and the state, for itself and its grantees, hereby disclaims any interest in mineral lands heretofore or hereafter selected by the state on account of any grant from the United States. All persons desiring titles to mines upon lands which have been selected by the state, must obtain such title from the United States under the laws of Congress, notwithstanding such selection. Stats. 1887, p. 103, § 2, as amended in 1897, Stats. of 1897, p. 36.

## III. Reference to Miscellaneous Legislation on Mining Subjects.

1. Providing that the county recorder of each county shall be ex-officio district mining recorder and providing that he be responsible for the safekeeping of all mining records. Gen. Stats. 1885, § 300.

2. Providing that duplicate copies of mining records be transmitted by local mining recorder to the county recorder, and providing for fees of recorders. Stats. 1885, p. 27, § 1; as amended in 1897, Stats. of 1897, p. 77.

3. Regulating the sale by the state of timber and mountainous grazing lands selected by the state under any grant by the United States, and providing that the deeds contain clauses reserving all mineral. Stats. 1883, p. 103-4.

4. An act for the better preservation of titles to mining claims, dealing with delinquent co-owners and method of selling their interests: Stats. 1887, p. 136.

5. Providing for damages for unlawful encroachment of one mining company upon the property of another. Stats. of 1891, p. 37.

6. An act to encourage the development of mineral resources of the state of Nevada, providing for a laboratory to be used for the free analysis of ore. Laws of 1891, p. 47.

7. An act to provide for the storage of water to encourage mining, milling, and internal improvements, etc. Laws of 1889, p. 102.

8. An act to encourage mining, providing for the condemnation of private property for mining purposes. Laws of 1887, p. 102.

9. Providing that the proceeds alone of mines shall be taxed. Const., art. X, sec. 1; see Laws of 1893, p. 194.

10. Regulating the manner of assessing the proceeds of mines, and providing that an uncollected tax on the proceeds of a mine shall constitute a lien on the mine. Laws of 1891, p. 162.

11. Providing for an order of inspection in an action concerning a mining claim. Comp. Laws of 1873, §§ 119, 1321.

## NEW MEXICO.

I. Laws Relating to the Location, Relocation, and Development of Mines.

II. Reference to Miscellaneous Legislation on Mining Subjects.

### I. Laws Relating to the Location, Relocation, and Development of Mining Claims.

**1. Posting Notice; Marking Boundaries; Location Certificate and Record.**

Any person or persons desiring to locate a mining claim upon a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposit, must distinctly mark the location on the ground, so that its boundaries may be readily traced;[1] and post in some conspicuous place on such location, a notice in writing, stating thereon the name or names of the locator or locators, his or their intention to locate the mining claim, giving a description thereof by reference to some natural object or permanent monument as will identify the claims;[2] and, also, within three months after posting such notice, cause to be recorded a copy thereof in the office of the recorder of the county in which the notice is posted; and provided, no other record of such notice shall be necessary.[3] Comp. Laws 1884, p. 754, sec. 1566.

[1] Marking boundaries: See next paragraph.

[2] Preliminary notice and its posting discussed: §§ 350-356.
Place and manner of posting: § 356.
Liberal rules of construction applied to notices: § 355.

[3] Section referred to in text: § 380, p. 492.
Purpose of location certificate: § 379, p. 490.
Rules of construction applied: § 381, p. 494.
Effect of failure to comply with the law as to contents of certificate: § 384, p. 498.
Time and place of record and effect of failure to record within time limited: §§ 389, 390.

**2. Marking Boundaries.**

Within one hundred and twenty days from the date of locating any mining claim within this territory, the locator or locators thereof shall cause the surface boundaries of such claim to be plainly marked by eight substantial posts or stone monuments, each projecting at least three feet above the surface of the ground, to wit: One at each corner of said claim, and one at the center of each end and side line thereof, each of which posts or monuments shall be plainly marked so as to show the name of such claim and the direction thereof from each post or monument. Laws of 1897, p. 127, § 6.

This section was passed since the early chapters of the text of this treatise were printed.

Necessity for, and object of, marking: § 371.
Time allowed for marking: § 372.
What is sufficient marking under the Federal law: § 373.
State statutes defining the character of marking: § 374.
Perpetuation of monuments: § 375.

**3. Discovery Shaft and Equivalent.**

The locator or locators of any mining claim, located after this act shall take effect, shall, within ninety days from the date of taking possession of the same sink a discovery shaft upon such claim to a depth of at least ten feet from the lowest part of the rim of such shaft at the surface, exposing mineral in place, or shall drive a tunnel, adit, or open cut upon such claim to at least ten feet below the surface, exposing mineral in place. Laws of 1889, p. 42 et seq., sec. 1.

Statute referred to in text: § 343, p. 449.
Object of requirement as to development work: § 344.
Relationship of discovery shaft to discovery: § 345.
Extent of development work: § 346.

**4. Forfeiture of Claim for Failure to Perform Development Work.**

Whenever the locator or locators of any mining claim in this territory, located under the laws of the United States and of this territory, shall fail or neglect to do and to perform, or cause to be done or performed, upon such mining claim, the amount and

character of work necessary to be done and performed thereon as required by section 1 of chapter 25 of the acts of the 28th session of the legislative assembly of the territory of New Mexico, within the ninety days from the date of such location as provided in said section, such locator, or locators, and his or their assigns, shall forfeit all right to such mining claim, and shall henceforth for the period of ninety days from and after the expiration of such ninety days be debarred and prohibited from relocating, or procuring, or becoming interested, directly or indirectly, except as a bona fide purchaser for value, in the relocation of such claim, or the location of any other claim which will include any portion of the ground which was included in such forfeited claim. Laws of 1897, p. 124, sec. 1.

This section was passed since the early chapters of the text of this treatise were printed.

Relocations by original locator: § 405. See post, par. 9.

**5. Amended Location Certificate and Change of Boundaries.**

If at any time the owner of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that the original notice of location is defective, erroneous or the requirement of the law has not been complied with before filing; or shall be desirous of changing his surface boundaries or to take in any part of an overlapping claim which has been abandoned; or in case the original notice of the location was made prior to the passage of this act and the owner shall be desirous of obtaining the benefits of this act, such owner may file in the offices where notices of locations are by law required to be filed, an amended or additional notice of location, subject to the provisions of this act; provided, that such additional or amended notice of location does not interfere with the existing rights of others at the time of filing such notice; and no such amended or additional location, or record thereof, shall preclude the claimant or his assigns from proving any such title as he or they may have held under the previous location. Laws of 1889, p. 43, et seq., § 4.

Objects and functions of amended certificates: § 398, p. 507.
Circumstances justifying change of boundaries: § 396.
Privilege of changing boundaries independent of State legislation: § 397, p. 506.

### 6. Relocation of Mining Claims.

The relocation of any mining ground, which is subject to relocation, shall be made in the same way as an original location is required by law to be made, except the relocator may either sink a new shaft upon the ground relocated to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, exposing mineral in place, or drive a new tunnel, adit, or open cut upon such ground at least ten feet below the surface, exposing mineral in place, or the relocator may sink the original discovery shaft ten feet deeper than it is at the time of relocation, or drive the original tunnel, adit, or open cut upon such claim ten feet further. Laws of 1889, p. 42 et seq., sec. 3.

When relocation may be made: § 402, p. 511.
New discovery not essential as a basis of relocation: § 403, p. 512.
Relocation admits the validity of the original: § 404, p. 512.
Relocation by original locator: § 405, p. 513. See post, par. 9.
Relocation by one of several original locators, in hostility to others: § 406, p. 517.
Relocation by agent or others occupying fiduciary or contractual relationship with original locator: § 407, p. 518.
Right of second locator to improvements made by first: § 409, p. 522.

### 7. Proof of Annual Labor.

The owner or owners of any unpatented mining claim in this territory, located under the laws of the United States and of this territory, shall within sixty days from and after the time within which the assessment work required by law to be done upon such claim should have been done and performed, cause to be filed with the recorder of the county in which such mining claim is situated, an affidavit setting forth the time when such work was done, and the amount, character, and actual cost thereof, together with the name or names of the person or persons who performed such work; and such affidavit, when made and filed as herein provided, shall be prima facie evidence of the facts therein stated. The failure to make and file such affidavit as herein provided shall in any contest, suit or proceedings touching the title to such claim, throw the burden of proof upon the owner or owners of such claim to show that such work has been done according to law. Laws of 1897, p. 127, sec. 8.

Proof of annual labor discussed in text: § 636.
Annual labor discussed: §§ 623-638.

**8. Value of Day's Labor.**

In estimating the worth of labor required to be performed upon any mining claims, to hold the same by the laws of the United States, in the regulation of mines, the value of a day's labor is hereby fixed at the sum of four dollars; provided, however, that in the sense of this statute, eight hours of labor actually performed upon the mining claim shall constitute a day's labor. Comp. Laws, 1884, p. 754, sec. 1568.

The above section is referred to in the text and its validity questioned: § 635, p. 799.

**9. Forfeiture of Claims by Failure to Perform Work; Original Locators Debarred from Relocating Within Ninety Days.**

Whenever the locator or locators, or his or their assigns, of any lode or placer mining claim in this territory, located under the laws of the United States and of this territory, shall fail to do or cause to be done, the amount of the assessment work required by law to be done thereon, within the time prescribed by law, such claim shall be considered forfeited and abandoned, and such locator or locators, and his or their assigns, shall thenceforth for the period of ninety days from and after the expiration of the time within which such work should have been done, be debarred and prohibited from relocating such claim, or becoming interested directly or indirectly, except as a bona fide purchaser for value in the location or relocation of any claim, which shall include the land covered by such forfeited claim, or any part thereof. And the subsequent locator of such claim, or of any claim including the whole or any part of the land covered by such forfeited claim, shall not be entitled to credit for any work that may have been done thereon before the time of such forfeiture, nor shall the former owner of any such forfeited claim have any right to compensation therefor. Laws of 1897, p. 127, sec. 2.

Requirements as to annual labor imperative: § 624.
Forfeiture discussed: § 645.
Distinction between abandonment and forfeiture: § 643.
Resumption of work prevents forfeiture: §§ 651-653.
Relocation by original locator: § 405.

**10. Local Rules, to be Made by Certain Land Owners; Recording.**

The owner or owners of lands within this territory, the title to which has been vested by letters patent from the United States government, may make and file in the office of the county clerk of the county in which such lands are situated, such rules and regulations, not inconsistent with the laws of the United States, and of this territory, as they may see fit, governing the location and acquisition of mining claims thereon, which rules and regulations when so filed, shall be binding upon all parties, and a copy thereof duly certified by the county recorder shall be received and admitted as evidence in any suit or proceedings relating to such mining claims; such rules and regulations may be changed and supplemented from time to time by other rules and regulations filed in like manner, providing that such change shall not affect rights acquired thereto.

## II. Reference to Miscellaneous Legislation on Mining Subjects.

1. Providing that the probate clerk shall provide books of record in which to record mining claims, and regulating fees to be paid such clerks for recording claims. Comp. Laws of 1884, p. 754, § 1567.

2. Providing when an action of ejectment will lie for the recovery of a mining claim. Comp. Laws, 1884, p. 756, § 1570.

3. Force and effect of local customs and regulations as evidence in actions concerning mining claims. Laws of 1882, p. 95, § 1.

4. Providing a penalty for locating, claiming, or staking upon, the surface ground of the mining claim of another who has complied with the law and local regulations. Laws of 1882, p. 95, §§ 2 and 3.

5. An act relating to the termination of leases upon mines. Laws of 1891, p. 132.

6. Providing a penalty for the larceny of ores and for the purchase of stolen ores by persons having a knowledge of the theft. Laws of 1891, p. 133.

7. Providing penalty for slander of title of mine. Laws of 1889, p. 23.

8. Providing penalty for removing boundary objects, and notices. Laws of 1889, p. 43, § V.

9. Providing the manner in which mining claims shall be abandoned. Laws of 1889, p. 43, § VI.

10. Providing that mortgagee or lienholder may perform annual labor where the owner neglects to do so, and providing a penalty for obstructing lienholder in his work. Laws of 1889, p. 44, § VII.

11. An act to facilitate the recovery of ore taken by theft or trespass. Laws of 1889, p. 244.

12. Regulating damages for injury to mine by livestock. Laws of 1889, p. 248.

13. An act in relation to bringing suits where mining claims are contested before the U. S. Land office, and acts amendatory thereto. Laws of 1887, p. 205; Laws of 1889, p. 276.

14. An act providing for the weighing of coal at mines. Laws of 1889, p. 299.

15. Providing for the establishment of a school of mines. Laws of 1889, p. 324, § 3.

16. An act to provide for the condemnation of rights of way for tramways over any lands. Laws of 1889, p. 347.

17. Relating to certain evidence in mining suits. Laws of 1887, p. 206.

18. Relating to the right to survey and inspect mines. Laws of 1887, p. 206.

19. Providing a penalty for altering, defacing, or changing the location notice of any mining claim. Laws of 1897, p. 125, § 3.

20. Providing a penalty for relocating, or attempting or assisting to relocate, or attempting to hold possession of any forfeited mining claim, except as provided for. Laws of 1897, p. 126, § 4.

21. Providing a penalty for unlawfully entering with intent to hold possession of a mining claim against one lawfully in possession. Laws of 1897, p. 126, § 5.

22. Providing that a failure to perform development work within ninety days shall work a forfeiture of the claim. Laws of 1897, p. 124, § 1.

## NORTH DAKOTA.

I. Legislation Relating to Acquisition of Title to Lode Claims.
II. Reference to Miscellaneous Legislation on Mining Subjects.

### I. Legislation Relating to Acquisition of Title to Lode Claims.

#### 1. Length of Lode Claims.

The length of any lode claim hereafter located within the state may equal but shall not exceed 1500 feet along the vein or lode. Rev. Code 1895, sec. 1426.

See text: §§ 250 (1), 361.

#### 2. Lode Claims, Width.

The width of lode claims shall be 150 feet on each side of the center of the vein or crevice; provided, that any county may at any general election determine upon a greater width not exceeding 300 feet on each side of the center of the vein or lode, by a majority of the legal votes cast at such election, and any county by such vote at such election may determine upon a less width than above specified; provided, that not less than 25 feet on each side of the vein or lode shall be prohibited. Rev. Code 1895, sec. 1427.

Statute referred to in text: § 361, p. 465.
Location covering excessive area: § 362, p. 466.
Provision of Federal law: Rev. Stats. U. S., § 2320, Appendix, p. 1164.
See note to preceding section.

#### 3. Location Certificate; Contents and Record.

The discoverer of a lode shall within sixty days from the date of discovery record his claim in the office of the register of deeds of the county in which such lode is situated by a location certificate, which shall contain:

1. The name of the lode;
2. The name of the locator;
3. The date of the location;
4. The number of feet in length claimed on each side of the discovery shaft;
5. The number of feet in width claimed on each side of the vein or lode;
6. The general course of the lode as near as may be. Rev. Code 1895, sec. 1428.

Section referred to in text: § 380, p. 494.
Purpose of location certificate: § 379, p. 490.
Rules of construction applied: § 381, p. 494.
Effect of failure to comply with the law as to contents of certificate: § 384, p. 498.
Time and place of record and effect of failure to record within time limited: §§ 389, 390, pp. 499, 501.

**4. Location Certificate Void, When.**

Any location certificate of a lode claim which shall not contain the name of the lode, the name of the locator, the date of location, the number of lineal feet claimed on each side of the discovery shaft, the number of feet in width claimed, the general course of the lode and such description as shall identify the claim with reasonable certainty, shall be void. Rev. Code 1895, sec. 1429.

Effect of failure to comply with law as to contents of certificate: § 384, p. 498.

**5. Discovery Shaft, Posting Notice; Manner of Locating Claim.**

Before filing such location certificate the discoverer shall:

1. Locate his claim by first sinking a discovery shaft thereon sufficient to show a well-defined mineral vein or lode;[1]

2. By posting at the point of discovery on the surface, a plain sign or notice containing the name of the lode, the name of the locator and the date of discovery, the number of feet claimed in length on either side of the discovery and the number of feet in width claimed on each side of the lode;[2]

3. By marking the surface boundaries of the same. Rev. Code 1895, sec. 1430.

[1] Section referred to in text: § 343, p. 450; § 352, p. 458.
Object of requirement as to development work: § 344.
Relationship of discovery shaft to discovery: § 345.
Extent of development work: § 346, p. 454.
Can preliminary work required by state laws as an act of location be credited on first year's work? § 632.
[2] Place and manner of posting: § 356.
Liberal rules of construction applied to notices: § 355.

**6. Marking Boundaries.**

Such surface boundaries shall be marked by eight substantial posts hewed or blazed on the side facing the claim and plainly marked with the name of the lode and the corner, end or side of the claim that they respectively represent and sunk in the ground as follows: One at the corner and one at the center of each side line and one at each end of the lode. When it is impracticable on account of rock or precipitous ground to sink such posts, they may be placed in a monument of stone. Rev. Code 1895, sec. 1431.

Section referred to in text: § 374, p. 487.
Time allowed for marking: § 372.
Necessity for, and object of, marking: § 371.
What is sufficient marking under the Federal law? § 373.
Perpetuation of monuments: § 375.

**7. Equivalent of Discovery Shaft.**

Any open cut, cross cut or tunnel at a depth sufficient to disclose the mineral vein or lode, or an adit of at least ten feet in length along the lode from the point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft. Rev. Code 1895, sec. 1432.

Subject discussed in text: §§ 343-346.

**8. Time Within which Discovery Shaft Must be Completed.**

The discoverer shall have sixty days from the time of uncovering or disclosing a lode in which to sink a discovery shaft thereon. Rev. Code 1895, sec. 1433.

See note to par. 5, ante.

**9. Intralimital and Extralateral Rights.**

The location or location certificate of any lode claim shall be so construed as to include all surface ground within the surface lines thereof, and all lodes and ledges throughout their entire depth, the top or apex of which lies inside of such lines extended vertically, with such parts of all lodes or ledges as continue by dip beyond the side lines of the claim, but shall not include any portion of such lodes or ledges beyond the end lines of the claim or the end lines continued, whether by dip or otherwise, or beyond the side lines in any other manner than by the dip of the lode. Rev. Code 1895, sec. 1434.

Validity of legislation questioned: § 251, pp. 318, 319.

**10. Lode Not to be Pursued on Strike beyond End Line.**

If the top or apex of the lode in its longitudinal course extends beyond the exterior lines of the claim at any point on the surface, or as extended vertically downward, such lode may not be followed in its longitudinal course beyond the point where it is intersected by the exterior. Rev. Code 1895, sec. 1435.

Validity of such legislation questioned: § 251, p. 319.

**11. Amended Location Certificate; Change of Boundaries.**

If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing his surface boundaries, or of taking in any part of an overlapping claim which has been abandoned, or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefit of this chapter, such locator or his assigns may file an additional certificate subject to the provisions of this chapter; provided, that such relocation does not interfere with the existing rights of others at the time of such relocation; and no such relocation or the record thereof shall pre-

clude the claimant from proving any such title as may have held under previous locations. Rev. Code, 1895, sec. 1437.

Objects and functions of amended certificates discussed in text: § 398, p. 507.

Circumstances justifying change of boundaries: § 396.

Privilege of changing boundaries exists in absence of intervening rights independent of state legislation: § 397, p. 506.

**12. Relocation of Abandoned Lode Claims.**

The relocating of abandoned lode claims shall be made by sinking a new discovery shaft and fixing new boundaries in the same manner as if it were the location of a new claim, or the relocator may sink the original shaft, cut, or adit to a sufficient depth to comply with sections 1430 and 1434, and erect new or adopt the old boundaries, renewing the posts if removed or destroyed. In either case a new location stake shall be erected. In any case whether the whole or part of an abandoned claim is taken, the location certificate must state that the whole or any part of the new location is located as abandoned property. Rev. Code, 1895, sec. 1439.

Statute referred to in text: § 408, p. 520.

Circumstances under which relocations may be made: § 402, p. 511.

New discovery not essential as a basis of relocation: § 403, p. 512.

Relocation admits the validity of the original: § 404, p. 512.

Relocation by original locator: § 405, p. 513.

Relocation by one of several original locators in hostility to others: § 406, p. 517.

Relocation by agent or others occupying fiduciary or contractual relationship with original locator: § 407.

Right of second locator to improvements made by first: § 409, p. 522.

**13. Location Certificate Must Contain Description of but One Location.**

No location certificate shall contain more than one location, whether the location is made by one or several locators; and if it purports to claim more than one location it shall be absolutely void, except as to the first location therein described; and if they are described together, or so that it can not be told which location is first described, the certificate shall be void as to all. Rev. Code 1895, sec. 1440.

Location certificate and its contents discussed: §§ 379-385.

**14. Local Customs and Regulations, How far Binding.** In actions respecting mining claims proof must be admitted of the customs, usages or regulations established and in force at the bar or diggings embracing such claim; and such customs, usages, or regulations, when not in conflict with the laws of this state and the United States must govern the decision of the action. Rev. Code 1895, sec. 5918.

Subject discussed in text: §§ 268-275.
Permissive scope of local regulations: § 270.
Acquiescence and observance, not mere adoption, the test: § 271.
Regulations, how proved; their existence a question of fact for the jury; their construction a question of law for the court: § 272, p. 347.

## II. Reference to Miscellaneous Legislation on Mining Subjects.

1. Relating to the duty of officials and mine owners to furnish information and statistics to commissioner of agriculture and providing punishment for failure so to do. Rev. Code, 1895, § 124.

2. Providing that when the right to mine is separate from the ownership of the surface ground, the owner of surface is entitled to security. Rev. Code, 1895, § 1436.

3. Conferring authority on the district judges to order surveys in cases of disputed mining property. Rev. Code, 1895, § 1442.

4. Providing that writs of injunction for affirmative relief having the force and effect of writs of restitution, restoring to possession person improperly ousted from mining property. Rev. Code, 1895, § 1443.

5. Regulating the organization of mining corporations. Rev. Code 1895, §§ 3154-3161.

## OREGON.

I. Laws Relating to Location and Recording of Mining Claims.
II. Reference to Miscellaneous Legislation on Mining Subjects.

### I. Laws Relating to the Location and Recording of Mining Claims.

(These laws were all passed prior to 1884 and therefore likewise apply to Alaska.)

**1. Length and Width of Lode Claims.**

Any person or company of persons, establishing a claim on any quartz lead containing gold, silver, copper, tin, or lead, or a claim on a vein of cinnabar, for the purpose of mining the same, shall be allowed to have, hold, and possess the lead or vein with all its dips, spurs, and angles, for the distance of fifteen hundred feet in length, and three hundred feet in width on each side of such lead or vein. Hill's Annotated Statutes of Oregon (1892), sec. 3827.

Section noted in text: § 250 (2).

**2. Location; Posting Notice; Recording; Forfeiture for Failure to Perform Work.**

To establish a valid claim, the discoverer or person wishing to establish a claim shall post a notice on the lead or vein, with name or names attached, which shall protect the claim or claims for thirty days;[1] and before the expiration of said thirty days, he or they shall cause the claim or claims to be recorded as hereinafter provided, and describing as near as may be the claim or claims, and their location;[2] but continuous working of said claim or claims shall obviate the necessity of such record. If any claim shall not be worked for twelve consecutive months, it shall be forfeited, and considered liable to location by any person or persons, unless the owner or owners be absent on account of sickness or in

the service of their country in time of war. Hill's Annotated Laws of Oregon (1892), sec. 3828.

[1] Liberal rules of construction applied to notices: § 355.
Place and manner of posting: § 356.
[2] Time and place of record and effect of failure to record within time limited: §§ 389, 390.
Purpose of location certificate: § 379.
Rules of construction applicable: § 381.
Requirements of Federal law as to contents of recorded notices: Rev. Stats., § 2324, ante p. 1168.

**3. Number of Claims That May be Located by One Person.**

Any person may hold one claim by location, as hereinafter provided, upon each lead or vein, and as many by purchase as the local laws of the miners in the district where such claims are located may allow; and the discoverer of any new lead or vein, not previously located upon, shall be allowed one additional claim for the discovery thereof. Nothing in this section shall be so construed as to allow any person, not the discoverer, to locate more than one claim upon any one lead or vein. Hill's Annotated Laws of Oregon (1892), sec. 3829.

**4. Development; Labor to be Performed Within One Year; Taxation.**

Every person or company of persons, after establishing such claim or claims, shall, within one year after recording or taking such claim or claims, work or cause to be worked the said claim to the amount of fifty dollars for each and every claim; provided, that any person or company, either joint or incorporate, owning claims on any lead or vein shall be allowed to work upon any one claim the whole amount required as above for all the claims, and thereby be exempted from working on the rest of his or their claims in said lead or vein; provided, further, that when the individual, company, or corporation owning any quartz claim or claims shall file the affidavit of said owner or one of the members of the company or corporation with the county clerk of the county in which said claims are situated, to the effect that the amount of work

required by this act has been performed on such claim (or if there be more than one claim, then on each of them), together with the affidavit of two disinterested persons to the same effect, with the addition, "that they are not interested directly or indirectly in said claim or claims," and such claims shall thereafter be considered as real estate, and the title therein shall vest in such persons, company, or corporation against all others, save the government of the United States; and the improvements, machinery and buildings thereon only shall be taxed as other property. Hill's Ann. Statutes of Oregon (1892), sec. 3830.

Certain parts of this section obnoxious to federal law: §§ 626, 250 (10).

Object of requirement as to development work: § 344.

Extent of development work: § 346.

**5. Records of Miner's Meetings, and Records of Locations; Transmission of Records.**

It shall be the duty of the county clerk of any county, upon the receipt of notice of a miners' meeting organizing a miners' district in said county, with a description of the boundaries thereof, to record the same in a book, to be kept in his office as other county records, to be called a "Book of Record of Mining Claims"; and upon the petition of parties interested, he may appoint a deputy for such district, who shall reside in said district or its vicinity, and shall record all mining claims and water rights in the order in which they are presented for record, and shall transmit a copy of such record at the end of each month to the county clerk, who shall record the same in the above mentioned book of record, for which he shall receive one dollar for each and every claim. It shall further be the duty of said county clerk to furnish a copy of this law to his said deputy, who shall keep the same in his office, open at all reasonable times for the inspection of all persons interested therein. Hill's Annotated Laws of Oregon (1892), sec. 3831.

## II. Reference to Miscellaneous Legislation on Mining Subjects.

1. Empowering miners to make local laws regarding water rights, placer claims, and town lots in mining camps. Hill's Ann. Laws of Oregon (1892), § 3832.

2. Providing that ditches used for mining purposes shall be real estate, and determining what shall constitute abandonment of such ditches. Hill's Ann. Laws of Oregon (1892), § 3833.

3. Providing that laws regulating the sale and transfer of real estate shall apply to mines, but placers may be transferred by bill of sale, recorded within thirty days. Hill's Ann. Laws of Oregon (1892), § 3834.

4. Providing that mortgages of interests in placers shall be foreclosed as mortgages of chattels. Hill's Ann. Laws of Oregon (1892), § 3835.

5. Regulating fee of county clerk for recording transfers. Hill's Ann. Laws of Oregon (1892), § 3836.

## SOUTH DAKOTA.

A. Mining Laws Enacted by the Legislature of South Dakota.
B. Mining Laws of Dakota Territory Adopted by South Dakota.
I. Relating to the Size, Location and Development of Mining Claims.
II. Reference to Miscellaneous Legislation on Mining Subjects.

### A. Mining Laws Enacted by the Legislature of South Dakota.

1. An act providing for the removal of unnecessary gases, fumes and dust from smelters and dry crushing works. Approved March 3, 1897. Laws of 1897, p. 248.

2. An act requiring mine owners to provide safety cages to be used in hoisting and lowering employees and other persons, from or into the shaft. Laws of 1897, p. 247.

3. An act creating the office of inspector of mines, and regulating the duties of the inspector. Laws of 1890, p. 263.

### B. Laws of Dakota Territory Relating to Mines Adopted by South Dakota.

After the division of Dakota territory into North and South Dakota and the admission of those states into the Union, the legislature of South Dakota enacted that: "All laws, in force in the territory of Dakota at the date of admission of the state of South Dakota into the Union and not repugnant to or inconsistent with the constitution of said state shall continue and be in full force and effect until altered, amended, or repealed." Laws of 1890, chap. 105, § 1.

The state legislature has not amended the laws of Dakota relating to mines and they are consequently in force, as hereafter outlined.

## I. Laws Relating to the Size, Location, and Development of Mining Claims.

### 1. Length of Lode Claim.

The length of any lode claim hereafter located within this territory may equal, but shall not exceed fifteen hundred feet along the vein or lode. Comp. Laws of Dakota Ty. (1887), sec. 1997.

The above section is but a re-enactment of the Federal law.
Surface area, length and width of lode claims discussed in text: § 361, p. 464.
Location covering excessive area: § 362, p. 466.

### 2. Width of Lode.

The width of lode claims shall be one hundred and fifty feet on each side of the center of the vein or crevice; provided, that any county may, at any general election, determine upon a greater width not exceeding three hundred feet on each side of the center of the vein or lode, by a majority of the legal votes cast at said election, and any county, by such vote at such election, may determine upon a less width than above specified; provided, that not less than twenty-five feet on each side of the vein or lode shall be prohibited. Comp. Laws of Dak. Ty. (1887), sec. 1998.

Section referred to and discussed in text: § 361, p. 465.

### 3. Location Certificate and Record.

The discoverer of a lode shall, within sixty days from the date of discovery, record his claim in the office of the register of deeds of the county in which such lode is situated, by a location certificate, which shall contain:

First, the name of the lode; second, the name of the locator or locators; third, the date of location; fourth, the number of feet in length claimed on each side of the discovery shaft; fifth, the number of feet in width claimed on each side of the vein or lode;

sixth, the general course of the lode, as near as may be. Comp. Laws of Dak. (1887), sec. 1999.

Section referred to in text: § 380, p. 494.
Purpose of location certificate: § 379, p. 490.
Rules of construction applied: § 381, p. 494.
Effect of failure to comply with the law as to contents of certificates: § 385, p. 499.
Time and place of record and effect of failure to record within time limited: §§ 389, 390.

**4. Location Certificate; Effect of Failure to Comply with Law as to Contents.**

Any location certificate of a lode claim which shall not contain the name of the lode, the name of the locator, the date of location, the number of lineal feet claimed on each side of the discovery shaft, the number of feet in width claimed, the general course of the lode, and such description as shall identify the claim with reasonable certainty, shall be void. Comp. Laws of Dak. (1887), sec. 2000.

Effect of failure to comply with law as to contents discussed: § 384, p. 498.

**5. Discovery Shaft; Posting Notice.**

Before filing such location certificate, the discoverer shall locate his claim by first sinking a discovery shaft thereon sufficient to show a well-defined mineral vein or lode;[1] second, by posting at the point of discovery, on the surface, a plain sign or notice containing the name of the lode, the name of the locator or locators, and the date of discovery, the number of feet claimed in length on either side of the discovery, and the number of feet in width claimed on each side of the lode; third, by marking the surface boundaries of the claim.[2] Comp. Laws of Dak. (1887), sec. 2001.

[1] Section referred to in text: § 343, p. 450; § 352, p. 458.
Object of requirement as to development work: § 344.
Relationship of discovery shaft to discovery: § 345.
Extent of development work: § 346, p. 454.
[2] Place and manner of posting: § 356.
Liberal rules of construction applied to notices: § 355.
Can preliminary work required by state laws as an act of location be credited on first year's work? § 632.

**6. Marking Surface Boundaries.**

Such surface boundaries shall be marked by eight (8) substantial posts, hewed or blazed on the side or sides facing the claim and plainly marked with the name of the lode and the corner, end or side of the claim that they respectively represent, and sunk in the ground, to-wit: one at each corner, and one at the center of each side line, and one at each end of the lode. When it is impracticable on account of rocks or precipitous ground, to sink such posts, they may be placed in a monument of stone. Comp. Laws of Dak. (1887), sec. 2002.

Section referred to in text: § 374, p. 487.
Time allowed for marking: § 372.
Necessity for, and object of, marking: § 371.
What is sufficient marking under the Federal law? § 373.
Perpetuation of monuments: § 375.

**7. Equivalent of Discovery Shaft.**

Any open cut, cross cut, or tunnel, at a depth sufficient to disclose the mineral vein or lode, or an adit, of at least ten (10) feet in along the lode, from a point where the lode may be in any manner discovered, shall be equivalent to a discovery shaft. Comp. Laws of Dak. (1887), sec. 2003.

Discovery shaft and equivalent discussed in text: §§ 343-346.

**8. Time Within Which Discovery Shaft Must be Completed.**

The discoverer shall have sixty days from the time of uncovering or disclosing a lode, to sink a discovery shaft thereon. Comp. Laws of Dak. (1887), sec. 2004.

See note to preceding sections.

**9. Intralimital and Extralateral Right.**

The location or location certificate, of any lode claim shall be construed to include all surface ground within the surface lines thereof, and all lodes and ledges throughout their entire depth, the top or apex of which lie inside of such lines extended vertically, with such parts of all lodes or ledges as continue by dip beyond the side lines of the claim, but shall not include any por-

tion of such lodes or ledges beyond the end lines of the claim, or the end lines continued, whether by dip or otherwise, or beyond the side lines in any other manner than by the dip of the lode. Comp. Laws of Dak. (1887), sec. 2005.

Validity of legislation questioned: § 251, pp. 318, 319.

**10. Lode Not to be Pursued on Strike Beyond End Lines.**

If the top or apex of the lode in its longitudinal course extends beyond the exterior lines of the claim at any point on the surface, or as extended vertically downward, such lode may not be followed in its longitudinal course beyond the point where it is intersected by the exterior. Comp. Laws of Dak. (1887), sec. 2006.

Validity of state legislation of the character of above questioned: § 251, p. 319.

**11. Amended Location Certificate; Change of Boundaries.**

If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law had not been complied with before filing, or shall be desirous of changing his surface boundaries, or of taking in any part of an overlapping claim which has been abandoned, or in case the original certificate was made prior to the passage of this law, and he shall be desirous of securing the benefit of this act, such locator or his assigns may file an additional certificate subject to the provisions of this act; provided, that such relocation does not interfere with the existing rights of others at the time of such relocation; and no such relocation or the record thereof shall preclude the claimant or claimants from proving any such title or titles as he or they may have held under previous locations. Comp. Laws Dak. (1887), sec. 2008.

Objects and functions of amended certificates discussed: § 398, p. 507.

Circumstances justifying change of boundaries: § 396, p. 504.

Privilege of changing boundaries exists in the absence of intervening rights independent of state legislation: § 397, p. 506.

**12. Relocation of Abandoned Lode Claims.**

The relocation of abandoned lode claims shall be by sinking a new discovery shaft, and fixing new boundaries in the same manner as if it were the location of a new claim, or the relocator may sink the original shaft, cut, or adit to a sufficient depth to comply with sections 2001 and 2003, and erect new or adopt the old boundaries, renewing the posts if removed or destroyed. In either case, a new location stake shall be erected. In any case, whether the whole or part of an abandoned claim is taken, the location certificate must state that the whole or any part of the new location is located as abandoned property. Comp. Laws Dak. (1887), sec. 2010.

Section referred to in text: § 406, p. 520.
Circumstances under which relocations may be made: § 402, p. 511.
New discovery not essential as a basis of relocation: § 403, p. 512.
Relocation admits the validity of the original: § 404, p. 512.
Relocation by original locator: § 405, p. 513.
Relocation by one of several original locators in hostility to others: § 406, p. 517.
Relocation by agent or others occupying fiduciary or contractual relationship with original locator: § 407, p. 518.
Right of second locator to improvements made by first: § 409, p. 522.

**13. Annual Labor.**

The amount of work to be done or improvements made during each year, to hold possession of a mining claim, shall be that prescribed by the laws of the United States, to wit: one hundred dollars annually, provided, that the period within which the work required to be done annually on all unpatented claims so located, shall commence on the first day of January succeeding the date of location of such claim. Comp. Laws of Dak. (1887), sec. 2009.

Requirement of above section the same as the Federal law: § 623.
Subject of annual labor discussed: §§ 623-638.

**14. Location Certificate Must Contain Description of but One Location.**

No location certificate shall claim more than one location, whether the location be made by one or several locators; and if it purport to claim more than one location, it shall be absolutely void, ex-

cept as to the first location therein described; and if they are described together, or so that it can not be told which location is first described, the certificate shall be void as to all. Comp. Laws Dak. (1887), sec. 2011.

**Location certificate discussed: §§ 379-385.**
**Effect of failure to comply with law as to contents of certificate: § 384.**

## II. Reference to Miscellaneous Legislation on Mining Subjects.

1. Providing that the owner of the surface of any mining claim or the rightful occupant may demand security from the miner when the right to mine is separate from the right of occupancy of the surface. Comp. Laws Dak. (1887), § 2007.

2. Regulating the fees of the recorder for recording mining claims (one dollar) and for certificates. Comp. Laws Dak. (1887), § 2012.

3. Providing that a miner shall have a lien on mines for work and labor done, or for material furnished, and providing for the collection of miners' wages when employed by other than the owner. Comp. Laws. 1887, §§ 2039-2040.

## UTAH.

I. Act of 1897 Providing the Manner in which Lode and Placer Claims may be Located and Recorded.

II. Reference to Miscellaneous Legislation on Mining Subjects.

### I. Act of 1897 Providing for the Location and Recording of Quartz and Placer Mines.

[Laws 1897, p. 57 et seq.]

(This act was passed after the early chapters of this work had been printed. This accounts for the absence of a proper classification in the text of the legislation of this state.)

**Length; Discovery; Width; Parallelism of End Lines.**

§ 1. A mining claim, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. Any lode mining claim may extend three hundred feet on each side of the middle of the vein at the surface, except where adverse rights render a lesser width necessary. The end lines of each claim must be parallel.

Surface area, discussed in text: § 361.
Location covering excessive area: § 362.
Surface conflicts with prior locations: § 363.
Surface must include apex: § 364.
End lines discussed: § 365.
Side-end lines: § 367.
What constitutes a valid discovery? § 336.
Where discovery must be made: § 337.
Effect of loss of discovery upon remainder of location: § 338.
Extent of locator's rights after discovery and prior to completion of location: § 339.

**Preliminary Notice and Its Posting.**

§ 2. The locator, at the time of making the discovery of such vein or lode, must erect a monument at the place of discovery, and must post thereon his notice of location, which notice shall contain:

1st. The name of the lode or claim;

2nd. The name of the locator or locators;

3rd. The date of the location.

4th. If a lode claim, the number of linear feet claimed in length along the course of the vein each way from the point of discovery, with the width on each side of the center of the vein, and the general course of the vein or lode, as near as may be, and such a description of the claim, located by reference to some natural object or permanent monument as will identify the claim.

5th. If a placer or mill-site claim, the number of acres or superficial feet claimed, and such a description of the claim or mill-site located by reference to some natural object or permanent monument as will identify the claim or mill-site.

Local customs as to preliminary notice prior to enactment of Federal laws: § 350.

Liberal rules of construction applied to notices: § 355.

Place and manner of posting: § 356.

**Marking Boundaries.**

§ 3. Within thirty days from the date of discovery or establishment, the locator must mark the boundaries of his lode, or placer, or millsite claim by establishing in each corner thereof, and at any angle in the side lines, a monument marked with the name of the claim and the corner or angle it represents. When from any cause a monument cannot be safely planted at the true corner or angle, it must be placed as near thereto as practicable and so marked as to indicate the place of such corner or angle. Monuments may be made of any such material and in such form as will readily give notice; and when of posts or trees, they must be hewn and marked upon the side facing toward the discovery, and must be at least four inches in diameter. Monuments must be at least four feet high above the ground, and trees must be so hewn as to readily attract attention. Monuments and stakes must be kept in such state of preservation as to notify persons of the boundaries of the mining claim.

Necessity for and object of marking: § 371.

Time allowed for marking: § 372.

What is sufficient marking under the Federal law: § 372.

Perpetuation of monuments: § 375.

**Location Certificate and Record.**

§ 4. Within thirty days from the date of posting the location notice upon the claim, the locator or locators, or his or their assigns, must file for record in the office of the county recorder of the county in which such claim is situated, a substantial copy of such notice of location. Said county recorder shall charge and collect a fee of one dollar for filing and recording such notice; provided, that such notice of location shall not be abstracted unless a subsequent conveyance affecting the same property be filed for record, when said notice shall be abstracted.

Purpose of location certificate discussed: § 379.
Rules of construction of location certificate: § 381.
Variation between descriptive calls in certificate and monuments on the ground: § 382.
"Natural objects" and "permanent monuments": § 383.
Effect of failure to comply with the law as to contents of certificate: § 384.
Time and place of record: § 389.
Effect of failure to record within time limited: § 390.
Proof of record: § 391.
The record as evidence: § 392.

**Discovery Work; Notice in Case of Group Claims.**

§ 5. Within ninety days from the date of posting the location notice upon the claim, the locator or locators, or his or their assigns, shall do at least fifty dollars' worth of work upon said claim. Every person or company owning a group of claims and doing the development work for said group at one point, shall post a notice upon each claim (at the discovery monument) stating where such work is being done.

Object of requirement as to development work: § 344.
Extent of development work: § 346.
Can discovery work be credited on first year's work? See § 632, text.

**Proof of Annual Labor.**

§ 6. The owner of any quartz lode or placer mining claim who shall do or perform or cause to be done or performed the annual labor or improvement required by the laws of the United States in order to prevent a forfeiture of the claim, must, either during

the year or within thirty days after the completion of such work or improvements, if completed after the termination of said year in or for which said work was done or improvements made, file in the office of the county recorder of the county in which such claim is situated, an affidavit or affidavits of the person or persons who performed such labor or made such improvements, showing:

1st. The name of the claim and where situated.

2nd. The number of days' work done and the character and value of the improvements placed thereon.

3rd. The date or dates of performing said labor and making said improvements and number of cubic feet of earth or rock removed.

4th. At whose instance or request said work was done or improvements made.

5th. The actual amount paid for said labor and improvements, and by whom paid, when the same was not done by the owner or owners of said claim.

Such affidavits or duly certified copies thereof shall be prima facie evidence of the facts therein stated.

"Annual labor" discussed in text: §§ 623-638.
Requirement as to annual labor imperative: § 624.
Value of labor and improvements, how estimated: § 635.
Circumstances under which annual labor is excused: § 634.
Proof of annual labor: § 636.

**Local Mining Rules to be Recorded Free.**

§ 7. It shall be the duty of each county recorder to record the mining rules and regulations of the several mining districts in his county without fee, and certified copies of such record shall be received in all tribunals and before all officers of this state as prima facie evidence of such rules and regulations.

Local district regulations discussed: §§ 268-275.

**County Recorder to be Official Mining Recorder; Transfer of Records.**

§ 8. The county recorders of the respective counties shall perform the duties heretofore performed by the district mining recorders in such counties, respectively; and the district mining re-

corders of each county shall, within thirty days after this act shall take effect, deposit the books and records pertaining to their offices with the county recorder of the county in which the district or the greater part thereof is situated. Provided; that said books and records shall not be required to be abstracted, by the county recorder. Any district mining recorder who shall fail to deposit as aforesaid the books and records pertaining to his office, shall be deemed guilty of a misdemeanor.

**Records as Evidence.**

§ 9. Copies of notices of location of mining claims, mill sites, and tunnel sites, heretofore recorded in the records of the several mining districts, and of the mining rules and regulations in force in the several mining districts, in like manner recorded, heretofore duly certified by the mining recorder, shall be receivable in all tribunals and before all officers of this state, as prima facie evidence.

The record as evidence: § 392.

**Copies of Record as Evidence.**

§ 10. Where books, records, and documents pertaining to the office of district mining recorder have been or shall hereafter be deposited in the office of any county recorder of this state, such county recorder is authorized to make and certify copies therefrom, and such certified copies shall be receivable in all tribunals and before all officers of this state in the same manner and to the same effect as if such records had been originally filed or made in the office of the county recorder.

**Transmission of Records.**

§ 11. The board of commissioners of each county shall provide ways and means for the transportation of all books and records pertaining to the office of the respective mining recorders, to the offices of its respective county recorders.

**Return of District Records.**

§ 12. Upon receipt of a petition signed by not less than one hundred bona fide miners residing in any mining district, petition-

ing for the return of the records of such mining district, the board of county commissioners shall cause the records of such district to be copied by the county recorder with the joint assistance of the district recorder of such mining district, if the said district recorder wishes to render such assistance, and shall cause the original records to be sent to such mining district recorder, the copy so made shall remain in the office of the county recorder, and shall be considered the original record. One-half of the expenses of copying the said records shall be paid out of the county treasury and one-half shall be paid out of the state treasury.

## II. Reference to Miscellaneous Legislation on Mining Subjects.

1. Providing that the width of lode claims may be three hundred feet on each side of the middle of the vein or lode. Comp. Laws of 1888, vol. II, § 2790.

2. Providing a penalty for defacing notices, or destroying monuments. Comp. Laws of 1888, vol. II, § 2791.

3. Providing penalty and measure of damages for extracting ores. Comp. Laws of 1888, Vol. II, § 2792.

4. Providing that a miner shall have a lien, for labor performed, upon the interest, right and property in such mine. Comp. Laws of 1888, Vol. II. § 2793.

5. Providing that copies of location notices properly certified as well as copies of district rules shall be admitted in evidence in suits involving mining claims. Comp. Laws of 1888, Vol. II, § 2794.

6. Requiring county recorders to record rules and regulations of mining districts, to make copies of same for persons requesting them, and fixing fees of the recording, and providing punishment for receiving excessive fees or failing to make copies of records. Comp. Laws of 1888, Vol. II, §§ 2795-2796.

7. Relating to district recorders, providing for their election, etc. Comp. Laws of 1888, Vol. II, §§ 2797-2800.

8. Providing for escapement shafts in coal mines. Laws of 1892, chap. 38, p. 40.

9. Providing for the safety of workmen employed in coal mines. Laws of 1892, chap. 41, p. 44.

10. Providing for the protection of the lives of miners in coal mines and providing for an inspector. Laws of 1896, p. 346.

11. Prohibiting the employment of women and children in mines. Laws of 1896, p. 106.

12. Forbidding the posting of notices to influence voters. Laws of 1896, p. 154.

13. Regulating the hours of employment in smelters. Laws of 1896, p. 219.

14. Declaring mining to be a public use and providing that the right of eminent domain may be exercised in behalf thereof. Laws of 1896, p. 316.

## WASHINGTON.

I. Laws Relating to Location of Mining Claims and Defining Locator's Rights and Duties.

II. Reference to Miscellaneous Legislation on Mining Subjects.

### I. Laws Relating to Location of Claims and Defining Locator's Rights and Duties.

**1. Length of Lode Claims Governed by Law in Force at Date of Location.**

All mining claims upon veins or lodes of quartz or other rock in place, bearing gold, silver or other valuable mineral deposits heretofore located, shall be governed as to length along the vein or lode by the customs, regulations and laws in force at the date of such location. Hill's Ann. Stats. and Codes of Wash., vol. I, sec. 2210.

See note to next paragraph.

**2. Length and Width of Lode Claims; Discovery; End Lines.**

A mining claim located upon any vein or lode of quartz or other rock in place, bearing gold, silver or other valuable mineral deposits, after the approval of this act by the governor, whether located by one or more persons, may equal, but shall not exceed fifteen hundred feet in length along the vein or lode;[1] but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claims located.[2] No claims shall extend more than 300 feet on each side of the middle of the vein at the surface, nor shall any claims be limited by any mining regulation to less than fifty feet of surface on each side of the middle of such vein or lode, at the surface, excepting where adverse rights, existing at the date of the approval of this act, shall make such limitation necessary.[3] The end lines of such

claim shall be parallel to each other.[4] Hill's Ann. Stats. and Codes of Wash., vol. I, sec. 2211.

[1] Surface area, length of location: § 361.
[2] Discovery the source of miner's title: § 335.
What constitutes valid discovery: § 336.
Where such discovery must be made: § 337.
Effect of loss of discovery upon remainder of location: § 338.
Extent of locator's rights after discovery and prior to completion of location: § 339.
Surface must include apex: § 364.
[3] Width of lode claims: § 361.
[4] End lines: §§ 365, 582.

### 3. Extent of Locators' Rights; Intralimital; Extralateral.

The locators of all mining locations heretofore made or hereafter made under the provisions of this chapter, on any mineral vein, lode, or ledge on the public domain, and their heirs and assigns, so long as they comply with the laws of the United States and the state and local laws relating thereto, shall have the exclusive right to the possession and enjoyment of all surface included within the lines of their location, and of all veins, lodes, and ledges, throughout their entire depth, the top or apex of which lies within the surface lines of such location, extending downward vertically, although such veins, lodes, or ledges may so far depart from the perpendicular in their course downward as to extend outside of the vertical side line of said surface location. Hill's Ann. Codes and Stats. of Wash., vol. I, sec. 2212.

This subject is not within the permissive scope of state legislation: § 251.

### 4. Annual Work, Amount and Time of Performance.

The miners of each mining district may make any rules and regulations governing the location and amount of work necessary to hold possession of a mining claim, not in conflict with the laws of the United States or of this state; but on each claim it shall be necessary to do at least one hundred dollars' worth of work each year, and the first year shall date from the date of location of such claim. A failure to comply with this requirement shall work a forfeiture of the claimant's rights to such claim and

the same shall become subject to relocation. Hill's Ann. Codes and Stats. of Wash., vol. I, sec. 2213.

This statute commented on in text: § 626, p. 781.
Annual labor discussed: §§ 623-637.
Provisions of Federal law as to amount of annual work and time within which first year's work must be done: § 623.
Relocation discussed: §§ 402-409.

**5. District Recorder and District Records.**

The miners of each mining district may elect a recorder of said district. When so elected such recorder shall provide books of record, in which it shall be his duty to record all notices of locations or transfers, bonds, conveyances, or assignments of mining claims within his district when the same shall be presented to him for record. Such records are hereby declared to be public records, open to inspection and shall have the same force and effect, as far as notice is concerned, as the records of deeds and mortgages in this state. Hill's Ann. Codes and Stats. of Wash., vol. I, sec. 2214.

Local regulations concerning records of mining claims: § 273.
See next paragraph and note.

**6. Records of Locations, Deeds and Transfers.**

Inasmuch as the two preceding sections of this chapter leave the election of a recorder for a mining district optional with the miners thereof, all location notices,[1] bonds, assignments and transfers of mining claims shall be recorded in the office of the county auditor of the county where the same is situated, within thirty days after the execution thereof; provided, that all records of mining claims and of assignments, deeds, bonds, and transfers heretofore made by any recorder of any mining district, or by any county auditor, are hereby declared to be valid and to have the same force and effect as records made in pursuance of the provisions of this chapter. Hill's Ann. Stats. and Codes of Wash., vol. I, sec. 2216.

[1] Time and place of record: § 389.
Effect of failure to record within the limited time: § 390.
Proof of record: § 391.
The record as evidence: § 392.

## II. Reference to Miscellaneous Legislation on Mining Subjects.

1. Providing for the creation of a mining bureau, and regulating the duties of its officers. Hill's Ann. Stats. and Codes of Wash., §§ 2204-2209.

2. Defining the duties of the district recorder, and regulating his fees. Hill's Ann. Stats. and Codes of Wash., Vol I, § 2215.

3. Providing for the protection of persons working in coal mines. Hill's Ann. Codes and Stats. of Wash., Vol. I, §§ 2217, 2244; Laws of 1897, pp. 58-62.

4. Relating to oil wells, salt wells, etc. Hill's Ann. Stats., Vol. I, §§ 2246-2262.

5. Providing protection against accidents from open shafts. Hill's Ann. Codes and Stats., Vol. I, §§ 2263-2271.

6. Extending the right of eminent domain to mining, milling and reduction works companies. Laws of 1897, p. 95.

7. Regulating the method of assessing mining property. Laws of 1897, p. 155.

8. Providing a punishment for destroying, defacing, or mutilating notices and monuments upon mining claims. Laws of 1897, p. 221.

9. Regulating the leasing of mineral lands belonging to the state. Laws of 1897, p. 293.

## WYOMING.

I. Laws Relating to the Location of Lode Claims and the Extent of Locator's Rights Therein.
II. Laws Relating to the Location and Annual Development of Placer Claims.
III. Reference to Miscellaneous Legislation on Mining Subjects.

### I. Laws Relating to the Location of Lode Claims, and Extent of Locator's Rights Therein.

(The territorial laws of Wyoming were adopted by the state on its admission into the Union: Const., Art. XXI., sec. 3.)

#### 1. Length of Lode Claim.

The length of any lode mining claim located within Wyoming territory shall not exceed fifteen hundred feet measured horizontally, along such lode or vein. Nor can the regulations of any mining district limit a locator to less than this length. Laws 1888, p. 87, sec. 13.

Length of lode claims discussed in text: § 361.

#### 2. Width of Lode Claim.

The width of any lode claim located within Wyoming territory shall not exceed three hundred feet on each side of the discovery shaft. The discovery shaft being always equally distant from the side lines of the claims. Nor can any mining district limit the locator to a width of less than one hundred and fifty feet on either side of the discovery shaft. Laws 1888, p. 87, sec. 14.

Width discussed in text: § 361.

#### 3. Extent of Locators' Rights; Extralateral; Intralimital.

The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode or ledge, situ-

ated on the public domain, their heirs or assigns, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface location. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize a locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another. Laws 1888, p. 89, sec. 20.

**Validity of legislation of character of above questioned: § 251.**

**4. Discovery Shaft; Posting Notice; Marking Boundaries.**

Before the filing of a location certificate in the office of the county clerk and ex-officio register of deeds, the discoverer of any lode, vein, or fissure, shall designate the location thereof, as follows:

First, by sinking a shaft upon the discovered lode or fissure to the depth of ten feet from the lowest part of the rim of such shaft at the surface;[1] second, by posting at the point of discovery, on the surface, a plain sign or notice, containing the name of the lode or claim, the name of the discoverer, and locator, and date of such discovery;[2] third, by marking the surface boundaries of the claim, which shall be marked by six substantial monuments of stone or posts hewed or marked on the side or sides which face is toward the claim and sunk in the ground, one at each corner, and one at the center of each side line, and when thus marking the boundaries of a claim, if any one or more of such posts or monuments of stone shall fall, by necessity, upon precipitous ground, when the proper placing of it is impracticable or dangerous to life or limb, it shall be lawful to place any such post or

monument of stone at the nearest point, properly marked to designate its right place; provided, that no right to such lode or claim, or its possession or enjoyment, shall be given to any person or persons unless such person or persons shall discover in said claim mineral bearing rock in place.[3] Laws 1888, p. 88, sec. 17.

[1] Object of requirement as to development work: § 344.
Relationship of discovery shaft to discovery: § 345.
Extent of development work: § 346.
Can preliminary development work be credited on first year's labor? § 632.
[2] Liberal rules of construction applied to notices: § 355.
Place and manner of posting: § 356.
[3] Time allowed for marking: § 372.
Necessity for and object of marking: § 371.
Perpetuation of monuments: § 375.

### 5. Equivalent of Discovery Shaft.

Any open cut which shall cut the vein ten feet in length and with face ten feet in height, or any cross cut tunnel, or tunnel on the vein ten feet in length which shall cut the vein ten feet below the surface, measured from the bottom of such tunnel, shall hold such lode the same as if a discovery shaft were sunk thereon. Laws of 1888, p. 88, sec. 18.

Discovery shaft and its equivalent discussed: §§ 343-346.

### 6. Time Within Which Discovery Shaft Must be Sunk.

The discoverer of any mineral lode, or vein in this state shall have the period of one hundred and twenty days from the date of discovering such lode or vein in which to sink a discovery shaft thereon. Laws 1888, p. 88, sec. 19, as amended in 1890; Laws 1890-1, p. 180, sec. 12.

See text: §§ 343-346.

### 7. Location Certificate; Contents and Record.

A discoverer of any mineral lead, lode, ledge or vein shall within ninety days of the date of the discovery record such claim with the recorder of the mining district in which it is situated, if such district be organized, and shall within one hundred and twenty days from date of discovery cause such claim to be recorded

within the office of the county clerk and ex-officio register of deeds of the county within which such claim may exist, by a location certificate which shall contain the following facts:

First, the name of the lode claim; second, the name or names of the locator or locators; third, the date of location; fourth, the length of the claim along the vein measured each from the center of the discovery shaft and the general course of the vein, as far as it is known; fifth, the amount of surface ground claimed on either side of the center of the discovery shaft or discovery workings; sixth, a description of the claim by such designation of natural or fixed objects, or if, upon ground surveyed by the United States system of land survey, by reference to section or quarter section corners, as shall identify the claim beyond question. Laws of 1888, p. 87, sec. 15, as amended in 1890; Laws of 1890-91, p. 179, sec. 1.

**Purpose of location certificate: § 380.**
**Rules of construction applied: § 381.**
**Requirements of Federal law as to contents of certificate: § 385.**
**Time and place of record and effect of failure to record within time limited: §§ 389-390.**

### 8. Location Certificate, Void unless Containing Proper Elements.

Any certificate of the location of a lode claim which shall not fully contain all the requirements named in the preceding section, together with such other description as shall identify the lode or claim with reasonable certainty, shall be void. Laws 1888, p. 88, sec. 16.

**Effect of failure to comply with the law as to contents of certificate: § 384.**

### 9. Location Certificate Must Contain One Location or Claim.

No location certificate shall contain more than one claim or location, whether the location be made by one or more locators; and any location certificate that contains upon its face more than one location claim, shall be absolutely void, except as to the first location named and described therein; and in case more than one claim or location is described together so that the first one can

not be distinguished from the others, the certificate of location shall be void as an entirety. Laws 1888, p. 85, sec. 8.

**10. Amended Location Certificate; Change of Surface Boundaries.**

Whenever it shall be apprehended by the locator, or his assigns, of any mining claim or property heretofore or hereafter located, that his or their original location certificate was defective, erroneous, or that the requirements of the law had not been complied with before the filing thereof, or shall be desirous of changing the surface boundaries of his or their original claim or location, or of taking in any part of an overlapping claim or location which has been abandoned, or in case the original certificate was made prior to the approval of this act, and he or they shall be desirous of securing the benefit of this law, such locator or locators, or his or their assigns, may file an additional location certificate in compliance with and subject to this act; provided, however, that such relocation shall not infringe upon the rights of others existing at the time of such relocation, and that no such relocation, or other record thereof, shall preclude the claimant or claimants from proving any such title or titles as he or they may have held under any previous location. Laws of 1888, p. 85, sec. 7.

**Objects and functions of amended certificates: § 398.**
**Circumstances justifying change of boundaries: § 396.**
**Privilege of changing boundaries exists in absence of intervening rights independent of state legislation: § 397.**

**11. Relocation of Abandoned Claim.**

§ 21. Any abandoned lode, vein or strata claim may be relocated, and such relocation shall be perfected by sinking a new discovery shaft and by fixing new boundaries in the same manner as provided for the location of a new claim; or the relocator may sink the original discovery shaft ten feet deeper than it was at the time of its abandonment, and erect a new or adopt the old boundaries, renewing the posts or monuments of stone if removed or destroyed. In either event, a new location stake shall be fixed. The location certificate of an abandoned claim may state that the whole or any

part of the new location is located as an abandoned claim. Laws 1888, p. 89; sec. 21.

Circumstances under which relocation may be made: § 402.
New discovery not essential as a basis of relocation: § 403.
Relocation admits the validity of the original: § 404.
Relocation by original locator: § 405.
Relocation by one of several original locators in hostility to others: § 406.
Relocation by agent or others occupying fiduciary or contractual relationship with original locator: § 407.
Right of second locator to improvements made by first: § 409.

## II. Laws Relating to Location and Development of Placer Claims.

### 1. Placer Claims; Location Certificate and Record; Posting; Marking Boundaries.

Hereafter the discoverer of any placer claim shall, within thirty days of the date of discovery, record such claim with the recorder of the mining district in which it is situated if such district be organized, and shall within ninety days from the date of discovery cause to be recorded such claim within the office of the recorder of deeds of the county within which such claim may exist, by a location certificate, which shall contain in either or both cases the following facts:

First, the name of the claim, designating it as a placer claim.

Second, the name or names of the locator or locators thereof.

Third, the date of such location.

Fourth, the number of feet or acres thus claimed.

Fifth, a description of the claim by such designation of natural or fixed objects as shall identify the claim beyond question.[1] Before filing such location certificate, the discoverer shall locate his claim. First, by securely fixing upon such claim a notice in plain painted, printed or written leters, containing the name of the claim, the name of the locator or locators, the date of discovery, and the number of feet or acres claimed.[2] Second, by designating the surface boundaries by substantial posts or stone monu-

ments at each corner of the claim.[3] Laws 1888, pp. 89-90; sec. 22.

[1] Location certificates: § 459.
Object of location certificate: § 379.
Rules of construction: § 381.
Effect of failure to comply with law as to contents: § 384.
[2] Posting notices on placers: § 442.
[3] Marking boundaries of placers: §§ 454-455.

### 2. Placers; Annual Labor; Proof.

§ 23. (1) For every placer claim, assessment work as hereinafter provided shall be done during each and every calendar year after the first day of January following the date of location. Such assessment work shall consist in manual labor, permanent improvements made on the claim in buildings, roads or ditches made for the benefit of working such claims, or after any manner, so long as the work done accrues to the improvement of the claim, or shows good faith and intention on the part of the owner or owners, and their intention to hold possession of said claim.

(2) On placer claims of an area of one hundred and sixty acres heretofore or hereafter located in this territory, and not situated in an organized district, not less than one hundred dollars' worth of assessment work shall be performed during each calendar year, from the first day of January after the date of location. On every placer mining claim so located, of less than one hundred and sixty acres, the amount of annual assessment work shall be at the rate of sixty-two and one-half cents per acre for each and every acre and fraction thereof; provided, that the total amount to be annually expended be in no case less than fifteen dollars.

(3) When two or more placer mining claims lie contiguously and are owned by the same person, persons, company or corporation, the yearly expenditure of labor and improvements required on each of such claims may be made upon any one of such contiguous claims if the owner or owners shall thus prefer.

(4) But where such placer claims are situated in an organized mining district, or if they are finally embraced in such a district, than (then) the amount of assessment work, and the manner of its accomplishment shall be regulated entirely by the dis-

trict laws, whether the amount of work required annually be greater or less than the amount hereinbefore set forth as required of placer claims not located in such districts.

(5) Upon failure of the owners to do or have done the assessment work required within the time above stated, such claim or claims upon which such work has not been completed shall thereafter be open to relocation on or after the first day of January of any year after such labor or improvements should have been done, in the same manner and on the same terms as if no location thereof had ever been made; provided, that the original locators, their heirs, assigns or legal representatives have not resumed work upon such claim or claims after failure, and before any subsequent location has been made.

(6) Upon completion of the required assessment work for any mining claim, the owner or owners or agent of said owner or owners shall cause to be made by some person engaged in performing the work, an affidavit setting forth that the required amount of work was performed, which affidavit shall within thirty days after the completion of the work be recorded in the office of the recorder of the district in which the claim is situated, if such be organized, or if such district be not organized such affidavit shall within sixty days of completion of the work, be filed for record in the office of the recorder and register of deeds of the county in which said claim is located. Laws 1888, pp. 90-91, sec. 23.

**Annual labor upon placers: § 625.**
**Requirement as to annual labor imperative: § 624.**
**Work done within the limits of a group of claims in furtherance of a common system of development: § 630.**
**Period within which work must be done: § 632.**
**By whom labor must be performed: § 633.**
**Proof of annual labor: § 636.**

### 3. Amount of Annual Labor to be Performed before Issuance of Patent.

When any person, persons, or association, they and their grantors, have held and worked their placer claims in conformance with the laws of this territory and the regulations of the mining district in which such claim exists, if such be organized, for five

successive years after the first day of January succeeding the date of location, then such person, persons or association, they and their grantors, shall be entitled to proceed to obtain a patent for their claims from the United States without performing further work; but where such person, persons, or association, they or their grantors, desire to obtain a United States patent before the expiration of five years from the date hereinbefore mentioned, they shall be required to expend at least five hundred dollars' worth of work upon a placer claim. Laws 1888, p. 91, sec. 24.

States and territories may not dictate terms upon which patent may be obtained: See § 249, nor suspend the requirement or federal law as to performance of annual labor: § 637.

That obligation to perform annual labor ceases with final entry at the land office, see § 637.

Proof of annual labor before land office: § 686.

## III. Reference to Miscellaneous Legislation on Mining Subjects.

1. Providing that a miner who, at the request of the owner has performed work upon a mine, or a person who has furnished material for the mine shall have a lien upon the same. Rev. Laws 1887, §§ 1486-1493.

2. Providing for the organization of mining districts, the election of a recorder, the passing of resolutions and the transfer of a copy of all papers to the office of the recorder of deeds of the county. Laws of 1888, p. 83, § 1.

3. Providing for the drainage of mines already opened. Laws of 1888, p. 84, § 4.

4. Providing for rights of way for ditches, flumes, and tramways. Laws of 1888, p. 84, § 5.

5. Providing that the surface owner or occupant of land containing mineral shall have the right to exact security from the mine owner or operator, extracting ore from beneath the surface. Laws of 1888, p. 85, § 6.

6. Providing punishment for conspiring to obtain possession of mining property. Laws of 1886, p. 85, § 9.

7. Providing punishment for mutilating or destroying notices or monuments upon mines. Laws of 1888, p. 86, § 10.

8. Providing punishment for "salting" ores. Laws of 1888, p. 86, § 11.

9. Protecting livestock by requiring openings to be covered. Laws of 1888, p. 87, § 12.

10. Providing for the payment of coal miners and mine laborers semi-monthly, and in lawful money. Laws of 1890-91, p. 356.

11. Providing that eight hours' actual work shall constitute a lawful day's work in mines. Const. art. 19, § 1; Laws of 1890-91, p. 357.

12. Creating the office of inspector of mines, fixing the inspector's salary, and prescribing his duties. Also providing for the proper ventilation of coal mines. Laws of 1890-91, p. 340.

## DISTRICT OF ALASKA.

FEDERAL LAWS AND REGULATIONS CONCERNING MINES IN ALASKA.

I. STATUTES.
II. LAND DEPARTMENT REGULATIONS.

### I. STATUTES RELATING TO ALASKA.

*On May 17, 1884, Congress passed an act providing for the civil government of Alaska. The act contained the following provisions:*

"§ 8. That the said district of Alaska is hereby created a land district, and a United States land office for said district is hereby located at Sitka. [The commissioner provided for by this act to reside at Sitka shall be ex-officio register of said land office, and the clerk provided for by this act shall be ex-officio receiver of public moneys and the marshal provided for by this act shall be ex-officio surveyor-general of said district], and the laws of the United States relating to mining claims and the rights incident thereto, shall, from and after the passage of this act, be in full force and effect in said district, under the administration thereof herein provided for, subject to such regulations as may be made by the secretary of the interior, approved by the President; provided, that the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress; and provided further, that parties who have located mines or mineral privileges therein under the laws of the United States applicable to the public domain, or who have occupied and improved or exercised acts of ownership over such claims, shall not be disturbed therein, but shall be allowed to perfect their title to such claims by payment as aforesaid; and, provided also, that the land not exceeding six hundred and forty acres at any station now occupied as missionary stations among the Indian tribes in said section, with the im-

provements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which said missionary stations respectively belong until action by Congress. But nothing contained in this act shall be construed to put in force in said district the general land laws of the United States." 23 Stats. at Large, p. 24, sec. 8.

**The above act protects possessory claims to mines in Alaska theretofore initiated though not based upon a compliance with all the provisions of the United States laws relative to the location of a mining claim: Bennett v. Harkrader, 158 U. S. 441, § 64.**

**Does alien act of March 3, 1887, apply to Alaska? § 243.**

**Congress passed an act in 1897 (approved July 24th) amending section 8 above by striking out the words: "The commissioner provided for by this act to reside in Sitka shall be ex-officio register of said land office, and the clerk provided for by this act shall be ex-officio receiver of public moneys, and the marshal provided for by this act shall be ex-officio surveyor-general of said district." The amendment also provides for the appointment of a register and receiver of the land office and surveyor-general.**

"§ 7. The general laws of the state of Oregon now in force [May 17, 1884,] are hereby declared to be the law in said district [Alaska] so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States": 23 Stats. at Large, p. 24, § 7.

**It should be noted that changes made by the legislature of Oregon since May 17, 1884, do not apply to Alaska.**

**The laws of Oregon relating to mines are found in another part of the Appendix, p. 1319. These were all passed prior to 1884, although cited as appearing in Hill's Codes and Statutes of 1892. As no changes have been made by the legislature of Oregon upon this subject since 1884, the laws as given on page 1319 are now in force in Alaska.**

**Coal land laws do not apply to Alaska: § 497.**

## II. Land Department Regulations Governing Alaska.

1. In pursuance of the eighth section of the act of Congress, approved May 17, 1884, entitled "An act to provide a civil government for Alaska" (23 Stat. 24), it is hereby prescribed that

the rules and regulations of the general land office and department of the interior governing the administration of the mining laws of the United States, be adopted for and extended to the district of Alaska, so far as the same may be applicable.

2. Notices required by mining laws and regulations to be published in a newspaper nearest the claim, may, until newspapers are established in Alaska, be published in some suitable newspaper or newspapers printed in Washington territory, to be designated by the ex-officio register of the land district of Alaska.

3. No public lands other than specific mineral claims are subject to survey or disposal in said district.

4. The ex-officio register, receiver, and surveyor-general, while acting as such, and their clerks and deputy surveyors, will be deemed subject to the laws and regulations governing the official conduct and responsibilities of similar officers and persons under general statutes of the United States.

5. The commissioner of the general land office will from time to time direct the ex-officio land officers in the proper discharge of their official duties, and will exercise the same general supervision over the execution of the laws as are, or may be, exercised by him in other mineral districts. 4 L. D. 128. Issued July 28, 1885.

# TITLE XIV.

## FORMS AND PRECEDENTS.

# NOTICES AND CERTIFICATES OF LOCATION.

**The notice or certificate of a mining location is the basis of the miner's title—a statutory writing affecting realty, the first muniment of his paper title, upon the record of which patent proceedings are based (*ante*, § 379). The suggested forms here given have been prepared with a view to exhibiting the difference in the statutory requirements in the different states and territories, and to invite attention to the controlling importance of properly describing the claim with reference to *natural objects and permanent monuments*, and to the proper marking of the location on the ground. These forms are all necessarily based upon fictitious descriptions, and are offered merely as suggestions.**

## ARIZONA.

### Certificate of Lode Location.

[Act of July 1, 1895. *Ante*, p. 1235.]

NOTICE IS HEREBY GIVEN, that I, Peter Smith, a citizen of the United States, have discovered within the limits of the claim hereinafter described a vein of rock in place carrying gold, silver, and other valuable deposits. I have located a claim embracing fifteen hundred feet of said vein. Said claim is named the "Josephine." It is situated upon public unsurveyed lands in Ellsworth mining district, Yuma county, Arizona. It adjoins on the south the Golden Eagle mine (patented), belonging to the Harqua Hala Gold Mining Company. The discovery shaft and monument on said vein is distant three hundred feet southerly from the point where the Harqua Hala and the Harrisburg trail crosses the south boundary of said Golden Eagle mine. The general course of said vein is east and west. I claim in length on said vein seven hundred and fifty feet east and seven hundred and fifty feet west from the center of the discovery shaft. I also claim three hundred feet on each side of the center of the discovery shaft, lengthwise of the claim.

Said claim was located January 1, 1897, by the under-

signed. I further certify that prior to filing this notice for record I sunk a discovery shaft upon said premises, at the point of discovery, to a depth of twelve feet from the lowest part of the rim of said shaft at the surface, showing in said shaft the vein in place. I also posted at the point of discovery on the surface, upon a substantial monument of rocks, a plain notice, conforming in all respects to this certificate, and marked such claim on the ground so that its boundaries can be readily traced.

The following is a description of said claim and the manner in which the same is marked upon the ground:—

Commencing at the discovery shaft and monument heretofore described; thence east seven hundred and fifty feet to a post in mound of rocks, said post being marked "J. 1 E. L. "P.," as and for the east lode post, from which post a mesquite tree. seven inches in diameter, blazed and marked "J. 1 B. "T.," bears northwest thirty feet distant; thence at right angles north three hundred feet to stone monument at the northeast corner of the claim; thence at right angles west seven hundred and fifty feet to a stone monument, the center of the north side line of said claim; thence continuing on said course west seven hundred and fifty feet to a stone monument, the northwest corner of the claim; thence south three hundred feet to a post in mound of rocks, said post being marked "J. 2 W. L. "P.," as and for the west lode post, from which post a *palo verde*, one foot in diameter, blazed and marked "J. 2 B. T.," bears southwest seventeen feet distant; thence continuing south three hundred feet to a stone monument at the southwest corner of the claim; thence east seven hundred and fifty feet to a stone monument, the center of the south side line of said claim; thence continuing east seven hundred and fifty feet to a stone monument at the southeast corner of the claim; thence at right angles north three hundred feet to the east lode post, marked "J. 1 E. L. P." Said posts project at least three feet above the surface of the ground, and said monuments are at least three feet high.

Dated January 20, 1897. PETER SMITH, Locator.

NOTE.—A notice conforming to this must be posted, and this must be recorded with the county recorder within ninety days from discovery, which period is allowed for sinking discovery shaft. The Arizona law allows marking by either posts or stone monuments.

# CALIFORNIA.

## Preliminary Notice of Lode Location.

[Under Act of March 27, 1897. Stats. 1897, p. 214. *Ante*, p. 1243.]

NOTICE IS HEREBY GIVEN, that I, John Williams, a citizen of the United States, have discovered a vein of rock in place carrying gold, silver, and other valuable deposits, upon which I have erected a discovery monument and posted this notice, as hereinafter set forth;

That in accordance with the provisions of title thirty-two, chapter six, of the Revised Statutes of the United States, and the laws of the state of California, I hereby claim fifteen hundred linear feet of said vein, measured thereon as hereinafter set forth.

Said discovery was made on the 29th day of May, 1897. Immediately upon making the same, and on said May 29, 1897, I erected at the point of discovery a substantial monument and mound of rocks, and posted thereon this notice.

The general course of said vein is north and south. I claim in length thereon five hundred feet northerly and one thousand feet southerly from said discovery monument. I also claim three hundred feet on each side of the center of the vein.

This vein or claim shall be known as and called the "Eliza-"beth." It is situated in Jackson mining district, Amador county, California, in section 20, township 6 north, range 11 east, Mount Diablo meridian, the discovery monument being placed four hundred feet westerly from the point where the Jackson and Volcano road crosses the west bank of Dry creek.

This notice is the first, or preliminary, notice required by the provisions of section two of the act of the legislature of California, approved March 27, 1897, entitled, "An act pre-"scribing the manner of locating mining claims upon the "public domain of the United States, recording notices of "location thereof, amending defective locations, and provid-"ing for the deposit of district records with county record-"ers, and prescribing the effect to be given to recordation of "notices of location and affidavits."

In accordance with the provisions of said act, I claim sixty days from the date of said discovery to enable me to perfect the location of said claim.

Dated and posted on the ground, May 29, 1897.

(Signed.) JOHN WILLIAMS, Locator.

NOTE.—A duplicate of this notice is required to be recorded in the county recorder's office of the county wherein the claim is situated, within twenty days from the date of discovery. As to the object and purpose of this notice, and the effect of its record, see note to § 2 of the act, *ante*, p. 1244.

## Final Certificate of Lode Location.

[Under Act of March 27, 1897. *Ante*, p. 1243.]

I, John Williams, a citizen of the United States, hereby certify, that on the 29th day of May, 1897, I discovered a vein of rock in place bearing gold, silver, and other valuable deposits, in section 20, township 6 north, range 11 east, Mount Diablo meridian, Jackson mining district, Amador county, California. On said day I erected at the point of discovery a substantial monument and mound of rocks, and placed thereon a preliminary notice, as required by the provisions of section two of an act of the legislature of the state of California, entitled, "An act prescribing the manner "of locating mining claims upon the public domain of the "United States," etc., approved March 27, 1897;

That on June 10, 1897, I caused said preliminary notice to be recorded in the county recorder's office of Amador county, and the same is now of record therein in book B of quartz mining claims, page 50, to which record reference is hereby made for all the particulars therein contained;

That within sixty days from the date of said discovery I performed labor in the development of said discovery, which labor was, and is, reasonably worth the sum of sixty dollars, and consisted of sinking a shaft of ordinary dimensions on said vein to the depth of ten feet, said shaft having been sunk at the place of discovery;

That within said period I distinctly marked the location of said claim on the ground, so that the boundaries can be readily traced, and perfected said location;

That the following is a description of said location as finally marked on the ground:—

Commencing at the discovery monument in said section 20, township 6 north, range 11 east, Mount Diablo base and meridian, which said monument is four hundred feet westerly from the point where the Jackson and Volcano road crosses the west bank of Dry creek; thence north five hundred feet to a stake in mound of rocks, said stake being marked "E. 1 N. L. "P.," as and for the north lode post, from which post a pine tree, three feet in diameter, blazed and marked "E. 1 B. T.," bears northeast sixty feet distant; thence at right angles west three hundred feet to a stake in mound of rocks at the northwest corner of claim, stake marked "E. 2"; thence at right angles south fifteen hundred feet to a stake in mound of rocks, stake marked "E. 3," the southwest corner of claim; thence at right angles east three hundred feet to stake in mound of rocks, stake marked "E. 4 S. L. P.," as and for the south lode post; thence continuing east three hundred feet to stake in mound of rocks, stake marked "E. 5," the southeast corner of the claim; thence at right angles north fifteen hundred feet to a stake in mound of rocks at the northeast corner of the claim, stake marked "E. 6," from which an oak tree three feet in diameter, marked "E. 6. B. T.," bears northeast, distant ninety feet; thence at right angles west three hundred feet to stake in mound of rocks marked "E. 1 L. P.," embracing fifteen hundred linear feet of said lode. All of said stakes are four feet long, four inches square, and set one foot in the ground.

The claim is known and called the "Elizabeth."

This certificate is the final notice of location required by section three of the act of the legislature of the state of California, hereinbefore referred to.

Dated July 6, 1897.

JOHN WILLIAMS, Locator.

STATE OF CALIFORNIA, }
County of Amador. } ss.

John Williams, being first duly sworn, deposes and says: I

am the locator named in the foregoing final certificate of location. The facts stated in said certificate are true.

JOHN WILLIAMS.

Subscribed and sworn to before me this 7th day of July, 1897.
(Notarial seal.) D. B. SPAGNOLI,
Notary Public, Amador county, California.

NOTE.—No posting of the certificate is required. It must be recorded in the county recorder's office within sixty days from the date of discovery.

## Notice of Location of Placer Claim for Posting.

NOTICE IS HEREBY GIVEN, that I, Fred Zeitler, a citizen of the United States, have, this 1st day of August, 1897, discovered a valuable placer deposit within the limits of the north half of the northeast quarter of the northeast quarter of section 12, in township 16 north, range 8 east, Mount Diablo meridian, Washington mining district, Nevada county, California.

By virtue of such discovery, I have located, and hereby claim, said north half of the northeast quarter of the northeast quarter of section 12, in township 16 north, range 8 east, Mount Diablo meridian, containing twenty acres.

Said claim is hereby named the Searls placer claim.

The said claim is marked upon the ground as follows: At the northeast corner of said tract I have placed a stake in mound of rocks, stake marked "S. P. N. E. Cor.," from which a nut pine, one foot in diameter, blazed and marked "B. T. "S. P. N. E. Cor.," bears south twenty feet distant; at the northwest corner of said tract a stake in mound of rocks, stake marked "S. P. N. W. Cor."; at the southwest corner of said tract a stake in mound of rocks, stake marked "S. P. S. W. "Cor."; at the southeast corner of said tract stake marked "S. P. S. E. Cor."

This notice is posted on mound of rocks at point of discovery, sixty feet southwest from the stake and mound marking the northeast corner of the claim.

Dated and posted on the ground August 1, 1897.

FRED ZEITLER, Locator.

NOTE.—If location is upon unsurveyed lands, description should follow suggestions contained in final certificate of lode location. See text, § 454. A duplicate of this notice must be filed for record with the county recorder within thirty days from the discovery.

### Affidavit of Performance of Discovery Work upon Placer Claim.

STATE OF CALIFORNIA, } ss.
County of Nevada. }

Fred Zeitler, being first duly sworn, deposes and says: I am the locator of that certain placer claim known as and called the Searls placer, notice of the location of which is of record in the office of the county recorder of Nevada county, in book 8 of mining records, page 9, to which record reference is hereby made for all the particulars therein contained; that within sixty days from the date of discovery of said claim I performed labor upon the same, which labor was, and is, of the reasonable value of twelve dollars. Such labor consisted of sinking a shaft ten feet deep to the bedrock, and removing and washing the gravel therefrom. FRED ZEITLER.

Subscribed and sworn to before me, this 5th day of September, 1897.

(Seal.) F. H. POWER, Notary Public.

NOTE.—To be recorded within sixty days after discovery.

---

## COLORADO.

### Preliminary Lode Notice for Posting.

NOTICE IS HEREBY GIVEN, that I, John Jones, a citizen of the United States, have discovered a lode of rock in place carrying gold, silver, and other valuable deposits, upon which I have erected a discovery monument and posted this notice.

In accordance with the provisions of title thirty-two, chapter six, of the Revised Statutes of the United States, and the laws of the state of Colorado, I hereby claim fifteen hundred linear feet of said vein, measured thereon as hereinafter set forth.

The general course of this vein is north and south. I claim in length thereon eight hundred feet northerly and seven hundred feet southerly from said discovery monument. I also

claim one hundred and fifty feet on each side of the center of said vein.

NOTE.—In Gilpin, Clear Creek, Boulder, and Summit counties, width is limited to seventy-five feet on each side of the center of the vein. In other counties, one hundred and fifty feet on each side of such center.

Said lode is situated in Cripple Creek mining district, El Paso county, Colorado. It shall be known as the Mountain Maid lode. Said discovery was made January 1, 1897.

In accordance with the laws of the state of Colorado, I claim sixty days from date of such discovery, to enable me to sink a discovery shaft thereon, and three months from such discovery to otherwise perfect and record the location of said claim.

Dated and posted on the ground, January 1, 1897.

JOHN JONES, Locator.

NOTE.—This is not to be recorded. See text, § 351.

## Certificate of Lode Location for Recording.

I, John Jones, a citizen of the United States, hereby certify: That on January 1, 1897, I discovered within the limits of the claim hereinafter described, a lode of rock in place bearing gold, silver, and other valuable deposits; that thereafter, and prior to recording this certificate, I located said claim in the following manner: On January 1, 1897, I posted at the point of discovery a plain notice, containing the name of the lode (the "Mountain Maid"), the name of the locator (John Jones), and date of discovery (January 1, 1897). On January 30, 1897, I completed sinking a shaft on said lode at the point of discovery, to a depth of twelve feet, showing therein a well-defined crevice. On February 1, 1897, I marked the location upon the ground so that its boundaries can be readily traced.

The general course of said lode is north and south. I claim in length on said lode eight hundred feet northerly and seven hundred feet southerly from the center of the discovery shaft, and in width one hundred and fifty feet on each side of the center of said vein.

Said claim is known as the Mountain Maid lode claim, is situated on the southern slope of Tenderfoot hill in Cripple

Creek mining district, El Paso county, Colorado, and as marked on the ground is bounded and described as follows:—

Commencing at the discovery monument, which is situated six hundred feet easterly from a large fir tree standing on the north bank of Poverty gulch; thence north eight hundred feet to a post, marked "M. M. 1 N. L. P.," as and for the north lode post, from which stake a pine tree, eight inches in diameter, blazed and marked "M. M. 1 B. T.," bears north sixty feet distant; thence at right angles west one hundred and fifty feet to a post in mound of rocks, the northwest corner of the claim, post marked "M. M. N. W. Cor."; thence at right angles south seven hundred and fifty feet to post in mound of rocks, as and for the center west side line post, post marked "M. M. W. S. L."; thence continuing on said course south seven hundred and fifty feet to a stake and mound of rocks, the southwest corner of the claim, stake marked "M. "M. S. W. Cor."; thence at right angles east one hundred and fifty feet to a post marked "M. M. S. L. P.," as and for south lode post; thence continuing east one hundred and fifty feet to a post in mound of rocks, the southeast corner of the claim, post marked "M. M. S. E. Cor."; thence north seven hundred and fifty feet to post in mound of rocks, as and for the center east side line post, post marked "M. M. E. S. L.,"; thence continuing north seven hundred and fifty feet to a post in mound of rocks, the northeast corner of the claim, post marked "M. M. N. E. Cor."; thence at right angles west one hundred and fifty feet to the north lode post, marked "M. M. N. L. P." All of said posts are marked upon the sides which are in towards the claim, and are sunk in the ground one foot, and project above ground four feet. The rock mounds are four feet in diameter and two feet in height.

Dated February 3, 1897. JOHN JONES, Locator.

NOTE.—This must be recorded within three months from date of discovery. The Colorado law does not require center end line posts. They are used in the description for the purpose of "tieing" the claim to the discovery monument. Some of the states and territories require them.

## IDAHO.

### Discovery Notice for Posting on Lode Claim.

NOTICE IS HEREBY GIVEN, that I, Henry Harris, a citizen of the United States, have, this 5th day of July, 1897, discovered a lode bearing gold, silver, and other valuable deposits, and have erected at the place of discovery a monument, upon which this notice is posted. The name of the claim is the Bell lode. I claim seven hundred and fifty feet of the vein east from the discovery monument, and seven hundred and fifty feet west from said monument.

Dated July 5, 1897. HENRY HARRIS.

### Notice of Lode Location.

[To be posted and recorded.]

By following the suggestion contained in the Colorado certificate of location, the law of Idaho will be fully satisfied.

NOTE.—This notice must be posted on the discovery monument within three days after date of discovery, and a duplicate of the same, with the following certificate attached, must be recorded within ninety days after the location, either in the office of the county recorder or of the deputy recorder of the mining district.

STATE OF IDAHO, }
County of Clark. } ss.

I, Henry Harris, do solemnly swear, that I am a citizen of the United States, and that I am acquainted with the mining ground described in this notice of location and herewith called the Bell lode; that the ground and claim therein described, or any part thereof, has not, to the best of my knowledge and belief, been located according to the laws of the United States and of this state, and that I have opened new ground to the depth of ten feet, as required by the laws of Idaho.

HENRY HARRIS, Locator.

Subscribed and sworn to before me this 1st day of September, A.D. 1897. WILLIAM JOHNSON.

(Seal.) Notary Public.

NOTE.—If the claim is a relocation, the affidavit should state the fact, and that the prior location "has been forfeited by reason of the failure of the former "locators to comply in respect thereto with the requirements of said laws."

## MONTANA.

### Preliminary Notice for Posting.

NOTICE IS HEREBY GIVEN, that I, John Peckham, a citizen of the United States, have, this 10th day of June, 1896, discovered a lode bearing gold, silver, and other valuable deposits, and have named the same the Dobson lode. The course of the lode is east and west, and I claim four hundred feet on the vein east of the point where the discovery was made, and upon which this notice is posted, and eleven hundred feet west from the said place of discovery; and I claim three hundred feet on each side of the center of the vein.

Dated and posted on the ground June 10, 1896.

JOHN PECKHAM, Locator.

### Declaratory Statement.

I, John Peckham, a citizen of the United States, hereby declare:—

That on the 10th day of June, 1896, I discovered and located a lode bearing gold, silver, and other valuable deposits, and on the same day posted my notice of location at the place of discovery, and named the lode the Dobson lode;

That the general course of the vein is east and west, and I claim four hundred feet on the vein east, and eleven hundred feet west, from the point of discovery, and three hundred feet on each side of the center of the vein;

That the discovery shaft is located at the point of discovery, and is twelve feet deep and eight feet square, and discloses a well-defined crevice;

That the claim is located in the Hamilton mining district, Deer Lodge county, Montana.

NOTE.—The description suggested for the Colorado certificate of location will fulfill the requirements of the Montana law. As to character of marking, see *ante*, p. 1286, § 2.

Dated August 3, 1896.

JOHN PECKHAM, Locator.

STATE OF MONTANA, } ss.
County of Deer Lodge. }

John Peckham, being first duly sworn, deposes and says: I am the locator named in the foregoing declaratory statement. The facts stated in said declaratory statement are true.

JOHN PECKHAM.

Subscribed and sworn to before me, this 3d day of August, 1896.

(Notarial seal.) GEORGE HUDSON,
Notary Public, Deer Lodge county, Montana.

NOTE.—To be recorded in the office of the county clerk within ninety days from posting the notice of discovery.

## NEVADA.

The requirements in this state for the preliminary notice for posting on lode claims are the same as the requirements for the preliminary notice in Montana, and the form given on a preceding page for that state is applicable, therefore, to Nevada.

The certificate of location for lode claims required by the laws of Nevada corresponds with the declaratory statement required by the laws of Montana, and the form given for Montana may be used in Nevada. In the latter state the certificate must be recorded in the office of the mining district recorder, as well as in the county recorder's office, within ninety days from the date of posting.

No verification of the certificate is required by the laws of Nevada.

## NEW MEXICO.

### Notice of Location for Lode Claim.

NOTICE IS HEREBY GIVEN, that I, Mark Porter, have declared my intention to become a citizen of the United States; that I have, this 10th day of August, 1897, distinctly marked the boundaries of a mining claim upon a lode bearing gold, silver, and other valuable deposits, which claim I have named the Amy lode; that it is my intention to locate the same according to the laws of the territory of New Mexico.

The said claim is located in the Steeple Rock mining district, in Grant county, territory of New Mexico, and is bounded and described as follows:—

Beginning at a post eight hundred feet east and one

hundred and nine feet south of the point where the Santa Rosa trail crosses the south bank of Vegas creek, the said post being marked "A. L. S. W. Cor."; thence easterly seven hundred and fifty feet to the south center side line post, marked "A. "L. S. S. L."; thence continuing in the same direction seven hundred and fifty feet to a post at the southeast corner, marked "A. L. S. E. Cor."; thence at right angles northerly three hundred feet to a post at the center of the east end line, marked "A. L. E. L. P."; thence continuing in the same direction three hundred feet to a post at the northeast corner of the claim, said post being marked "A. L. N. E. Cor.," from which post a pine tree, two feet in diameter, marked "B. T. A. "L. N. E. Cor.," bears north ten feet; thence at right angles westerly seven hundred and fifty feet, to the north center side line post, marked "A. L. N. S. L."; thence continuing westerly seven hundred and fifty feet to a post at the northwest corner of the claim, marked "A. L. N. W. Cor."; thence at right angles southerly three hundred feet to a post at the center of the west end line, marked "A. L. W. L. P."; thence continuing in the same direction three hundred feet to the point of commencement. MARK PORTER, Locator.

NOTE.—A copy of the posted notice must be recorded in the office of the county recorder within three months after the date of posting.

---

## NORTH DAKOTA.

### Preliminary Notice for Posting.

TAKE NOTICE, that I, Joseph Bates, a citizen of the United States, discovered, on the 3d day of March, 1894, a mineral lode bearing gold, silver, and other valuable deposits, which lode I have named the Mascot lode.

That I claim eight hundred feet on the lode east of the point of discovery, the place where this notice is posted, and seven hundred feet west of the said point of discovery.

That I claim one hundred and fifty feet on each side of the middle of said lode.

That the said lode is located in the Hard Rock mining district, Bryant county, North Dakota.

Date of posting, March 27, 1894. JOSEPH BATES.

## Location Certificate.

I HEREBY CERTIFY, that on March 3, 1894, I, Joseph Bates, a citizen of the United States, discovered in Hard Rock mining district, Bryant county, North Dakota, a mineral lode, bearing gold, silver, and other valuable deposits, which lode I named the Mascot lode.

That thereafter I located a claim thereon by sinking a discovery shaft ten feet deep, disclosing a well-defined mineral lode, and posted at the point of discovery on the surface a notice of location, as required by section fourteen hundred and twenty-nine of the revised code of North Dakota, and by marking the boundaries of said claim, as required by section fourteen hundred and thirty-one of said code;

That I claim seven hundred feet on the lode east of the center of said discovery shaft, and eight hundred feet on the lode west therefrom; that I claim one hundred and fifty feet on each side of the middle of said lode;

That the course of said vein is east and west;

That the said claim is bounded and described as follows: Beginning at a post two hundred feet northwest of the junction of Indian gulch with White Cloud creek, which post is hewn on the side facing the claim and marked "Mascot lode, "S. E. Cor."; thence northerly one hundred and fifty feet to the east lode post, hewn and marked "Mascot lode, east lode "post"; thence continuing in the same direction one hundred and fifty feet to a post hewn and marked "Mascot lode, N. E. "Cor."; thence at right angles westerly seven hundred and fifty feet to a post hewn and marked "Mascot lode, center "north side line"; thence continuing in the same course westerly seven hundred and fifty feet to a post hewn and marked "Mascot lode, N. W. Cor."; thence at right angles southerly one hundred and fifty feet to the west lode post, hewn and marked "Mascot lode, west lode post"; thence continuing southerly in the same direction one hundred and fifty feet to a post hewn and marked "Mascot lode, S. W. Cor.," from which post an oak tree, three feet in diameter, bears southeasterly twenty feet; thence at right angles easterly seven hundred and fifty feet to a post hewn and marked "Mascot lode, center

"south side line"; thence continuing in the same course seven hundred and fifty feet to the point of beginning.

Dated April 6, 1894. JOSEPH BATES, Locator.

## OREGON.

In Oregon the requirements for preliminary notice of location are simple. The forms given for any of the other states may be used in this state. The certificate of location must be recorded in the office of the district deputy mining recorder within thirty days after posting; but continuous working will obviate the necessity for recording. The district deputy recorder must transmit a copy of his records at the end of each month to the county clerk, who must record the claims in a book provided for that purpose.

## SOUTH DAKOTA.

The requirements in this state regarding preliminary notices and location certificates for lode mining claims are the same as the requirements in North Dakota, and the forms suggested for the latter state, given on a preceding page, may be used in South Dakota.

## UTAH.

### Notice of Location for Lode Claim.

NOTICE IS HEREBY GIVEN, that I, George Riter, a citizen of the United States, have, on this 10th day of July, 1897, discovered and located a lode bearing gold, silver, and other valuable deposits, which lode I have named the Omega lode;

That the course of the vein is north and south, and that I claim seven hundred and fifty feet north and seven hundred and fifty feet south of the discovery monument on which this notice is posted; and that I claim three hundred feet on each side of the center of the vein;

That the said claim is located in the Juniper mining district, county of Kern, state of Utah, and is bounded and described as follows, to wit:—

Beginning at a large pine tree twenty feet south of the point where the Summit trail crosses the south bank of Rapid river, which tree is hewn and marked, "Omega, N. E. Cor.";

thence southerly fifteen hundred feet to a post set in the ground, hewn and marked, "Omega, S. E. Cor."; thence at right angles westerly six hundred feet to a tree blazed and marked "Omega, "S. W. Cor.," from which tree, shaft No. 1 of the Sensation mine bears southwesterly one hundred feet; thence at right angles northerly to a post set in the ground, hewn and marked "Omega, N. W. Cor."; thence at right angles easterly six hundred feet to the point of beginning.

Dated July 25, 1897.

GEORGE RITER, Locator.

NOTE.—The notice must be posted at the time of discovery, and a substantial copy thereof must be recorded in the office of the county auditor within thirty days after the date of posting.

## WASHINGTON.

No particular form of notice is required to be posted or recorded on lode claims in this state. Any of the forms given on the preceding pages for other states may be used in Washington. Location notices in this state should be recorded in the office of the county auditor within thirty days after posting.

## WYOMING.

The forms given for the location and recording of lode claims in Colorado fulfill the requirements of the laws of Wyoming; but if the claim is upon ground surveyed by the United States system of land survey, the laws of Wyoming require the description to be made with reference to section or quarter section corners.

The certificate must be recorded in the office of the district recorder within ninety days after the date of discovery, and in the office of the county clerk within one hundred and twenty days of the discovery.

## ALASKA.

The laws of Oregon as they existed in 1884 are applicable to Alaska. The district has no legislative powers, and the manner of locating and recording claims is governed by local regulations. Any of the forms heretofore given will fulfill the requirements of the federal law, and may be used in Alaska.

# PATENT PROCEEDINGS.

## LODES.

PRECEDENTS SELECTED FROM A CASE WHICH HAS PASSED THE SCRUTINY OF THE LAND DEPARTMENT, AND PATENT ISSUED THEREIN.

### Application for Survey.

SAN FRANCISCO, CAL., September 13, 1894.

United States Surveyor-General, San Francisco:—

*Sir:* As attorneys for James N. Cathey, Andrew McC. Cathey, and William King, claimants, we hereby make application for an official survey, under the provisions of chapter six, title thirty-two, of the Revised Statutes of the United States, and regulations and instructions thereunder, of the mining claim known as the Daisy quartz mine, situate in Coulterville mining district, Mariposa county, California, in section 36, township No. 3 south, range No. 16 east, Mount Diablo meridian. Said claim is based upon a valid location made on June 25, 1890, and duly recorded on July 7, 1890, and is fully described in the duly certified copy of the record of the location certificate, filed herewith. Said certificate contains the name of the locator, the date of location, and such a definite description of the claim by reference to natural objects or permanent monuments as will identify the claim, and said location has been distinctly marked by monuments on the ground, so that its boundaries can be readily traced.

We request that you will send us an estimate of the amount required to defray the expenses of platting and other work in your office, required under the regulations, that we may make proper deposit therefor, and that thereupon you will cause the survey to be made by Charles E. Uren, United States Deputy

Mineral Surveyor, and proper action to be taken thereon by your office, as required by the United States mining laws and regulations thereunder. LINDLEY & EICKHOFF,

Attorneys for Claimants.

Post office address, 530 California Street, San Francisco, Cal.

NOTE.—Consult § 670. As to manner of conducting survey, see § 671. Surveyor-general's certificate as to expenditures, § 673.

**Instruments Required to Accompany the Application (§ 678).**

I. THE APPLICATION FOR PATENT, WITH APPROVED FIELD NOTES ATTACHED.
II. COPY OF THE PLAT.
III. CERTIFIED COPY OF LOCATION NOTICE.
IV. PROOF OF POSTING ON CLAIM THE NOTICE OF INTENTION TO APPLY FOR PATENT, AND COPY OF PLAT.
V. PROOF OF CITIZENSHIP.
VI. AGREEMENT OF PUBLISHER OF NEWSPAPER.
VII. PROOF THAT ANNUAL LABOR HAS BEEN PERFORMED.
VIII. ABSTRACT OF TITLE.
IX. PROOF OF MINERAL CHARACTER OF LAND.

I.

IN THE UNITED STATES LAND OFFICE, AT STOCKTON, CALIFORNIA.

In the Matter of the Application for Patent for the DAISY QUARTZ MINE, Coulterville Mining District, Mariposa County, California.

**Application for Patent.**

[To be attached to approved field notes.]

To the Register and Receiver United States Land Office, Stockton, California:—

STATE OF CALIFORNIA, County of Mariposa. } ss.

James N. Cathey, being first duly sworn, deposes and says: That by virtue of a compliance with the provisions of the laws of the United States and the rules and regulations thereunder

prescribed by the land department of the United States, governing the acquisition of title to mineral lands on the public domain, this affiant, James N. Cathey, together with Andrew McC. Cathey and William King, have become, and are now, the owners as tenants in common, and are now in the actual, quiet, and undisturbed possession of that certain lode mining claim, containing gold and silver, situate in section thirty-six (36),[1] township three (3) south, range sixteen (16) east, Mount Diablo base and meridian, in the Coulterville mining district, Mariposa county, state of California, known as and called the Daisy quartz mine.

This affiant, for and on behalf of himself and his cotenants above named, hereby applies for a patent for said Daisy quartz mine.

The area and extent of said mining claim for which patent is applied for is particularly set forth and described in the official field notes of survey thereof hereto attached and made a part hereof, dated October 19, 1894, and in the official plat of said survey now posted conspicuously upon said mining claim, a copy of which is filed herewith, to which reference is hereby made.

Affiant further states that the facts relative to the ownership and right of possession of himself and his said cotenants, are substantially as follows:—

This affiant and the said Andrew McC. Cathey, having theretofore discovered within the boundaries of said claim a ledge of rock in place carrying gold, on June 25, 1890, duly located said mining claim, by posting upon said claim a proper notice of location, and marking the boundaries of said claim so they could be readily traced. Thereafter, and on July 7, 1890, they caused notice of such location to be recorded in the office of the county recorder of Mariposa county, where the same is now of record in book G of quartz records, at page 209.

A certified copy of said notice of location accompanies this application, and is hereby referred to for all the particulars therein contained.

Thereafter, and on September 4, 1893, the said Andrew McC.

[1] This section had been returned as mineral, and the state had selected other lands in lieu thereof.

Cathey sold and conveyed by deed to William King an undivided one-fourth interest in said mining claim, which said deed is recorded in the office of the county recorder of Mariposa county, in book 14 of deeds, page 189.

That ever since said date affiant and the said Andrew McC. Cathey and William King have been the owners of said mining claim as tenants in common, holding and owning interests in the same, as follows, to wit:—

James N. Cathey, an undivided one half thereof;

Andrew McC. Cathey, an undivided one fourth thereof;

William King, an undivided one fourth thereof.

That at the time of making said location the said James N. Cathey and Andrew McC. Cathey, locators, were, and are now, citizens of the United States, and said William King is a citizen of the United States, all of which will more fully appear from their several affidavits which accompany, and are filed with, this application, reference being made to said affidavits for all the particulars therein contained.

That at the time of making said location said locators entered into the possession of said mining claim, and ever since have been, and with their said cotenant, the said William King, are now in the exclusive possession of the same.

There are no miners' rules or regulations now in force in the Coulterville mining district. Those in existence prior to the passage of the act of congress of May 10, 1872, became obsolete, and have not been observed or in force since the passage of said act.

The value of the labor done and improvements made upon said mining claim by affiant and his cotenants exceeds the sum of four thousand dollars ($4000).

Said improvements consist of the following:—

A main working tunnel four feet by six feet, two hundred and forty-five feet long, where it intersects the ledge; timbered when necessary. From the face of the tunnel where the ledge is intersected, lateral drifts are extended on the ledge northeast and southwest, aggregating one hundred and thirty feet in length, averaging in width six feet.

The actual expense of running said tunnel and drifts exceeds the sum of twenty-five hundred dollars.

Forty feet of tunnel, forty feet of drifts, and thirty feet of incline on such vein, all of customary size for practical mining operations, the expense and cost of running which exceeded the sum of six hundred dollars.

Other open cuts, exposing the vein, the aggregate cost of which will approximate two hundred dollars.

In consideration of said facts, and in conformity with the provisions of chapter six of title thirty-two of the Revised Statutes of the United States, application is hereby made by affiant in behalf of himself and Andrew McC. Cathey and William King, his cotenants, for a patent from the government of the United States for the said Daisy quartz mine, as so officially surveyed and platted. JAMES N. CATHEY.

Subscribed and sworn to before me, this 10th day of January, 1895; and I hereby certify that I consider the above deponent a credible and reliable person, and that the foregoing affidavit, to which was attached the field notes of survey of the Daisy quartz mine, was read and examined by him before his signature was affixed thereto and the oath made by him.

F. E. HALL,
Justice of the Peace in and for No. 3 township, Mariposa county, California.

NOTE.—The certificate of the county clerk of Mariposa county as to the official character and genuineness of the signature of the justice of the peace is attached. This would be unnecessary if the oath had been administered before a notary or clerk of a court of record having a seal.

II.

**Copy of Plat Furnished by Surveyor-General.**

III.

**Certified Copy of Notice of Location.**

NOTICE IS HEREBY GIVEN, that the undersigned, in compliance with the requirements of the Revised Statutes of the United States and the local customs, laws, and regulations, have this day located, and claim fifteen hundred linear feet along the course of this lead, lode, or vein, of mineral-bearing quartz, and three hundred feet in width on each side of the middle of said lead, lode, or vein, together with all mineral

deposits contained therein, and all timber growing within the limits of said claim, and all water and water privileges thereon or appurtenant thereto, situate in the Coulterville mining district, in the county of Mariposa, state of California, and more particularly described as follows, to-wit:—

Commencing at an open cut on the lead, lode, or vein, at an oak stake with stone monument around it, on the north side of Merced river, between the Old Red Banks and Crown Peak; thence running in a northwesterly direction a distance of eight hundred and seventy feet, and in a southeasterly direction a distance of six hundred and thirty feet, to a small pine tree and a small oak tree, growing in close proximity to each other, with stone monument around them; the other corner and center monuments are marked by stakes with rock mounds around them.

The claim shall be known as the Daisy mine.

Located June 25, 1890. JAMES N. CATHEY,
ANDREW McC. CATHEY,
Locators.

STATE OF CALIFORNIA, } ss.
County of Mariposa. }

I, Maurice Newman, county recorder in and for said county, do hereby certify the foregoing to be a full, true, and correct copy of the notice of location of the Daisy mine, as the same appears of record in my office, in book G, page 209, of quartz records of Mariposa county.

Witness my hand and official seal, this 2d day of October, A. D. 1894.
(Seal.)
MAURICE NEWMAN,
County Recorder.

IV.

[Title same as in I.]

**Proof of Posting Notice and Diagram on Claim.**

STATE OF CALIFORNIA, } ss.
County of Mariposa. }

W. A. Jones and William Doidge, each for himself, and not one for the other, being first duly sworn according to law,

deposes and says: That he is a citizen of the United States, over the age of twenty-one years, and was present on the 9th day of January, 1895, when a plat representing the Daisy quartz mine, situated in Coulterville mining district, Mariposa county, California, and certified to as correct by the United States surveyor-general of California, and designated by him as lot No. 61, in township 3 south, range 16 east, Mount Diablo meridian, together with a notice of the intention of James N. Cathey, in behalf of himself and Andrew McC. Cathey and William King, his co-owners, to apply for a patent for the mining claim and premises so platted, was posted in a conspicuous place upon said mining claim, to-wit: at the mouth of the main working tunnel upon said claim, marked "tun-"nel" on the official plat, facing the traveled trail which passes said tunnel, where the same can be easily seen and examined.

A full and true copy of the notice, so conspicuously posted upon said claim, is annexed hereto, marked "Exhibit A," and made a part of this affidavit.

W. A. JONES,
WM. DOIDGE.

Subscribed and sworn to before me, this 9th day of January, 1895; and I hereby certify that I consider the above deponents credible and reliable witnesses, and that the foregoing affidavit was read by each of them before their signatures were affixed thereto and the oath made by them.

F. E. HALL,
Justice of the Peace, No. 3 township, Mariposa county, California.

## EXHIBIT A.

NOTICE OF APPLICATION OF JAMES N. CATHEY IN BEHALF OF HIMSELF AND HIS CO-OWNERS, ANDREW McC. CATHEY AND WILLIAM KING, FOR A UNITED STATES PATENT TO THE DAISY QUARTZ MINE.

NOTICE IS HEREBY GIVEN, that in pursuance of chapter six of title thirty-two of the Revised Statutes of the United States, the undersigned, James N. Cathey, whose post office address is

Bear Valley, Mariposa county, California, in behalf of himself and Andrew McC. Cathey and William King, co-owners with him, claiming thirteen hundred and seventy and eight-tenths linear feet of the Daisy quartz mine vein, lode, or mineral deposit, bearing gold, with surface ground three hundred feet in width on the southwest side of the lode and on the northeast side, width varying from fifty-nine feet on the northwest end line to two hundred and fifteen feet, or thereabouts, at the southeastern portion of the claim, lying and being situated within the Coulterville mining district, county of Mariposa and state of California, is about to make application to the United States for a patent for the said mining claim, which is more fully described as to metes and bounds by the official plat herewith posted, and by the field notes of survey thereof, now filed in the office of the register of the district of lands, subject to sale at Stockton, California, which field notes of survey describe the boundaries and extent of said claim on the surface, with magnetic variation at eighteen degrees east, as follows, to-wit:—

[Here follows description condensed from field notes. See suggestions in § 677.]

The notice of location of said Daisy quartz mine is of record in the office of the recorder of Mariposa county at Mariposa, in the county and state aforesaid, in book G of quartz records, at page 209.

The presumed general course or direction of the said Daisy quartz mine, vein, lode, or mineral deposit, is shown upon the plat posted herewith, as near as can be determined from present developments, this claim being for thirteen hundred and seventy and eight-tenths linear feet thereof, together with the surface ground shown upon the official plat posted herewith. The said mining premises hereby sought to be patented is bounded as follows, to wit:—

On the northeast by the Crown Lead quartz mine (lot No. 48-A), the Crown Peak quartz mine (lot No. 49-A) and the Jubilee quartz mine. On all other sides by vacant land and unoccupied land, the said claim being designated as lot No. 61 in the official plat posted herewith.

Any and all persons claiming adversely the mining ground, vein, lode, premises, or any portion thereof so described,

surveyed, platted, and applied for, are hereby notified that, unless their adverse claims are duly filed as according to law, and the regulations thereunder, within the time prescribed by law, with the register of the United States land office at Stockton, in the county of San Joaquin, state of California, they will be barred in virtue of the provisions of said statute.

JAMES N. CATHEY,
In behalf of himself and Andrew McC. Cathey and William King, his co-owners.

Dated and posted on the ground this 9th day of January, 1895.

Witnesses: W. A. JONES,
WM. DOIDGE.

V.

[Title same as in I.]

## Affidavit of Citizenship of James N. Cathey.

STATE OF CALIFORNIA, County of Mariposa. } ss.

James N. Cathey, being first duly sworn according to law, deposes and says:—

I am the owner of an undivided one-half part of the Daisy quartz mine, situated in Coulterville mining district, Mariposa county, state of California, designated upon the official plat thereof as lot No. 61, in township 3 south, range 16 east, Mount Diablo base and meridian.

In behalf of myself and my co-owners, William King and Andrew McC. Cathey, I am about to make application for a United States patent for said Daisy quartz mine.

I am a native-born citizen of the United States. I was born in Saline county, state of Arkansas in the year 1847, and am now a resident of Mariposa county, California.

JAMES N. CATHEY.

Subscribed and sworn to before me, this 9th day of January, A. D. 1895. F. E. HALL,
Justice of the Peace, No. 3 township, Mariposa county, California.

NOTE.—Similar affidavits were made by Andrew McC. Cathey and William King.

VI.

[Title same as in I.]

**Agreement of Publisher.**

STATE OF CALIFORNIA, County of Mariposa. } ss.

The undersigned, publisher and proprietor of the "Mariposa Gazette," a weekly newspaper published at Mariposa, county of Mariposa, and state of California, does hereby agree to publish a notice, required by chapter six of title thirty-two, Revised Statutes of the United States, of the intention of James N. Cathey to apply for a patent for the Daisy quartz mine, situated in Coulterville mining district, county of Mariposa, state of California, and to hold the said James N. Cathey alone responsible for the amount due for publishing the same.

And it is hereby expressly stipulated and agreed that no claim shall be made against the government of the United States, or its officers or agents, for such publication.

Witness my hand and seal, this 9th day of January, 1895.

JOHN JONES, Publisher.

VII.

[Title same as in I.]

**Proof of Labor (Claimant).**

STATE OF CALIFORNIA, County of Mariposa. } ss.

James N. Cathey, being first duly sworn, deposes and says: I am the owner of an undivided one-half interest in the Daisy quartz mine, designated upon the official plat of said mine as lot 61, in township 3 south, range 16 east, Mount Diablo meridian.

I know of my own knowledge, that at least one hundred dollars' worth of labor was done by myself and my co-owners upon and within the boundaries of said Daisy quartz mine during each and every year from, and including, the year 1891, down to, and including, the year 1894, for the purpose of holding and developing said claim.

During the year 1894 over one thousand dollars have been expended in running one hundred and thirty feet of lateral drifts along the vein, from the face of the main working tunnel, and at the present time the work of extending said drifts is being actively prosecuted. JAMES N. CATHEY.

Subscribed and sworn to before me, this 9th day of January, 1895; and I hereby certify that I consider the above deponent a credible and reliable witness, and that the foregoing affidavit was read by him before his signature was affixed thereto and the oath made by him. F. E. HALL,

Justice of the Peace, No. 3 township, Mariposa county, California.

[Title same as in I.]

## Proof of Labor (Witnesses).

STATE OF CALIFORNIA, } ss.
County of Mariposa. }

W. A. Jones and William Doidge, being duly sworn, each for himself and not one for the other, deposes and says:—

That he is a citizen of the United States, over twenty-one years of age, is a miner by occupation, and resides in Mariposa county, California;

That he is well acquainted with the Daisy quartz mine, situated in section 36, township 3 south, range 16 east, Mount Diablo meridian, Coulterville mining district, Mariposa county, California;

That he knows of his own knowledge that labor to the value of more than one thousand dollars was actually performed upon and within the boundaries of said Daisy quartz mine during the year 1894, for the purpose of developing said claim; said labor was done for the owners of said mine, James N. Cathey, Andrew McC. Cathey, and William King, and consisted of lateral drifts along the vein, extended from the face of the main working tunnel. Work is at the present time being actually prosecuted in said tunnel and drifts.

W. A. JONES,
WM. DOIDGE.

Subscribed and sworn to before me, this 9th day of January, 1895; and I hereby certify that I consider the above deponents

credible and reliable witnesses, and that the foregoing affidavit was read by each of them before their signatures were affixed thereto and the oath made by them. F. E. HALL,
Justice of the Peace, No. 3 township, Mariposa county, California.

VIII.

The abstract of title exhibits the record history of the claim as set forth in the patent application (I).

NOTE.—For suggestions as to abstracts, see § 687.

IX.

[Title same as in I.]

**Proof of Mineral Character of Land and Improvements (by Witnesses).**

STATE OF CALIFORNIA, }
County of Mariposa. } ss.

W. A. Jones and William Doidge, being first duly sworn, each for himself and not one for the other, deposes and says:—

That he is a citizen of the United States, over the age of twenty-one years, and resides in Mariposa county, California;

That he is by occupation a practical miner, and has followed that occupation for many years;

That he is well acquainted with the Daisy quartz mine, situated in the southern portion of section 36, township 3 south, range 16 east, Mount Diablo base and meridian, in the Coulterville mining district, Mariposa county, state of California.

Said Daisy quartz mine is situated about six miles southeast of the town of Coulterville, and about five and one half miles northwest of the town of Bear Valley, in said Mariposa county, on the west slope of the Sierra Nevada mountains;

Traversing said mining claim in a general northwesterly and southeasterly direction is a ledge of rock in place, carrying gold and silver. The ledge crops out at intervals within the claim, and the vein is exposed in several places where it is crossed by small ravines and gulches, and in open cuts, made for the purpose of prospecting the vein. This ledge is considered to be a fork of the "Mother Lode," which traverses

the Crown Peak and Crown Lead mines, adjoining the Daisy quartz mine on the northeast.

The ledge in the Daisy quartz mine is enclosed on the foot wall by black slate, and on the hanging by diabase. It descends into the earth in a northeasterly direction, at an average angle from the horizon of forty-five degrees. Its width ranges from two feet to eight feet. The quartz is of the character familiarly known as "ribbon rock." It carries some free gold and auriferous sulphurets. It can be worked by the ordinary mill process.

The improvements which have been made upon said property by the present owners, James N. Cathey, Andrew McC. Cathey, and William King, are as follows:—

A main working tunnel four by six feet, two hundred and forty-five feet long, where it intersects the ledge. It is timbered where necessary. From the face of the tunnel where the ledge is intersected, lateral drifts are extended on the ledge northeast and southwest, aggregating one hundred and thirty feet in length, and averaging six feet in width. The amount expended for such work exceeds the sum of twenty-five hundred dollars.

In addition thereto, there are forty feet of drifts, an upper incline shaft sunk thirty feet on the vein, all of customary size for practical mining operations, the expense and cost of running and the reasonable value of which exceeded the sum of six hundred dollars; also other open cuts exposing the vein, the aggregate cost of which will approximate two hundred dollars.

W. A. JONES,
WM. DOIDGE.

Subscribed and sworn to before me, this 9th day of January, 1895; and I hereby certify that I consider the above deponents credible and reliable witnesses, and that the foregoing affidavit was read by each of them before their signatures were affixed thereto and the oath made by them. F. E. HALL,

Justice of the Peace, No. 3 township, Mariposa county, California.

NOTE.—As the section within which this mine is situated was returned as mineral, this proof may have been unnecessary. But we have advised the practice of submitting full proofs on subject of mineral character, § 689.

A similar affidavit by claimant accompanied this.

X.

[Notice to be published and posted in register's office.]

## Notice of Application for Patent.

U. S. LAND OFFICE,
STOCKTON, CALIFORNIA, January 12, 1895.

NOTICE IS HEREBY GIVEN, that James N. Cathey, whose post office address is Bear Valley, Mariposa county, California, in behalf of himself and his co-owners, Andrew McC. Cathey and William King, has filed an application for patent for the lode mining claim called the Daisy quartz mine, situated in Coulterville mining district, Mariposa county, California, and designated by the field notes and official plat on file in this office as lot No. 61, in township 3 south, range 16 east, Mount Diablo base and meridian, said lot No. 61 being described as follows (magnetic variation being eighteen degrees east):—

[Here follows description condensed from field notes, same as in Exhibit A, attached to instrument IV, posted on claim.]

The presumed course of the lode is northwest and southeast. The number of feet claimed on the lode is thirteen hundred and seventy and eight tenths, extending from the northwest lode post to the southeast lode post of said claim, as described in the foregoing field notes. The surface ground claimed is three hundred feet in width on the southwest side of the center of the lode, and on the northeast side varying from fifty-nine feet to two hundred and fifteen feet, or thereabouts, to conform to the lines of adjoining claims.

The notice of location of said Daisy quartz mine is of record in the office of the county recorder of Mariposa county, at Mariposa, in book G of quartz records, at page 209.

Adjoining claims: On the northeast the Crown Lead quartz mine (lot No. 48-A); the Crown Peak quartz mine (lot No. 49-A), and the Jubilee quartz mine (lot No. 60). On all other sides the claim is surrounded by unoccupied public land.

Any and all persons claiming adversely the mining ground, vein, lode, premises, or any portion thereof so described, surveyed, platted, and applied for, are hereby notified that unless their adverse claims are duly filed according to law, and the

regulations thereunder, within the time prescribed by law, with the register of the United States land office at Stockton, in the state of California, they will be barred by the provisions of the law in such cases made and provided.

J. WALTER SMITH, Register.

NOTE.—For directions as to publication, see §§ 685, 689. For directions as to posting in register's office, see § 691.

Upon completion of period of publication, the claimant filed the following instruments:—

XI. PROOF THAT PLAT AND NOTICE REMAINED POSTED ON CLAIM.
XII. STATEMENT OF FEES AND CHARGES.
XIII. AFFIDAVIT OF PUBLICATION.
XIV. CERTIFICATE OF CLERK THAT NO SUIT IS PENDING.
XV. APPLICATION TO PURCHASE.

## XI.

[Title same as in 1.]

### Proof That Plat and Notice Remained Posted on Claim During Time of Publication.

STATE OF CALIFORNIA, } ss.
County of Mariposa. }

James N. Cathey, being first duly sworn according to law, deposes and says, that he is claimant and co-owner with Andrew McC. Cathey and William King in the Daisy quartz mining claim, situated in Coulterville mining district, county of Mariposa, and state of California, the official plat of which premises, together with a notice of intention to apply for a patent therefor, was posted thereon, on the 9th day of January, 1895, as fully set forth and described in the affidavit of W. A. Jones and Wm. Doidge, dated the 9th day of January, 1895, which affidavit was duly filed in the office of the register, at Stockton, California, in this case; and that the plat and notice so mentioned and described remained continuously and conspicuously posted upon said mining claim from the 9th day of January, 1895, until, and including, the 20th day of April, 1895, including the sixty days' period during which notice of said application for patent was published in the newspaper.

JAMES N. CATHEY.

Subscribed and sworn to before me this 25th day of April, 1895; and I hereby certify that the foregoing affidavit was read to the said James N. Cathey previous to his name being subscribed thereto, and that deponent is a respectable person, to whose affidavit full faith and credit should be given.

F. E. HALL,
Justice of the Peace in and for No. 3 township, Mariposa county, California.

XII.

[Title same as in I.]

**Statement of Fees and Charges.**

STATE OF CALIFORNIA, }
County of Mariposa. } ss.

James N. Cathey, being first duly sworn, deposes and says, that he is one of the applicants for patent for the Daisy quartz mine, lot No. 61, section 36, township 3 south, range 16 east, Mount Diablo meridian, situate in Coulterville mining district, Mariposa county, California; that he has conducted said application on behalf of himself and his co-owners, and is familiar with the sums of money paid and expended in that behalf; that in the prosecution of said application he has paid out, in the manner below indicated, the following named sums, and no more:—

| | |
|---|---|
| To the United States surveyor-general, for fees, office work, and stationery, | $35.00 |
| To the United States deputy mineral surveyor, | 75.00 |
| Fee to the register, for filing application for patent, | 10.00 |
| For publication of notice of application for patent, | 60.00 |
| Purchase price of land entered, | 70.00 |
| Total, | $250.00 |

JAMES N. CATHEY.

Subscribed and sworn to before me, this 25th day of April, 1895.

J. H. CORCORAN,
(Seal.) Notary Public, Mariposa county, California.

## XIII.

### Affidavit of Publication.

[This is supplied by the publisher, and its form is stereotyped.]

## XIV.

### Certificate That No Suit is Pending.

STATE OF CALIFORNIA, } ss.
County of Mariposa. }

I, Maurice Newman, county clerk of the county of Mariposa, and *ex officio* clerk of the superior court thereof, do hereby certify, that there is no suit or action of any character pending in said court involving the right of possession to any portion of the Daisy mine, situated in Coulterville mining district, Mariposa county, California, of which mine James N. Cathey, Andrew McC. Cathey, and William King claim the ownership, and for which patent has been applied for, and that there has been no litigation before said court affecting the title to said claim, or any part thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at my office in Mariposa, Mariposa county, California, this 25th day of April, 1895.

MAURICE NEWMAN,
County Clerk of the county of Mariposa, and *ex officio* clerk of the superior court thereof.

{ Seal of the superior court, Mariposa county. }

NOTE.—As there was no adverse proceeding in this case, we do not see the necessity of requiring this certificate. See § 750, p. 942, note 5.

## XV.

[Title same as in I.]

### Application to Purchase.

To the Register and Receiver of the United States Land Office, Stockton, Cal.:—

*Gentlemen:* The undersigned claimants, under the provisions of the Revised Statues of the United States, chapter six,

title thirty-two, and legislation supplemental thereto, hereby apply to purchase that mining claim known as the Daisy quartz mine, situate in section 36, township 3 south, range 16 east, Mount Diablo meridian, designated as lot No. 61. Said mining claim embraces thirteen and ninety-one one hundredths acres in the Coulterville mining district, in the county of Mariposa, state of California, as shown by survey thereof, and we hereby agree to pay therefor seventy dollars, being the legal price thereof.

Dated April 25, 1895.

(Signed.) JAMES N. CATHEY,
ANDREW McC. CATHEY,
WM. KING.

[Upon which the register endorsed the following]:—

I, J. Walter Smith, register of the land office at Stockton, California, do hereby certify that the aforesaid quartz mining claim, or lot No. 61, in section 36, township 3 south, range 16 east, Mount Diablo meridian, as applied for above, is subject to entry by the above-named applicants. The area of said quartz mining claim being thirteen and ninety-one one hundredths acres; the price thereof is seventy dollars.

(Signed.) J. WALTER SMITH,
Register.

## PLACER CLAIMS—UNSURVEYED LANDS.

Where a placer claim sought to be patented is situated upon unsurveyed lands, the proceedings are similar to those in cases of lodes, proper allowance being made for the difference in the nature of the deposits (§ 699), a descriptive report being also required from the deputy surveyor, establishing the character of the land (§ 672); but the department requires, in all cases of placers, an affirmative showing that no known lodes exist within the limits of the placer (§ 703).

We select the following illustration as conforming to the regulations of the department in this behalf:—

### Proof That No Known Lodes Exist on Placer Claim.

IN THE UNITED STATES LAND OFFICE, AT STOCKTON, CALIFORNIA.

In the Matter of the Application for Patent for the COOLGARDIE PLACER MINE, Coulterville Mining District, Mariposa County, California.

STATE OF CALIFORNIA, County of Mariposa. } ss.

A. M. da Silva and Wm. Doidge, each of lawful age and resident in the county of Mariposa, state of California, being first duly sworn, each for himself, and not one for the other, saith: That he is a miner by profession; that he is well acquainted with the Coolgardie placer mine, situate in Coulterville mining district, county of Mariposa, state of California, claimed by A. Wartenweiler, applicant for United States patent therefor; that for several years he has resided near said land, and has been, and now is, well acquainted with the character of said land, having frequently passed over the same; that his knowledge of said land is such as to enable him to testify understandingly in regard thereto; that there is not, to his knowledge, within the limits of said placer claim any vein, or lode, of quartz or

other rock in place bearing gold, silver, cinnabar, lead, tin, or copper, or any other valuable deposit in place, upon said claim or any part thereof; that he has no interest whatever in the said placer claim.

A. M. DA SILVA,
WM. DOIDGE.

Subscribed and sworn to before me this 19th day of March, 1897; and I hereby certify that the foregoing affidavit was read to the above-named A. M. da Silva and Wm. Doidge previous to their names being subscribed thereto, and that deponents are reputable persons, to whom full faith and credit should be given.

F. E. HALL,
Justice of the Peace in and for No. 3 township, Mariposa county, California.

NOTE.—An affidavit of similar import, made by claimant, is also filed.

## SAME—SURVEYED LANDS.

Where the placer claim is located by government subdivisions, no survey is necessary (§ 672). A descriptive report by a deputy mineral surveyor may be obtained (§ 701), but is not required. Proof of the mineral character of the land must be supplied by affidavits (§ 702).

As the surveyor-general has no office to perform in this class of cases, proof of the five hundred dollars' expenditure for patent purposes must be supplied by claimant. For nature and character of such proofs, consult § 701.

# INDEX.

# INDEX.


**Abandonment.**

by senior of area conflicting with junior locator will not inure to benefit of latter, § 363.
abandoned conflict area can only be appropriated by junior locator by amended location, § 363.
of portion of claim for purpose of paralleling end lines does not affect remainder, § 365.
amended certificate of location not necessarily abandonment of first, § 398.
may title to mining claim be lost by? § 642.
distinction between forfeiture and, § 643.
a question of intention, § 643.
operates *instanter*, § 643.
may occur at any time, § 643.
evidence establishing, § 644.
evidence negativing, § 644.
a question for the jury, § 644.
need not be specially pleaded, § 643.
may be proved under general issue, § 643.
burden of establishing rests upon party asserting, § 643.
failure of one co-owner to contribute proportion of assessment work not evidence of, § 644.

**Abstract of Title.**

to be furnished in patent proceedings, § 687.
regulations of land department concerning, p. 1192-1193, par. 32.

**Access.**

right of surface owner to strata underlying granted stratum, § 827.
reciprocal rights of owners of different strata, § 827.
See INSPECTION AND SURVEY.

**Account.**

between tenants in common of a mine, § 790.
between mining partners on dissolution, § 803.

**Actions.**

**Ejectment.**

mining claims are subjects of, §§ 535, 538, 773.
may be maintained on certificate of purchase, § 773.

**Injunction.**

will not issue, restraining land department from discharging its duties, § 438.
when lies at suit of one cotenant against another, § 790.
to prevent pollution of water, § 842.
deposit of tailings, § 842.
injuries from hydraulic mining, §§ 848-853.
as an auxiliary remedy in actions of trespass, §§ 872.

**Actions**—*Continued.*
**Partition of Mining Property.**
mining claims are subject of, §§ 535, 792.
usually require sale, § 792.
owner of incorporeal hereditament cannot maintain, § 792.
**Possessory.**
for mining claims not affected by fact that fee is in the United States, § 773.
pleadings in ordinary, §§ 233, 754.
**Trespass.**
pleadings in, §§ 233, 754.
scope of, in mining states, § 865.
within what time action must be brought in case of underground, § 867.
burden of proof in cases of underground, § 866.
presumptions in favor of surface proprietor, § 866.
apex proprietor, § 866.
measure of damages, § 868.
**Actions upon Adverse Claims.**
provisions of the federal law concerning, Revised Statutes, § 2326, p. 1172.
no presumptions of fact indulged in, § 227.
pendency of, does not excuse performance of annual labor, § 632.
tribunals having jurisdiction, §§ 746-750.
federal courts, §§ 747-749.
jurisdiction, to what referable, § 749.
questions involved are federal, § 748.
removal from state courts to, § 750.
pleadings in, § 754.
state courts, § 750.
jurisdiction, to what referable, § 750.
removal from, to federal court, § 750.
pleadings in, §§ 754, 755.
character of the action at law or in equity, § 754.
how considered in federal courts, § 754.
California, § 754.
Idaho, § 754.
Montana, § 754.
Nevada, § 754.
South Dakota, § 754.
Wyoming, § 754.
time within which, must be commenced, § 756.
appeal from order of register declining to receive adverse claim does not excuse commencement, § 737.
when deemed commenced, § 757.
parties to, § 758.
functions of land department pending, § 759.
must be prosecuted with due diligence, § 759.
question of diligence to be determined by the courts, § 759.
the judgment, its form, § 763.
when becomes available in the land office, § 764.
effect of, § 765.

**Actions upon Adverse Claims**—*Continued.*
the judgment, effect of appeal from, § 764.
certified copy to be filed with register, p. 1208, par. 89.
dismissal of, equivalent to waiver, § 766.
evidence of, required by land department, p. 1208, par. 90.
**Act of July 26, 1866 (Lode and Water Law).**
text of the act, p. 1141.
generally known as the "lode and water law," § 49.
title of the act; history of its passage, § 53.
essential features, § 54.
important principles established by, § 54.
declaration of governmental policy, § 55.
recognition of local customs and possessory rights, § 56.
a crystallization of local rules and customs, §§ 56, 306.
title to lode claims, how acquired, § 57.
relationship of surface to lode, § 58.
construction of the act by the land department, § 59.
by the courts, § 60.
end lines, § 60.
Idaho-Maryland case, § 59.
vein crossing side lines, § 60
the Flagstaff case, § 60,
local rules and customs after passage of the act, § 61.
"dips, angles, and variations," § 61.
a muniment of existing titles, § 53.
only lode claims patentable under, § 57.
only one lode could be held under one location, § 58.
or patent, § 572.
owner of lode located under, need not adverse patent application made under act of 1872, § 727.
extralateral or dip right under, §§ 60, 567–577.
end lines implied, § 58.
not required to be parallel, §§ 58, 576.
where end lines converge, § 574.
diverge, § 575.
function of diagram and surface lines, conclusions of author, § 577.
on lodes other than original, conferred by act of 1872, § 598.
where end lines are parallel, § 599.
not parallel, § 600.
construction of patents applied for under, but issued subsequent to act of 1872, § 604.
distinction between acts of 1866 and 1872, § 71.
**Act of July 9, 1870 (Placer Law).**
text of the act, p. 1146.
an amendment to lode law of 1866, § 62.
first legislation on subject of placers, § 419.
opened placers and all forms of deposit not *in place*, to exploration and purchase, § 62.
essential features of the act, § 62.
limit of area subject to location, §§ 62, 448.
form and extent of location under, § 448.

**Act of July 9, 1870 (Placer Law)**—*Continued.*
recognized title by adverse possession, § 62.
superseded by act of May 10, 1872, § 62.
**Act of May 10, 1872 (General Mining Law).**
text of the act, p. 1149.
passage of the act, § 68.
basis of the existing system, §§ 68, 75.
declaration of governmental policy, § 69.
changes made by, § 70.
with regard to lodes, § 71.
other claims, §§ 72, 448.
new provisions affecting all classes of claims, § 73.
local rules and customs subsequent to, § 76.
embodied in the Revised Statutes, § 75.
**Acts of Congress.**
**Miscellaneous Acts Referred to in Text.**
May 20, 1785, ordinance for disposing of lands in western territory, § 30.
first on subject of mineral lands, § 30.
March 3, 1807, reserving lead mines from sale, and providing for leasing, § 33.
March 3, 1829, for sale of reserved lead mines in Missouri, § 35.
September 4, 1841, pre-emption act reserving mines, § 36.
July 11, 1846, for sale of reserved lead mines in other states, § 35.
March 1, 1847, for sale of copper and lead mines in Michigan, § 35.
March 3, 1847, for sale of mineral land in Chippewa district, § 35.
March 3, 1849, creating department of interior, § 47.
September 26, 1850, ordering sale of mineral lands in Michigan, § 47.
July 1, 1862, Pacific railroad act, §§ 149, 150, 151.
July 1, 1864, regulating sales of coal lands, § 49.
July 2, 1864, Pacific railroad act, §§ 150, 151.
February 27, 1865, recognizing possessory rights in mineral lands, § 47.
March 3, 1865, regulating sale of coal lands, § 49.
May 5, 1866, concerning mining claims in Nevada, § 49.
July 25, 1866, Sutro tunnel act, § 49.
February 18, 1873, excepting Michigan, Wisconsin, and Minnesota from operation of mining laws, § 75.
embodied in § 2345, Revised Statutes, p. 1182.
March 1, 1873, extending time for performance of annual labor, § 75.
June 6, 1874, extending time for performance of annual labor, § 75.
February 11, 1875, tunnel amendment to § 2324, Revised Statutes, p. 1169.
May 5, 1876, excepting Missouri and Kansas from operation of mining laws, § 75.
January 12, 1877, relating to saline lands, § 514.
territorial limit of its operation, § 514.
March 3, 1877, relating to desert lands, § 212.
June 3, 1878, (*a*) timber cutting, § 75.
June 3, 1878, (*b*) stone and timber act, §§ 75, 210, 421.

**Acts of Congress**—*Continued.*
January 22, 1880, fixing uniform time for annual labor, § 75.
text of law, p. 1169.
March 3, 1881, judgments in suits upon adverse claims, p. 1173.
object of the act, §§ 749, 763.
April 26, 1882, verification of adverse claims, p. 1173.
March 3, 1883, exempting Alabama from operation of mining laws, § 75.
May 17, 1884, providing a civil government for Alaska, § 172.
extract from the act, p. 1351.
March 3, 1887, alien act, § 243.
amended by act of March 2, 1897, p. 863, note 1.
March 3, 1891, affecting townsites, § 166.
limited to incorporated cities, § 172.
object and intent, § 173.
not retroactive, § 174.
March 3, 1891, relating to desert lands, § 212.
August 4, 1892, stone lands subject to entry under mining laws, § 210.
March 1, 1893, creating California debris commission, p. 1271.
causes leading up to its passage, § 848.
essential features of the act, § 850.
February 26, 1895, classification of railroad lands in Idaho and Montana, § 160.
February 11, 1897, petroleum act, § 422.
text of act, p. 1228.
circular instructions, p. 1228.
March 2, 1897, alien law, text of act, p. 1229.
commented on, p. 863, note 1.
June 4, 1897, mining claims in forest reservations, p. 1222.

**Adjacent Support.** See SUPPORT.

**Adjoining Claims.**
lines of, are "permanent monuments," § 373.
must be specified in notices of patent applications, p. 1192, par. 29.
junior locator must conform to lines of senior, § 365.

**Adverse Claim.**
distinction between protest and, § 712.
patent proceedings are *in rem*, § 713.
must be filed, or rights are lost, § 713.
what is and what is not subject of, §§ 717-730.
contemplates controversies between rival mineral claimants, § 717.
character of land is not subject of, § 717.
controversies between agricultural and mineral claimants, § 717.
prior patentees, § 718.
prior patent applicants, § 718.
mortgagees, § 719.
lien holders, § 719.
owners of equitable interests, § 719.
lode claimant against placer applicant, § 720.
placer claimant against lode applicant, § 721.
mineral claimant against townsite applicant, § 722.

**Adverse Claim**—*Continued.*
townsite claimant against mineral applicant, § 723.
millsite claimant against mineral applicant, § 724.
tunnel proprietor against lode applicant, § 725.
owners of lodes located prior to act of 1872, § 726.
cross lodes, § 727.
co-owners as adverse claimants, § 728.
easements, § 729.
underground conflicts, §§ 583, 730.
presupposes existence of surface conflict, § 730.
how asserted, § 734.
contents of, § 734.
§ 2326, Revised Statutes, prescribing, p. 1172.
regulations of the land department concerning, p. 1206, par. 81.
amendments to, § 734.
survey of, when required, § 735.
by whom made, § 735.
regulation of the department, p. 1207, par. 86.
when excused, § 735.
verification, § 736.
by whom made, § 736.
before whom made, § 736.
provisions of federal statute, pp. 1172-1173.
regulations of land department, p. 1206, pars. 82-84.
sufficiency of, to be determined by the land department, § 737.
objections to, how raised, § 737.
right of appeal to commissioner when objection overruled or sustained, § 737.
appeal from order of register dismissing, does not excuse commencement of suit, § 737.
when must be filed, § 738.
time, how computed, § 738.
where must be filed, § 739.
but one need be filed, § 740.
proceedings before the register when filed, p. 1207, pars. 87, 88.
filing of, suspends functions of land department, § 741.
exceptions to this rule, §§ 632, 758.
effect of failure to file, § 742.
how waived, § 766.
right of successful adverse claimant to proceed to patent, § 765.
**Actions to Determine.**
provisions of the federal law concerning Revised Statutes, § 2326, p. 1172.
no presumptions of fact indulged in, § 227.
pendency of, does not excuse performance of annual labor, § 632.
tribunals having jurisdiction, §§ 746-750.
federal courts, §§ 747, 749.
jurisdiction, to what referable, § 749.
questions involved are federal, § 748.
removal from state courts to, § 750.
pleadings in, § 754.

**Adverse Claim**—*Continued.*
state courts, § 750.
jurisdiction, to what referable, § 750.
removal from, to federal court, § 750.
pleadings in, §§ 754, 755.
character of the action at law or in equity, § 754.
how considered in federal courts, § 754.
California, § 754.
Idaho, § 754.
Montana, § 754.
Nevada, § 754.
South Dakota, § 754.
Wyoming, § 754.
time within which must be commenced, § 756.
appeal from order of register declining to receive adverse claim does not excuse commencement, § 737.
when deemed commenced, § 757.
parties to, § 758.
functions of land department pending, § 759.
must be prosecuted with due diligence, § 759.
question of diligence to be determined by the courts, § 759.
the judgment, its form, § 763.
when becomes available in the land office, § 764.
effect of appeal from, § 764.
certified copy to be filed with register, p. 1208, par. 89.
dismissal of, equivalent to waiver, § 766.
evidence of, required by land office, p. 1208, pars. 90, 91.

**Adverse Possession.**
title to unpatented mining claim may be acquired by, §§ 62, 688.
provisions of federal law, Revised Statutes, § 2332, p. 1176.
proof of title by, in patent proceedings, § 688.
regulations of department, p. 1204, pars. 69-75.

**Affidavits.**
of performance of annual labor under state laws, § 636.
as evidence, § 636.
effect of failure to file, § 636.
in patent proceedings, by whom to be made, § 682.
before whom to be made, § 682.
See PROOFS; VERIFICATION.

**Agent.**
location may be made by, § 331.
principal presumed to assent to, § 331.
one colocator may act for others, § 331.
having made location cannot deprive principal of his rights, §§ 331, 407.
when may verify proofs in patent proceedings, § 682.
federal statute on the subject, p. 1171.
when may verify adverse claims, § 736.
federal statute on the subject, p. 1173.
department regulations, p. 1206, pars. 82, 84.
making proof in patent proceedings must show authority, § 684.
departmental regulation, p. 1206, par. 85.

**Agent**—*Continued.*
one mining partner as agent of others. See MINING PARTNERSHIP.
**Agreement.**
of publisher in patent proceedings, § 685.
departmental regulation, p. 1193, par. 34.
suggested form of, p. 1382.
See CONTRACTS.
**Agricultural Claims.**
classes of, which will prevent filing conflicting application for patent, § 679.
rights of claimants conflicting with mineral applicant not subject of adverse claim, § 717.
controversies between mineral and, determined by land department, § 717.
See AGRICULTURAL LANDS; CHARACTER OF LAND; HOMESTEAD; PRE-EMPTION.
**Agricultural Lands.**
laws governing acquisition of title to, § 203.
only, subject to entry under homestead laws, § 204.
estates in mining claims compared with estates in, § 542.
surveyor-general's return as evidence of character of land, §§ 106, 207.
may be overcome, § 106.
unreliability of, § 106.
hearings to establish character of, §§ 107, 717.
in case of school grants, §§ 143, 144.
railroad grants, § 157.
homesteads, §§ 204, 208.
regulations of the department concerning, p. 1211, pars. 108-118.
test of character, in controversies between mineral and agricultural claimants, § 207.
right of apex locator to pursue vein in depth underneath prior grant of, § 612.
reservation of "known mines" in patents for, § 779.
See CHARACTER OF LAND; HOMESTEAD; PRE-EMPTION.
**Alabama.**
partially acquired by Louisiana purchase, § 33.
excepted from operation of federal mining laws, §§ 29, 95.
method of acquiring coal lands in, p. 614, note 2.
**Alaska.**
purchase of, from Russia, § 64.
mining laws extended to, § 64.
extract from act providing civil government for, p. 1351.
general mining regulations extended to, p. 1209, par. 96; p. 1352.
governed by Oregon laws of 1884, § 172.
townsite laws extended to, § 172.
rules of construction of mining and townsite laws apply to, § 172.
forest reservation in, § 197.
a separate land district, § 172.

**Alaska**—*Continued.*
act of July 24, 1897, providing for appointment of land officers and surveyor-general, p. 1352, note.
not a territory, § 243.
alien laws of congress not applicable to, § 243.
federal coal land laws not operative in, § 497.
no lands, other than specific mineral, subject to disposal, p. 1353, par. 3.
dower right exists in (under Oregon laws), § 543.
does not attach to unpatented claims, § 543.
publication of notices of patent applications, where made, p. 1353, par. 2.
suggested form for lode location, p. 1372.
recording of mining location regulated by local rules, p. 1372, note.
Consult OREGON.

**Alien.**
alienage not an issuable fact in ordinary actions concerning mining claims, § 227.
cannot lawfully locate mining claim, § 223.
having declared his intention to become a citizen, has the status of citizen, § 224.
marriage of citizen woman with an, § 224.
alienage of stockholders of domestic corporation, § 226.
acquisition of title to unpatented mining claim by, § 231.
effect of alienage when claim is located or purchased by, § 231.
diversity of decision on subject of alienage, § 231.
effect of subsequent naturalization when claim located by, §§ 232, 234.
relocation by citizen of mining claim in possession of, §§ 233, 234.
may acquire lands by purchase, § 233.
location of mining claim creates estate by purchase, § 233.
locator may convey good title to citizen, § 233.
status of title to mining claims located by, § 233.
locator will hold until "office found," § 233.
government alone concerned with question of alienage, §§ 233, 234.
principles governing subject of alienage with reference to mining claims, § 234.
rights of, in patented mines governed by state laws, § 237.
property rights of, in the precious-metal-bearing states, § 238.
property rights of, in territories, under act of 1887, §§ 243, 244.
general scope of alien act of 1887, § 244.
tribute or beneficiating contracts not within inhibition, § 244.
not applicable to Alaska, § 243.
amendment of, by act of March 3, 1897, p. 1249.
effect of amendment, p. 863, note.

**Alum.**
claim of the crown of England to mines of, § 3.
classified as mineral under French law, § 12.
by land department, § 97.
lands containing, subject to entry under placer law, § 420.

**Amendment of Adverse Claim.**
under what circumstances permitted, § 734.

**Amendment of Location and Location Certificates.**
state legislation concerning, § 397.
Arizona, p. 1237, § 7.
Colorado, p. 1267, par. 13.
Idaho, p. 1279, § 5.
Nevada, p. 1295, § 6.
New Mexico, p. 1308, par. 5.
North Dakota, p. 1316, par. 11.
South Dakota, p. 1327, par. 11.
Wyoming, p. 1345, par. 10.
right to amend exists in absence of state legislation, § 397.
void location cannot be amended so as to defeat intervening townsite entry, § 176.
permitted for purpose of paralleling end lines, § 582.
circumstance justifying change of boundaries, § 396.
objects and functions of amended certificates, § 398.
void certificates not subject of, as against intervening rights, § 397.
same formalities required as in case of originals, § 397.
right of amendment when cut off by intervening locations, § 398.
relates back to original, § 398.
except where new territory is added, § 398.
treated as original when includes new ground, § 398.
not an abandonment of original, § 398.
title of colocator cannot be divested by omitting name in, § 398.
purpose for which made need not be recited in certificate, § 398.
**Annual Labor.**
foreign laws on subject of, §§ 1-3.
requirement of, under local rules prior to act of 1866, § 623.
performance of, necessary to perpetuate estate, § 623.
provisions of federal law, § 623.
amount of, fixed by act of May 10, 1872, § 73.
act of March 1, 1873, extending time for, § 75.
June 6, 1874, § 75.
January 22, 1880, fixing uniform time, § 75.
text of act, p. 1169.
performance of, imperative, § 624.
when first year's work must be performed, § 624.
law concerning, applicable to placers, § 625.
not applicable to millsites, § 638.
"claim," as used in § 2324 Revised Statutes, defined, § 628.
each location to be regarded as a claim for purpose of, § 628.
amount where several lode claims consolidated, § 628.
amount where several placer claims consolidated, § 628.
amount where placer locations made by association, § 628.
object of law requiring, § 629.
character of, § 629.
what is and what is not sufficient compliance with law, § 629.
placing tools and material on ground, § 629.
roadways, when may be estimated, § 629.
buildings, when cost of may be considered improvements, §§ 629-631.
wages paid watchman, § 629.

**Annual Labor**—*Continued.*
work done within limits of a single claim, § 629.
group of claims, § 630.
claims must be contiguous, § 630.
must be held in common, § 630.
consolidation for development, § 630.
aggregate amount of, § 630.
character of, § 630.
work done outside the boundaries, § 631.
tunnels, § 631.
constructing water ditches and pipe lines, § 631.
dams and reservoirs, § 631.
period within which must be done, § 632.
may preliminary development work be credited to? § 632.
may work done prior to January 1 next succeeding date of location be credited to? § 632.
work done in one year in excess of amount required cannot be credited on next year, § 632.
by whom must be performed, § 633.
by trespassers not considered, § 633.
by holder of color of title, § 633.
grantor of owner, § 633.
pendency of patent proceedings does not excuse, § 632.
nor of suit upon adverse claim, § 632.
circumstances under which excused, § 634.
special acts of congress, § 634.
Indian hostilities, § 634.
forcible dispossession, § 634.
threats and tortious acts of others, § 634.
*bona fide* effort to perform, necessary, § 634.
when obligation to perform ceases, § 637.
value of, how estimated, § 635.
reasonable value the test, § 635.
state statutes fixing value of day's labor, § 635.
immaterial, whether paid for or not, § 635.
forfeiture for failure to perform, §§ 645, 646.
to co-owners, § 646.
right of one co-owner to contribution for, § 646.
representation is a unit, § 646.
resumption of, prevents forfeiture, § 651.
what constitutes valid, § 652.
when right must be exercised, § 653.
general rules, § 654.
proof of, in patent proceedings, § 686.
**State Legislation.**
may not decrease amount fixed by federal law, §§ 626, 250 (10).
may increase amount required by federal law, § 250 (10).
fixing value of day's labor invalid, §§ 635, 250 (10).
can preliminary development work be credited to annual? § 443.
validity of certain existing, questioned, § 626.
summary of, § 626.

**Annual Labor**—*Continued.*
Arizona, p. 1237, § 8.
Colorado (placers), p. 1270, par. 2.
Nevada, p. 1296, § 9.
New Mexico, p. 1310, par. 8.
Oregon, p. 1320, par. 4.
South Dakota, p. 1328, par. 13.
Washington, p. 1338, par. 4.
Wyoming (placers), p. 1347, par. 2.
proof of, under state laws, §§ 636, 250 (11).
Arizona, p. 1238, § 9.
California, p. 1249, § 1.
Colorado, p. 1267, par. 14.
Idaho, p. 1280, § 6.
Montana, p. 1288, par. 5.
Nevada, p. 1297, § 10.
New Mexico, p. 1309, par. 7.
Utah, p. 1332, § 0.
Wyoming (placers), p. 1347, par. 2.
**Under Local Rules.**
in absence of state legislation amount of, may be increased, § 270.
when changes are made, previous locators must conform to, § 270.
**Apex.**
as a controlling factor in lode locations, § 305.
a lode, or vein, must have an, § 305.
term not found in miners' vocabulary, § 306.
not defined by geologists, § 306.
definitions of lexicographers, § 306.
contributed to public land commission, § 307.
of Dr. Raymond, § 308.
judicial, § 310.
the ideal lode and its, § 309.
necessarily a surface, § 309.
departure from the ideal lode, § 310.
the case of Duggan *v.* Davey, § 310.
illustrations, § 310.
the Leadville cases, § 311.
illustrations, § 311.
hypothetical illustrations based upon, § 312.
existence and *situs* a question of fact, § 313.
discovery of any portion of, within limits of claim sufficient, §§ 337, 364.
ideal location covering, described, § 360.
any portion of, sufficient to support location, § 364.
location can only be made covering, § 364.
Judge Hallett's views as to location on dip, § 364.
existence of, presumed after patent, § 364.
but *locus* of, must be shown, § 364.
prior to patent existence of, must be shown if locator's rights are challenged, § 364.
entire width of, must be included when extralateral right asserted, § 583.

**Apex**—*Continued.*
result where apex is broader than location, § 583.
bisected by side line, § 583.
extent of, necessary to be established in exercise of extralateral right, §§ 615, 866.
presumption as to continuity of, within lines of location, §§ 615, 866.
See EXTRALATERAL RIGHT.

**Appeal.**
from surveyor-general's action refusing to order survey for patent, § 670.
from surveyor-general's action refusing to approve survey, § 671.
from register and receiver where objections to adverse claim sustained or overruled, § 737.
effect of such appeal, § 737.
is judgment in suit on adverse claim available before time to, elapses, § 764.
effect of, from order of commissioner suspending certificate of purchase, § 772.
See LAND DEPARTMENT.

**Application for Patent.**
**Lode Claims.**
provisions of federal law, Revised Statutes, § 2325, p. 1170.
regulations of land department, p. 1192, par. 31.
certificate of location, the basis of, § 739.
amendment of, prior to, § 396.
patent proceedings are *in rem*, § 713.
contents of, § 680.
suggested form, p. 1374.
to be filed with register of land office, § 678.
may not be filed if land not clear on tract books, § 679.
filing of, withdraws the land, § 679.
applicant need not adverse subsequent applications, § 718.
pending, annual work must be done, § 679.
by one of several co-owners, § 681.
by corporations, § 681.
verification of, § 682.
when may be dismissed, § 679.
schedule of instruments to accompany, § 678.
suggested forms of, pp. 1374-1392.
notice of, for posting its contents, § 677.
form, p. 1379, exhibit "A."
object of posting, §§ 677, 713.
proof of posting, § 683.
form, p. 1378.
publication of, § 685.
designation of newspaper, § 685.
agreement of publisher, § 685.
form, p. 1382.
is process, § 713.
period of, how computed, § 738.
proof of annual labor, § 686.
form, p. 1382.

**Application for Patent**—*Continued.*
abstract of title, § 687.
certified copies of notice of location, § 687.
proof of title by possession without location, § 688.
proof that plat and notice remained posted on claim, § 692.
form, p. 1387.
statement of fees and charges, § 693.
form, p. 1388.
application to purchase, § 694.
form, p. 1389.
résumé of proceedings, § 695.
**Millsites.**
how applied for, § 708.
federal statute, Revised Statutes, § 2337, p. 1179.
regulations of department, p. 1202, pars. 64-68.
**Placer Claims.**
proceedings same as in lodes, § 699.
provisions of federal law, Revised Statutes, § 2329, p. 1174.
regulations of department, p. 1198, par. 52.
description of placers on surveyed lands, § 700.
proof of five hundred dollars' expenditures, § 701.
proof of mineral character of land, § 702.
proof that no known lodes exist within, § 703.
lodes within placers, how applied for, § 704.
See ADVERSE CLAIM: PATENT PROCEEDINGS.
**Appropriation of Water.**
not recognized at common law, § 838.
in some of the states, § 838.
the Pacific coast doctrine permitting, § 838.
right to reasonable use of water for deposit of tailings, §§ 840, 841.
**Area.**
**Lode Locations.**
maximum superficial, § 361.
effect of exceeding maximum, § 362.
excess in length, how cast off, § 362.
in width, how cast off, § 366.
not controlled by number of locators, § 362.
**Millsites.**
limited to five acres, §§ 519, 520.
**Placer Locations.**
form and extent of, prior to Revised Statutes, § 447.
under Revised Statutes, § 448.
maximum, by individuals, § 438.
by associations, § 438.
See SURFACE.
**Arizona.**
acquired partly by treaty with Mexico, § 40.
through Gadsden purchase, § 40.
subject to federal mining laws, § 81.
Mexican grants in, acts of congress concerning, §§ 118, 127.
forest reservation in, § 197.
alien laws of congress operative in, § 243.

**Arizona**—*Continued.*
alien act of 1887, §§ 243, 244.
1897, text of law, p. 1229.
its effect, p. 863, note 1.
saline law of January 12, 1877, does not apply to, § 514.
dower abolished in, § 544.
mining as a "public use" in, § 259.
laws of, on subject of mine drainage noted, § 252.
**Mining Legislation in.**
location notice, contents of, §§ 380, 250 (4).
text of law, p. 1235, § 1.
void unless conforms to law, p. 1235, § 2.
form suggested, p. 1357.
location, how made, p. 1236, § 3.
discovery shaft, p. 1236, § 3.
its equivalent, p. 1237, § 5.
time allowed for completing, p. 1237, § 6.
posting notice, § 353.
text of law, p. 1236, § 3.
marking boundaries, p. 486, § 347.
text of law, p. 1236, §§ 3, 4.
amendment to locations, § 397.
text of law, p. 1237, § 7.
relocation of abandoned claims, §§ 408, 250 (9).
text of law, p. 1239, § 11.
recording notice (Revised Statutes 1887, § 2349), § 389.
annual work, §§ 626, 250 (10).
text of law, p. 1237, § 8.
proof of performance of, §§ 636, 250 (11).
text of law, p. 1238, § 9.
concerning rights of way and mining easements, § 252.
forfeiture to co-owners, how effected, pp. 1240, 1241, §§ 1–5.
validity of legislation questioned, §§ 251 (5), 646.
description of mining claims, p. 1241, § 5.
does legislation apply to placers? §§ 442, 455, 459.
**Miscellaneous Mining Legislation.**
reference table, p. 1242.

**Arkansas.**
acquired through Louisiana purchase, § 33.
lands in, containing baser metals, sold under special laws, §§ 20, 35.
federal coal land laws operative in, § 497.
commissioner of general land office *ex officio* surveyor-general of, p. 1191, par. 28.

**Arsenic.**
classified as mineral under French laws, § 12.

**Asbestos.**
occurring in veins in place, how located, § 323.

**Asphaltum.**
classified as mineral by land department, § 97.
lands containing, subject to entry under placer laws, § 420.

**Assessment Work.**
See Annual Labor.

**Associations.**
does term "association of persons" named in placer laws include corporations? §§ 226, 449.
placer location by, limited to one hundred and sixty acres, § 447.
federal statute, Revised Statutes, §§ 2330-2331, p. 1175.
construed by land department, p. 1200, par. 61.
entire area located jointly, § 438.
requirement as to discovery, § 438.
applications for placer patents by, § 684.
consolidation of claims for patent purposes, § 447.
expenditure required for patent, § 438.
proof of citizenship, § 684.
general mining regulations, p. 1205, pars. 76-80.
See CORPORATIONS; PLACER LOCATIONS.
**Barriers.**
liability for injury caused by removal of, §§ 807, 808.
**Bismuth.**
classified as mineral under French laws, § 12.
**Bitumen.**
classified as mineral under French laws, § 12.
**Board of Equitable Adjudication.**
who constitute, and its functions, p. 852, note 3.
**Borax.**
classified as mineral by land department, § 97.
lands containing deposits not in place subject to entry under placer laws, § 420.
when occurring "in place" how located, § 323.
**Boundaries.**
manner of marking under Mexican law, §§ 13, 375.
requirements of federal law, Revised Statutes, § 2324, p. 1168.
**Lode Locations.**
end lines and side lines constitute, § 361.
controlling importance of surface, § 361.
end lines, how constructed and their functions, § 365.
side lines, and their functions, § 366.
side-end lines, § 367.
marking, requirements of federal law mandatory, § 371.
state has no power to dispense with requirements of federal law, § 371.
state may prescribe character of, § 371.
in absence of state legislation local rules may prescribe, § 270.
what is sufficient marking in absence of state or local regulations, § 373.
a question for the jury, § 373.
depends upon circumstances, § 373.
examples of, § 373.
suggestions of land department, p. 1187, par. 15.
posting notices cannot be substituted for, § 373.
state legislation defining character of, § 374.
Arizona, p. 1236, § 4.
Colorado, p. 1265, par. 6.

**Boundaries**—*Continued.*
Idaho, p. 1277, § 2.
Montana, p. 1286, par. 2.
Nevada, p. 1292, § 2.
New Mexico, p. 1307, par. 2.
North Dakota, p. 1315, par. 6.
South Dakota, p. 1325, par. 6.
Utah, p. 1331, § 3.
Wyoming, p. 1342, par. 4.
should be within statutory limit, § 373.
and not on ground covered by previous location, § 365.
including excessive area, when will not vitiate location, §§ 362, 373.
excess in length, how cast off, § 362.
in width, § 366.
failure to mark renders ground subject to relocation, § 373.
in case of relocations, § 408.
perpetuation of monuments not necessary, § 375.
exception to the rule, § 375.
statutory requirement in Utah, p. 1331, § 3.
location not complete until marked, § 371.
object of, § 371.
time allowed for, § 372.
what is a reasonable, § 339.
prescribed in different states, § 374.
Arizona, p. 1236, §§ 3, 4.
California, p. 1245, § 3.
Colorado, p. 1264, par. 5.
Idaho, p. 1277, § 2.
Montana, p. 1286, par. 2.
Nevada, p. 1292, § 2.
New Mexico, p. 1307, par. 2.
North Dakota, p. 1314, par. 5.
South Dakota, p. 1325, par. 5.
Utah, p. 1331, par. 3.
Wyoming, p. 1342, par. 4.
change of, not permitted to detriment of intervening locator, §§ 373, 396-397-398.
circumstances justifying, § 396.
for purpose of including abandoned overlapping surface, § 396.
paralleling end lines, §§ 396, 582.
right to change exists independent of state legislation, § 397.
state legislation concerning, § 397.
acts necessary to effect, § 398. See AMENDMENT OF LOCATION.
objects and functions of amended certificates, § 398.
variation between calls in certificate of location and monuments, § 382.
variation between calls in patents, § 778.

**Boundaries**—*Continued.*
"natural objects" defined, § 383.
"permanent monuments" defined, § 383.
lines of adjoining claims as permanent monuments, § 373.
classification of rights from location with reference to, § 549.
lode cannot be pursued on its strike beyond, § 553.
intralimital rights not affected by form of surface, § 552.
extralateral right, how affected by form of surface. See EXTRALATERAL RIGHT.
**Millsites.**
location of, substantially same as mining claims, § 521.
state legislation concerning marking, California no provision. Statement in § 521 erroneous.
Montana, p. 1286, par. 2.
Nevada, p. 1301, § 16.
Utah, p. 1331, § 3.
**Placer Locations.**
rule as to marking in absence of state legislation, § 454.
state legislation requiring marking, § 455.
California, p. 1246, § 4.
Colorado, p. 1269, par. 1.
Idaho, p. 1284, § 12.
Montana, p. 1286, par. 2.
Nevada, p. 1299, § 13.
Utah, p. 1331, § 3.
Wyoming, p. 1346, par. 1.
**Tunnel Locations.**
marking of, § 475.
See TUNNEL LOCATIONS.
**Brick Clay.**
classified as mineral by English authorities, § 92.
rulings of land department as to, § 97.
lands containing deposits of, subject to entry under placer laws, § 424.
**Buildings.**
character of, which may be considered improvements under annual labor laws, § 629.
owner of underlying mines not compelled to support, § 820.
adjacent mines, § 833.
**Building Stone.**
falls within designation of "mineral" under English authorities, § 92.
rulings of land department as to mineral character, §§ 97, 210.
in state school selections, § 139.
as to manner of acquiring title to, § 421.
decisions of courts as to mineral character of, § 421.
lands containing may be entered under placer laws, § 210.
or under stone and timber act, § 210.
recent ruling of Secretary Bliss on "marble," note to Revised Statutes, § 2319, p. 1163.
See STONE.

**Burden of Proof.**
in cases of alleged forfeiture or abandonment, rests upon party asserting, §§ 636, 643.
burden, when shifted, under Idaho law, § 636.
text of the law, p. 1280, § 6.
burden, when shifted, under New Mexico law, § 636.
text of law, p. 1309, par. 7.
in contests over character of land, §§ 106, 689.
to overcome surveyor-general's return, §§ 106, 207, 689.
when burden shifts, § 689.
in actions arising out of underground trespasses, § 866.
does burden shift during trial? § 866.
**California.**
discovery of gold in, § 40.
acquired by treaty with Mexico, § 40.
system of local rules adopted in, followed in other states, § 56.
historical review of origin and scope of local rules, § 44.
legislative and judicial recognition of, § 44.
subject to federal mining laws, § 81.
adjustment of claims to Mexican grants in, § 117.
forest reservations in, § 197.
laws of, defining property rights of aliens, § 238.
mining not a "public use" in, § 263.
legislation in, concerning rights of way and mining easements, § 252.
unconstitutional legislation in, concerning condemnation for mining easements, § 263.
constitutional provisions on subject of eminent domain, § 253.
saline law of January 12, 1877, applies to, § 514.
no dower exists in, § 543.
repealing state laws providing for sale of mineral lands belonging to the state, p. 1250, § 1.
mineral lands of state not to be sold, p. 1250, § 2.
mining claims on sixteenth and thirty-sixth sections, how located, § 1051.
validity of law questioned, note, p. 1251.
act of congress creating California debris commission, p. 1251.
causes leading up to its passage, § 848.
essential features of, § 850.
"hydraulic mining" within the meaning of the act, § 852.
judicial interpretation, its constitutionality, § 853.
See California Debris Commission.
right to appropriate running water, to what extent recognized in, § 841.
**Mining Legislation in.**
*Lode Claims.*
certificate of location, contents, § 389.
text of law, p. 1245, § 3.
void, unless conforms to law, p. 1248, § 6.
form of, suggested, p. 1360.
verification of, § 385.
text of law, p. 1245, § 3.

**California**—*Continued.*
record of, § 389.
text of law, p. 1245, § 3.
as evidence, p. 1247, § 5.
recording in districts abolished, p. 1248, § 7.
development work, text of law, p. 1245, § 3.
time allowed for completion, p. 1245, § 6.
posting preliminary notice, text of law, p. 1243, § 2.
object of the law, note, p. 1244,
form of notice suggested, p. 1359.
notice must also be recorded, p. 1244.
marking boundaries, § 374.
text of law, p. 1245, § 3.
proof of annual labor, § 636.
text of law, p. 1249, § 1.
*Millsites.* No legislation in. Statement in § 521 erroneous.
*Placer Claims.*
manner of locating, § 443.
text of law, p. 1246, § 4.
location certificate, § 459.
text of law, p. 1246, § 4.
record of, p. 1246, § 4.
form of, suggested, p. 1362.
posting notice, § 442.
text of law, p. 1246, § 4.
marking boundaries, § 455.
text of law, p. 1246, § 4.
development work required, § 443.
text of law, p. 1246, § 4.
affidavit of performance of, to be filed, p. 1247, par. 5.
form, p. 1363.
object and purpose of such laws, §§ 344, 443.
proof of annual labor, § 636.
text of law, p. 1249, § 1.
forfeiture to co-owners, p. 1249, § 1.
validity of legislation questioned, §§ 251 (5), 646.
**Miscellaneous Mining Legislation.**
reference table, p. 1262.
**California Debris Commission.**
act of congress creating, p. 1251.
causes leading up to its passage, § 848.
essential features of, § 850.
"hydraulic mining" within meaning of, § 852.
judicial interpretation; its constitutionality, § 853.
how composed, p. 1252, § 1.
organization, p. 1252, § 2.
compensation of, p. 1252, § 2.
adoption of rules, p. 1252, § 2.
territorial jurisdiction, p. 1252, § 3.
hydraulic mining, without license from commission, prohibited, p. 1252, § 3.
defined, p. 1254, § 8.

**California Debris Commission**—*Continued.*
duty of, p. 1253, §§ 4, 5, 6.
annual report of, p. 1254, § 7.
permit to mine, how obtained, p. 1254, § 9.
rights of petitioner to be surrendered to United States, p. 1255, § 10.
joint petition by adjoining owners, p. 1255, § 11.
publication of notice of petition, p. 1256, § 12.
examination of mine, p. 1256, § 12.
hearings to determine merits of petition, p. 1256, § 12.
decision of the commissioner, p. 1256, § 13.
order directing manner of constructing dams, p. 1256, § 13.
submission of plans for correction, p. 1257, § 14.
construction of works, p. 1257, § 14.
when mine owner may commence mining, p. 1257, § 15.
joint construction and use of dams by adjoining owners, p. 1257, § 16.
no hydraulic mining allowed when debris cannot be impounded, p. 1258, § 17.
order permitting mining may be revoked or modified, p. 1258, § 18.
intentional violation of order works forfeiture of right to mine, p. 1258, § 19.
duty of commission to visit mines in operation, p. 1259, § 20.
public lands, and timber and stone thereon, may be used by, p. 1259, § 21.
penalty for willfully injuring dams, p. 1259, § 22.
penalty for working by hydraulic process contrary to law, p. 1259, § 22.
debris fund established, tax upon gross proceeds of mine, p. 1260, § 23.
commission may consult with state engineers, p. 1261, § 24.
may construct dams to restrain debris in main rivers, p. 1261, § 25.
recommendations concerning, adopted, p. 1261, § 25.

**Canals.**
right of way for, over public lands, § 530.
mining locations subject to pre-existing easements for, §§ 530, 531.

**Cancellation.**
of certificate of purchase, power of commissioner of general land office, §§ 772, 208.
effect of, §§ 772, 208.
order of, when takes effect, § 772.
effect of appeal from order, § 772.
courts may inquire into action of commissioner, § 772.

**Carbonate of Soda.**
classified as mineral, § 97.
lands containing, subject to entry under placer law, § 420.

**Cement Gravels (Subterranean).**
are not deposits "in place," §§ 301, 427.
subject to location under placer laws, §§ 301, 427.
must locations of, on surveyed lands conform to public surveys? § 448.

**Certificate.**
that no suit is pending, to be filed in patent proceedings, §§ 688, 759.
suggested form of, p. 1389.
of surveyor-general of five hundred dollars' expenditures for patent purposes, § 673.
when must be filed, § 673.
what to be shown by when claims are consolidated, § 673.
**Certificate of Incorporation.**
evidence of citizenship of corporation, § 226.
in patent proceedings, § 681.
provisions of the federal law, Revised Statutes, § 2321, p. 1165.
regulations of the department, p. 1205, par. 76.
**Certificate of Location.**
**Lode.**
is instrument prepared for record after completion of location, § 379.
differs from posted notice, except in Arizona and New Mexico, § 379.
is a statutory writing affecting realty, § 379.
is first muniment of locator's paper title, § 379.
purpose and function of, § 379.
not required by federal law, § 379.
provisions of federal law as to contents of, where state law requires record, § 379.
text of, § 2324, Revised Statutes, p. 1168.
where state requires recording, certificate must contain elements provided for by Revised Statutes, § 379.
contents of, in the several states and territories, § 380.
Arizona, p. 1235, § 1.
form, p. 1357.
California, p. 1245, § 3.
form, p. 1360.
Colorado, p. 1263, par. 3.
form, p. 1364.
Idaho, p. 1277, § 2.
form, p. 1366.
Montana (declaratory statement), p. 1287, par. 3.
form, p. 1367.
Nevada, p. 1293, § 3.
form, p. 1368.
New Mexico, p. 1306, par. 1.
form, p. 1368.
North Dakota, p. 1313, par. 3.
form, p. 1370.
Oregon, p. 1319, par. 2.
form, p. 1371.
South Dakota, p. 1324, par. 3.
form, p. 1371.
Utah, p. 1330, § 2, p. 1331, § 4.
form, p. 1371.
Wyoming, p. 1343, par. 7.
form, p. 1372.
rules of construction applied to, § 381.
technical accuracy of expression not required, § 381.

**Certificate of Location**—*Continued.*
should be construed on lines of obvious common sense, § 381.
erroneous calls in, when do not affect validity, § 381.
may be aided by monuments on the ground, § 381.
to be considered in connection with markings on the ground, § 381.
variation between calls of certificate and monuments, § 382.
courses and distances yield to monuments, § 382.
but to invoke rule monuments must be perpetuated, §§ 375, 382.
"natural objects" defined, § 383.
"permanent monuments" defined, § 383.
illustrations of "natural objects" and "permanent monuments," § 383.
sufficiency of reference to natural objects a question of fact, § 383.
when presumed, § 383.
parol evidence when admissible in aid of, § 383.
effect of failure to comply with state laws as to contents, § 384.
*Verification of.*
states requiring, § 385.
California, p. 1245, § 3.
Idaho, p. 1283, § 13.
Montana (declaratory statement), p. 1287, par. 3.
validity of legislation discussed, §§ 251 (4), 385.
*Amendment of.*
state legislation concerning, § 397.
Arizona, p. 1237, § 7.
Colorado, p. 1257, par. 13.
Idaho, p. 1279, § 5.
Nevada, p. 1295, § 6.
New Mexico, p. 1308, par. 5.
North Dakota, p. 1316, par. 11.
South Dakota, p. 1327, par. 11.
Wyoming, p. 1345, par. 10.
right to amend exists in absence of state legislation, § 397.
void location cannot be amended so as to defeat intervening townsite entry, § 176.
permitted for purpose of paralleling end lines, § 582.
circumstance justifying change of boundaries, § 396.
objects and functions of amended certificates, § 398.
void certificates not subject of, as against intervening rights, § 397.
same formalities required as in case of originals, § 397.
right of amendment when cut off by intervening locations, § 398.
relates back to original, § 398.
except where new territory is added, § 398.
treated as original when includes new ground, § 398.
not an abandonment of original, § 398.
title of colocator cannot be divested by omitting name in, § 398.
purpose for which made need not be recited in certificate, § 398.
*Recording.*
in absence of state legislation local rules may provide for, § 270.
records of mining districts do not prove themselves, §§ 272, 391.
how proved, §§ 272, 391.
popular understanding as to necessity for, §§ 273, 389.

**Certificate of Location**—*Continued.*
custom as to, how shown, § 273.
to be binding, should be well known, § 273.
failure to, does not work forfeiture unless law or rule so prescribes, §§ 273, 274, 390.
unnecessary, unless required by state law or local rule, §§ 273, 328, 389.
constructive notice imparted by, a creature of the statute, §§ 392, 646.
evidence of, unless authorized by state law or local rule, inadmissible, §§ 273, 392.
if required by local rules, must contain requirements of federal law, § 273.
if required by state law, must conform to requirements of federal law, §§ 355, 379.
proof of record, § 391.
record as evidence, § 392.
time allowed, in absence of state law, § 389.
place of, § 389.
state legislation as to time and place of, § 389.
Alaska, regulated by local rules, p. 1372.
governed by laws of Oregon, p. 1352.
Arizona (Revised Statutes 1887, p. 2349), § 389.
California, p. 1245, § 3.
as evidence, p. 1247, § 5.
in districts, prohibited, p. 1248, § 7.
Colorado, p. 1263, par. 3.
Montana, p. 1279, § 4.
Nevada, p. 1293, § 3.
New Mexico, p. 1306, par. 1.
North Dakota, p. 1313, par. 3.
Oregon, p. 1319, par. 2.
South Dakota, p. 1324, par. 3.
Utah, p. 1332, § 4.
Washington, p. 1339, par. 6.
Wyoming, p. 1343, par. 7.
effect of failure to record within time fixed by state law, § 390.
**Millsites.**
location made substantially same as mining claim, § 521.
state legislation concerning, § 521.
California, no legislation, statement in § 521 as to, erroneous.
Montana, p. 1286, par. 1.
Nevada, p. 1301, § 16.
Utah, p. 1330, par. 2; p. 1332, par. 3.
**Placers.**
generally same rules apply as in lodes, § 459.
state legislation concerning, § 559.
Arizona, does legislation apply to placers? § 459.
California, p. 1246, § 4.
Colorado, p. 1260, par. 1.
Idaho, p. 1284, § 12.
Montana, p. 1287, par. 3.
Nevada, p. 1300, § 14.

**Certificate of Location**—*Continued.*
New Mexico, does legislation apply to placers? § 459.
Wyoming, p. 1346, par. 1.
**Tunnels.**
governed by regulations of land department, § 472.
text of departmental regulations, p. 1190, pars. 23, 24.
state legislation concerning, § 250 (14).
Colorado, p. 1273.
Montana, Comp. Stats. Mont. 1887, §§ 1487-1491.
Nevada, p. 1301, § 19; p. 1302, § 21.
**Certificate of Purchase.**
evidence of perfected location, § 773.
issuance of, § 770.
supervision of commissioner of general land office over, §§ 208, 637, 772.
power of commissioner not to be arbitrarily exercised, §§ 208, 772.
may be suspended in proper cases, §§ 208, 637, 772.
effect of suspension, §§ 208, 772.
may be canceled in proper cases, §§ 208, 772.
effect of cancellation, §§ 208, 772.
when takes effect, § 772.
effect of appeal from order of cancellation, § 772.
order of cancellation may be inquired into by the courts § 772.
title conveyed by, § 771.
equivalent to patent, §§ 208, 771.
recovery in ejectment may be had on, § 773.
distinction between mining and agricultural, § 773.
discovery of mineral after issuance of agricultural, will not defeat, § 208.
not subject to collateral attack, § 773.
how assailed, § 773.
obligation to perform annual labor ceases with issuance, § 637.
**Chalk.**
classified as mineral, p. 99, note 3.
when occurring "in place" how located, § 323.
**Character of Land.**
falling within provisions of federal mining laws, § 85.
necessity for definition of terms, § 85.
terms of reservation employed in various acts, § 86.
"mine" and "mineral" indefinite terms, § 87.
English denotations, § 88.
enlarged meaning of "mine," § 89.
definition of "mineral," § 90.
element of profitableness of controlling weight, § 90.
rules of interpretation of term "mineral," § 91.
substances classified as mineral, § 92.
American cases, defining "mine" and "mineral," § 93.
"mineral lands," § 94.
rules of statutory interpretation, § 96.
interpretation of terms by land department, § 95.
substances held to be mineral, § 97.

**Character of Land**—*Continued.*
recent decision of Secretary Bliss, note to Revised Statutes, § 2319, p. 1163.
rules for determining mineral, § 98.
no general classification of public lands, § 102.
geological surveys, § 103.
general system of land surveys, § 105.
surveyor-general's return, what constitutes, § 105.
*prima facie*, established by, §§ 106, 207.
presumptions flowing from, §§ 106, 156, 144, 689.
how overcome, § 106.
unreliability of, § 106.
a question of fact, §§ 107, 207.
land department may alone determine, § 717.
when and how established, § 107.
hearings to establish, §§ 107, 679.
state lieu selections, § 143.
sixteenth and thirty-sixth sections, § 144.
railroad grants, § 156.
indemnity selections, § 157.
homesteads, §§ 205, 207.
regulations of land department concerning, p. 1211, pars. 108-118.
in grants to states, sixteenth and thirty-sixth sections, § 144.
effect of surveyor-general's return, § 144.
state may accept, § 144.
interpretation of "mineral lands" in, §§ 137, 138, 139, 140.
when open to contestation, § 144.
petroleum lands in, § 138.
building stone lands in, § 139.
time to which inquiry is addressed, § 140.
state lieu selections, § 142.
test of, as applied in, §§ 140, 141.
subsequent discovery of mineral will not defeat title of state, §§ 142, 143.
subsequent exhaustion of mineral will not revest title in state, § 142.
hearings to determine, §§ 143, 144.
state has right to be heard, § 144.
general principles governing, § 145.
distinction between railroad grants and, § 156.
in railroad grants, mineral lands reserved, § 152.
except in grant of right of way, § 153.
to be determined when patent applied for, § 154.
construction of reservation by the courts, § 154.
by the land department, §§ 155, 158.
distinction between school grants and, § 156.
departmental restriction upon definition of "mineral lands," § 158.
ruling of department as to phosphates, § 158.
petroleum, § 158.

**Character of Land**—*Continued.*
return of surveyor-general, effect of, § 156.
test of, § 159.
indemnity selections, § 157.
hearings to determine, §§ 156, 157.
agricultural claims—homesteads, § 204.
claimant may "prove mineral off," § 204.
land department governed in first instance by surveyor-general's return, § 204.
hearings to determine, where mineral asserted, §§ 205, 207.
strict rule of interpretation applied, § 336.
when to be determined, § 207.
question one of comparative value, § 207.
test of, § 207.
open to contestation until final entry, § 208.
intermediate determination not conclusive, § 208.
in townsites, §§ 173, 175.
what constitutes mineral under reservations in, § 176.
decision of land department as to, final, § 207.
patent conclusive evidence of, § 779.
qualification of the rule, § 779.
liberal rules of construction applied between rival mining claimants, § 336.
strict rules of construction applied between mining and agricultural claimants, § 336.
mineral not inferred from character of adjoining tracts, § 438.
determination of, sought to be entered as coal, § 496.
proof of, in patent proceedings, §§ 689, 702.
suggested form for lodes, p. 1384.

**China Clay.**
classified as mineral by English authorities, § 92.
land department, § 97.
lands containing, subject to entry under placer laws, § 420.

**Chinese.**
born in the United States are citizens, § 224.

**Cinnabar.**
specially named in the lode law of 1866, § 323.
act of 1872, §§ 71, 323.
Revised Statutes, § 2320, p. 1164.
mines of, reserved from Mexican grants under act of 1891, §§ 118, 127.
from entry under townsite laws, §§ 166, 176.
manner of locating lands containing, depends upon form of occurrence, § 323.

**Citizens.**
only, and those who have declared their intention, may locate mining claims, § 223.
the federal law, Revised Statutes, § 2319, p. 1163.
who are, § 224.
neither age nor sex involved in definition, § 224.
by birth, § 224.
by naturalization, § 224.

**Citizens**—*Continued.*
effect of subsequent naturalization on estate of alien locator, §§ 232, 234.
Indians, § 224.
Chinese born in the United States, § 224.
married women, § 224.
marriage of citizen woman with alien, § 224.
minors, § 224.
domestic corporations, § 226.
may acquire good title by purchase from alien locator, § 233.
relocation by, of mining claim in possession of alien, §§ 233, 234.
See CITIZENSHIP.

**Citizenship.**
how proved, § 227.
presumption as to, from residence, § 227.
of domestic corporations, § 226.
of stockholders of a corporation, § 226.
proof of, in proceedings before the land department, § 227.
in patent proceedings, § 684.
the federal law, Revised Statutes, § 2321, p. 1165.
departmental regulations, p. 1205, pars. 76-80.
of original locators not required unless they are applicants, § 227.
in ordinary actions, § 227.
in actions upon adverse claims, § 755.
suggested form of affidavit, p. 1381.
averment of, when necessary in actions concerning mining claims, §§ 754, 755.
not open to contestation except in patent proceedings, § 227.
at instigation of government, §§ 233, 234.
proceedings to obtain patent in nature of "inquest of office," §§ 233, 234.
of patentee conclusively presumed, §§ 227, 777.
See ALIENS; CITIZENS.

**Civil Law.**
influence of, in development of American mining system, § 1.
regalian doctrine, of same as common law, § 11.
ownership of mines under, § 11.
decree of Emperor Gratian, § 11.
Gamboa's statement of the rules of, § 11.
Roger's, § 11.
Halleck's, § 12.
estate in unpatented mining claim compared with tenures of, § 541.

**Claim.** See MINING CLAIM.

**Clay.**
China, or kaolin, classified as mineral under English law, § 92.
by American authorities, § 97.
lands containing, subject to entry under placer laws, § 420.
"in place," how located, § 323.
brick, classified as mineral by English authorities, § 92.
rulings of land department as to, § 97.
subject to entry under placer laws, § 424.

**Coal.**
mines in Forest of Dean regulated by local customs, § 7.
state legislation regulating manner of working, § 19.
act of July 1, 1864, providing for disposal of lands, § 49.
March 3, 1865, § 49.
classified as mineral under English decisions, § 92.
by American courts, § 93.
land department, § 97.
by legislative construction, § 495.
lands containing, do not pass under school grants, § 140.
nor under railroad grants unless specially named, §§ 152, 158, 495.
its occurrence in veins suggested, § 323.
lands containing, sold under special laws, § 323.
history of legislation concerning, § 495.
rules for determining character of land, § 496.
geographical scope of federal laws, § 497.
federal laws regulating sale of lands, pp. 1214-1217.
departmental regulations, pp. 1217-1224.
who may enter coal lands, § 501.
different classes of entries, § 502.
private entry, § 503.
preferential right of purchase, § 504.
declaratory statement, § 505.
assignability of inchoate rights, § 506.
purchase price, § 507.
final entry, § 508.
system compared with other mining laws, § 509.
**Collateral Attack.**
certificate of purchase not subject to, § 773.
patent not subject to, § 777.
**Colonies.**
reservation of mines in crown grants to American, § 31.
**Colorado.**
acquired partly through Louisiana purchase, § 33.
partly through cession from Mexico, § 40.
subject to federal mining laws, § 81.
Mexican grants in, acts of congress in relation to, §§ 118, 127.
forest reservations in, § 197.
laws of, defining property rights of aliens, § 238.
mining as a "public use" in, § 252.
legislation in, concerning rights of way and mining easements, § 252.
drainage of mines, § 252.
constitutional provisions on subject of eminent domain, § 253.
saline law of January 12, 1877, applies to, § 514.
no dower exists in, § 543.
legislation on subject of subjacent support, § 822.
**Mining Legislation in.**
*Lode claims.*
length, § 361.
text of law, p. 1263, par. 1.

**Colorado**—*Continued.*
width, § 361.
text of law, p. 1263, par. 2.
location, how made, p. 1264, par. 5.
certificate of location, contents, § 380.
text of law, p. 1263, par. 3.
void, unless conforms to law, p. 1264, par. 4.
must claim but one location, p. 1269, par. 16.
form of, suggested, p. 1364.
record of, § 389.
text of law, p. 1263, par. 3.
amendment of, § 397.
text of law, p. 1267, par. 13.
discovery shaft, §§ 343, 250 (15).
text of law, p. 1264, par. 5.
its equivalent, p. 1265, par. 7.
time allowed for completion, p. 1265, par. 8.
posting preliminary notice, § 352.
text of law, p. 1264, par. 5.
form of notice suggested, p. 1363.
marking boundaries, § 374.
text of law, p. 1265, par. 6.
change of boundaries, p. 1267, par. 13.
rights conveyed by perfected location, p. 1265, pars. 9, 10, 12.
validity of law questioned, § 251.
defining rights in cases of cross or uniting veins, p. 1266, par. 11.
validity of law questioned, § 251.
proof of annual labor, § 636.
text of law, p. 1267, par. 14.
relocation of abandoned claims, § 408.
text of law, p. 1268, par. 15.
*Placer Claims.*
location certificate, § 459.
text of law, p. 1269, par. 1.
must claim but one location, p. 1269, par. 16.
record of, p. 1269, par. 1.
amendment of, p. 1267, par. 13.
posting preliminary notice, § 442.
text of law, p. 1269, par. 1.
marking boundaries, § 455.
text of law, p. 1269, par. 1.
annual labor, §§ 626, 250 (10).
text of law, p. 1270, par. 2.
law invalid, § 626.
proof of, § 636.
text of law, p. 1267, par. 14.
forfeiture to co-owners, p. 1270, par. 2.
validity of legislation questioned, §§ 251 (5), 646.
*Tunnel Claims.*
recording, p. 1273.
length on lode discovered in, p. 1274.
law not in force. See note to Revised Statutes, § 2323, p. 1167.

**Colorado**—*Continued.*
right to run through another's ground, p. 1272, §§ 1, 2.
constitutionality of such laws discussed, §§ 252-264.
right to enter and inspect, p. 1272, § 2.
forfeiture of right to continue tunnel, p. 1272, § 2.
damages for extracting ore from another's vein, p. 1273, § 3.
burden of proof as to ownership of vein discovered in, p. 1273, § 4.
For rights of tunnel proprietor under federal law, see TUNNEL LOCATIONS.
**Miscellaneous Mining Legislation.**
reference table, p. 1274.
**Commissioner of the General Land Office.**
appointment, powers, and duties, § 662.
supervisory power over acts of register and receiver, § 208.
may suspend or cancel final certificate of purchase, §§ 208, 627.
See LAND DEPARTMENT.
**Common Law.**
engrafted upon American legal system, § 1.
property in mines under, § 2.
owner of surface *prima facie* owner of minerals, § 2.
*prima facie* ownership of minerals, how rebutted, § 2.
"royal mines" defined, ownership of, § 3.
rules of, modified by local customs in parts of England, § 4.
doctrine of, as to customs, no application to local customs in America, § 272.
estate in unpatented mining claim compared with copyhold estates at, § 540.
grant of right to pursue vein in depth beyond boundaries, not in derogation of, § 568.
doctrine of, as to riparian rights and stream pollution, §§ 838, 839.
"tin streaming" in Cornwall, § 839.
accepted in some of the states, § 838.
modified in the mining states, §§ 838, 840.
**Condemnation.**
of private property for mining purposes, § 19.
in Massachusetts, § 19.
Kentucky, § 19.
Tennessee, § 19.
New York, § 20.
Colorado, § 252.
Arizona, § 259.
Georgia, § 260.
Nevada, § 258.
Pennsylvania, § 261.
West Virginia, § 262.
California, § 263.
for purposes of mining easements, state legislation, § 252.
See EASEMENTS; EMINENT DOMAIN; PUBLIC USE.
**Conflict Area.**
exceptions in junior patents of, held under senior title, § 782.
See ADVERSE CLAIM.

**Congress.**
power of, to legislate for territories, §§ 242, 252.
cannot control exercise of rights of eminent domain by states, § 252.
cannot invest state courts with jurisdiction in adverse suits, § 750.
See ACTS OF CONGRESS.
**Connecticut.**
not subject to federal mining laws, § 19.
no mining legislation in, § 19.
reservation of mines in crown grants to, § 31.
**Constitutional Law.**
state, on subject of alienage, § 232.
eminent domain, § 253.
right of, in states governed by state constitution, § 252.
federal government may not interfere with state rights, § 252.
mining as a public use, § 254.
Arizona, § 259.
California, § 263.
Georgia, § 260.
Nevada, § 258.
Pennsylvania, § 261.
West Virginia, § 262.
general conclusions, § 264.
condemnation for purpose of pipe lines, § 255.
lateral railroads, § 252.
tramways (Colorado), § 252
physical and industrial conditions as affecting rule of public utility, § 257.
**Contracts.**
tribute or beneficiating contracts not within inhibition of alien laws, § 244.
"grub stake" and prospecting, § 858.
options, working bonds and executory contracts of sale, § 859.
mining licenses and their distinguishing features, § 860.
mining leases, § 861.
distinction between leases and tribute contracts, § 244.
**Contribution.**
between co-owners for assessment work, §§ 406, 790.
cotenants for improvements made by one in possession, § 790.
**Conveyance.**
of mining claim, in early days parol transfer authorized by local rules, § 270.
under existing laws, and recording transfer not subject to district regulation, § 270.
must be in writing, §§ 270, 642.
rules applicable to other real estate governs, § 270.
law of, regulated by the states, §§ 544, 857.
by one of several cotenants, effect of, § 791.
**Co-owners.**
location by several, creates tenancy in common, § 788.
one locating for benefit of several cannot divest rights by relocation, §§ 331, 398.

**Co-owners**—*Continued.*
one cannot relocate in his own name after neglect of all to perform annual-work, § 406.
amended location by one will inure to benefit of all, § 398.
one cannot protect his individual estate by performance of annual labor, § 406.
annual representation a unit, § 616.
failure of one to contribute to assessment work not evidence of abandonment, § 644.
remedy where one contributes more than his share, § 646.
application for patent by one of several, § 681.
remedy of those excluded from, § 646.
as adverse claimants in patent proceedings, § 728.
contribution between, for assessment work, §§ 406, 770, 779.
cotenancy in mining claim, how created, § 788.
general rules of cotenancy applicable to, § 788.
right of each to occupy and use common property, § 789.
working by one in ordinary way not waste, § 789.
remedy of excluded, § 790.
accounting between, § 790.
when injunction lies against one in possession, § 790.
one cannot compel others to join in working, § 790.
leases and licenses executed by one of several, § 791.
conveyance by one of his interest, § 791.
forfeiture to, for failure to contribute to assessment work, § 646.
text of the federal law, Revised Statutes, § 2324, p. 1168.
object of the statute, § 646.
suggestion of unconstitutionality, § 646.
to be strictly construed, §§ 646, 251 (5).
how treated by land department, § 646.
proceedings culminating in, how established, § 646.
state statutes supplementing federal law, § 251 (5).
Arizona, p. 1240, §§ 1-5.
California, p. 1249, § 1.
Colorado, p. 1270, par. 2.
Nevada, p. 1297, § 11.
validity of laws questioned, §§ 251 (5), 646.

**Copper.**
exploration for, in Lake Superior regions, § 29.
ordinance of 1785 reserved one third to government, § 30.
development of copper mines of Lake Superior, § 32.
lands in Michigan sold under special laws, § 35.
specially named in act of 1866, §§ 71, 323; p. 1142, § 2.
act of 1872, §§ 71, 323; p. 1150, § 2.
Revised Statutes, § 2320, p. 1164.
mines of, reserved from entry under townsite laws, § 166.

**Coprolites.**
(phosphatic nodules) classified as mineral, § 92.

**Copyhold.**
analogy between estate by, and mining tenure under civil law, § 11.
estate in unpatented mining claim compared with, § 540.

**Cornwall.**
customs of, as defeating *prima facie* ownership of minerals, § 2.
tin mines in, regulated by local custom, § 5.
rights of "free tinners," § 5.
"dish" or "toll" tin, § 5.
tin bounds, their nature and extent, § 5.
proclamation of, at stannary courts, § 5.
writ of possession, § 5.
renewal of boundaries, § 5.
failure to renew boundaries, effect of, § 5.
sale of, § 5.
nature of estate in, § 5.
failure to work, forfeited estate, § 5.
time allowed for commencing work, § 5.
stannary courts, their jurisdiction, § 5.
"tin streaming" in, § 839.
pollution of streams sanctioned by custom, § 839.

**Corporations.**
**Domestic.**
what are, § 226.
are citizens, § 226.
may locate mining claims, § 226.
citizenship, how proved, § 226.
proof of, in patent proceedings, § 684.
the federal law, § 2321, Revised Statutes, p. 1165.
departmental regulations, p. 1205, pars. 76-80.
of stockholders presumed, § 226.
in territories under alien act of 1887, §§ 243, 244.
extent of placer ground which may be located by, § 226.
are they to be treated as individuals or associations? §§ 226, 449.
applications for patents by, § 681.
proofs to be furnished, § 681.
**Foreign.**
may hold title to unpatented mining claims until office found, § 244.
See ALIENS.

**Cotenancy.** See CO-OWNERS; TENANTS IN COMMON.

**Course of Vein.**
onward, called "strike," § 318.
"strike" defined, § 318.
cannot be followed beyond boundaries, §§ 553, 60.
rule prior to patent under act of 1866, §§ 58, 59.
cross lodes, §§ 557-560.
presumptions as to continuity within location boundaries, §§ 615, 866.
downward, term used in Revised Statutes, § 317.
text of federal law, Revised Statutes, § 2322, p. 1165.
equivalent of "dip," § 318.
"dip" judicially defined, § 318.
See EXTRALATERAL RIGHT.

**Courts.**
cannot interfere with land department in the disposal of public lands, § 438.

**Courts**—*Continued.*
what are competent to try actions upon adverse claims, § 746.
federal, jurisdiction of, § 747.
to what such jurisdiction referable, §§ 748, 749.
transfer of causes from state to, § 750.
state, jurisdiction of, § 750.
to what such jurisdiction is referable, §§ 748, 749.
transfer of causes from, to federal, § 750.
judgments of, in adverse suits, how considered by land department, § 765.
**Cross Lodes.**
text of federal law on subject of, Revised Statutes, § 2336, p. 1178.
interpretation of, § 557.
Colorado doctrine, § 558.
Montana doctrine, § 559.
Arizona-California doctrine, § 560.
author's conclusions, § 560.
owner of, as adverse claimant in patent proceeding, § 727.
**Customs.**
of miners, existence of a question of fact, § 272.
no distinction between legal effect of, and written rule, § 272.
existence may be proved regardless of date of adoption, § 272.
or duration of operation, § 272.
common law doctrine does not apply to, § 272.
of "free tailings" not extended to depositing waste on another's land, § 843.
right to pollute stream in conduct of mining operations may be founded on, §§ 839, 841.
See Local Rules and Customs.
**Damages.**
liability for failure to leave pillars to support surface, § 819.
flooding lower mine, §§ 807, 808.
measure of, in actions of trespass on mining claims, § 868.
for depositing debris on lands of others, § 844.
**Damnum Absque Injuria.**
injury caused to mines by natural underground flow of water is, § 807.
fouling streams in mining operations, when, § 841.
**Dams.**
cost of construction of, when may apply to annual labor, § 631.
liability for injuries caused by breaking of, § 808.
See Hydraulic Mining.
**Death.**
does not dissolve mining partnership, §§ 796, 803.
surviving partner in mining partnership has no right as survivor to take control, § 803.
**Debris.** See Tailings; Hydraulic Mining; Pollution of Streams.
**Debris Commissioner.** See California Debris Commission.
**Declaratory Statement.**
under Montana law same as certificate of location in other states, § 379.
under coal land laws, § 505.
See Certificate of Location

**Deed.**
of mining claim, not required to transfer title under early customs, § 270.
under existing laws, transfer of title and recording not subject to local district regulation, § 270.
necessary to transfer title to mining claim, §§ 270, 642.
rules applicable to other real estate govern, § 270.
law of conveyancing regulated by the state, §§ 544, 857.
by one of several cotenants, effect of, 791.

**Deep Placers.**
are not deposits "in place," §§ 301, 427.
subject to location under placer laws, §§ 301, 427.
must locations of, on surveyed lands conform to public surveys? § 448.

**Definitions.**
difficulties of accurate, § 282.
mining terms not susceptible of exact, § 282.
are dangerous by reason of inaccuracy, § 282.
important questions of law not determined by slavish adherence to, §§ 282, 289.
*Apex*—not found in miner's vocabulary, § 306.
not defined by geologists, § 306.
definition of lexicographers, § 306.
sent to public land commission, § 307.
of Dr. Raymond, § 308.
the ideal lode and its, § 309.
necessarily a surface, § 309.
illustrations, §§ 310, 311, 312.
*Claim*—as used in § 2324, Revised Statutes, § 628. See MINING CLAIM.
*Deposits*. See VALUABLE DEPOSIT.
*Dip* (of vein)—not found in Revised Statutes, § 317.
popular use of term, § 317.
judicially defined, § 318.
*Downward Course*—used in Revised Statutes, § 2322, p. 1165.
judicial definitions, §§ 317, 318.
*Face* (of tunnel)—as used in tunnel laws, § 473.
*Hydraulic Mining*—as used in California debris act, § 852.
*In Place*—classification of mineral deposits, § 298.
use of term in mining laws, § 299.
blanket deposits of Leadville, § 300.
judicial interpretation, § 301.
*Known Mines*—as used in pre-emption law, § 308.
not the equivalent of "mineral lands," § 308.
*Lead*—synonymous with "lode," § 290.
applied to subterranean auriferous gravels, § 290.
*Ledge*—as defined by lexicographers, § 287.
elements to be considered in applying definition, § 289.
legal equivalent of "lode" and "vein," § 289.
a local term, § 290.
*Line* (of tunnel)—in tunnel laws, § 473.

**Definitions**—*Continued.*
*Location*, § 327.
not always legal equivalent of "mining claim," § 327.
"claim" as used in § 2324, Revised Statutes, means, § 628.
*Lode*—English and Scotch definitions, § 286.
when used as equivalent of mine, §§ 89, 176, 286.
as defined by the lexicographers, § 287.
as defined by the geologists, § 288.
miners made the definition first, § 289.
definition of Dr. Raymond, § 289.
elements to be considered in applying definition, § 289.
legal equivalent of "vein," "ledge," § 290.
may include more than one vein, § 290.
classification of cases in which term to be construed, § 291.
judicial definition, § 292.
the Eureka case, § 292.
the Leadville cases—blanket deposits, § 293.
other judicial definitions, § 294.
neither size nor richness of ore elements, § 294.
includes impregnations, § 294.
*Mine*—an indefinite term, § 87.
English definitions, §§ 88, 89.
American definitions, § 93.
as used in townsite laws, § 176.
sometimes equivalent of "vein," §§ 89, 176, 286.
*Mineral*—an indefinite term, § 87.
English denotation, §§ 88, 90.
American definitions, § 93.
*Mineral Lands*, §§ 94, 95.
restriction of, in cases of school grants, §§ 137, 140.
railroad grants, §§ 158, 162.
not equivalent of "known mines," § 208.
metallic, or nonmetallic character, as affecting their appropriation, § 323.
*Mining Claim*, § 327.
not always synonymous with "locations," § 327.
"claim" as used in § 2324, Revised Statutes, means location, § 628.
as used in townsite laws, § 176.
*Placer*, § 419.
*Public Lands*, §§ 80, 85, 112, 322.
*Rock in Place*—use of term in mining laws, § 299.
blanket deposits of Leadville, § 300.
judicial interpretation, § 301.
*Strike* (of vein)—term not found in mining laws, § 317.
popular use of the term, § 317.
judicial definition, § 318.
*Top.* See APEX.
*Valuable Deposits*—meaning of term as occurring in mining laws, § 323.
term first used in act of 1872, § 71.
equivalent of "mineral lands," §§ 86, 323.

**Definitions**—*Continued.*
*Vein*—English and Scotch definitions, § 286.
when used as equivalent of "mine," §§ 89, 176, 286.
as defined by the lexicographers, § 287.
as defined by the geologists, § 288.
miners made the definition first, § 289.
definition of Dr. Raymond, § 289.
elements to be considered in applying definition, § 289.
legal equivalent of "lode" and "ledge," § 290.
classification of cases in which term is used, § 291.
judicial definitions and their application, § 292.
the Eureka case, § 292.
the Leadville cases, blanket deposits, § 293.
other judicial definitions, § 294.
neither size nor richness of ore elements, § 294.
includes impregnations, § 294.
**Delaware.**
not subject to federal mining laws, § 19.
no mining legislation in, § 19.
**Department of the Interior.**
act of congress creating, § 47.
supervision of mineral lands transferred to, § 47.
See LAND DEPARTMENT.
**Deposit.**
"forms of," term used in act of 1870, § 71.
"valuable," term used in act of 1872, § 71.
Revised Statutes, § 2320, p. 1164.
meaning of term, § 323.
equivalent of mineral lands, §§ 86, 323.
for purposes of location divided into two classes, "in place" and "not in place," §§ 298, 323, 419.
what are "in place," §§ 299, 300, 301.
nonmetallic, "in place," how appropriated, § 323.
what are not "in place," *i. e.* subject to location under placer laws, § 419.
**Deputy Mineral Surveyors.**
their appointment and duties, § 661.
the federal statute, Revised Statutes, § 2334, p. 1177.
departmental regulations, p. 1210, par. 98.
not permitted to act as attorneys, § 661.
departmental regulations, p. 1210, par. 101.
not prevented from locating claims, § 661.
right of mineral applicant to select, § 670.
the federal statute, Revised Statutes, § 2334, p. 1177.
departmental regulations, p. 1210, par. 98.
fees to be paid by applicant for survey, § 670.
the federal statute, Revised Statutes, § 2334, p. 1177.
See SURVEYS, MINERAL.
**Derbyshire.**
customs of, as defeating *prima facie* ownership of minerals, § 2.
lead mines governed by local customs, § 8.
right to search for ore, § 8.

**Derbyshire**—*Continued.*
right of discoverer, § 8.
"meer" defined, § 8.
distinction between "rake" and "flat" veins, § 8.
measurement of "meers" by barmaster, § 8.
surface rights in connection with vein, § 8.
"freeing the meer," § 8.
"lot" and "cope," § 8.
necessity for working the vein, § 8.
"nicking the spindle," § 8.
resumption of work, § 8.
nature of estate in "meer," § 8.
"dip" right in rake vein, § 8.
similarity between and American customs, § 43.

**Description.**
in certificates of location variations between courses and calls for monuments, §§ 381, 382.
courses and distances yield to monuments, §§ 382, 778.
but to invoke rule monuments must be perpetuated, §§ 375, 382.
by reference to natural objects and permanent monuments in location notices, §§ 381, 382.
sufficiency of, a question of fact, § 383.
when presumed, § 383.
parol evidence when admissible in aid of, § 383.
of surveyed claims in notices of application for patent, § 677.
of placers on surveyed lands in patent proceedings, § 700.
exceptions in junior patent of senior conflicting area, § 782.

**Desert Lands.**
acts providing for reclamation of, § 212.
mineral lands not subject to appropriation under laws, § 212.

**Development Work (as an Act of Location).**
states may prescribe nature and extent of, §§ 250 (15), 443.
can it be credited to annual work required by federal law? §§ 632, 443.

**Lodes.**
object of requirement, § 344.
state legislation on subject, § 343.
California, character of, not specified, p. 1245, § 3.
Utah, character of, not specified, p. 1332, § 5.
See DISCOVERY SHAFT AND ITS EQUIVALENT.

**Placers.**
object of requirement, § 443.
validity of state laws, § 443.
state legislation, § 443.
California, p. 1246, § 4.
Idaho, p. 1284, § 12.
Montana, p. 1286, par. 2.
Utah, p. 1332, § 5.
See ANNUAL LABOR.

**Devonshire.**
customs of, as defeating *prima facie* ownership of minerals, § 2.
tin bounding in, governed by customs similar to Cornwall, § 6.
See CORNWALL.

**Diagram.**
in patent application under act of 1866, functions of, §§ 59, 60, 572, 573.
**Diamonds.**
lands containing, classified as mineral by land department, § 97.
subject to entry under placer laws, § 420.
**Dip (of Vein).**
pursuit of rake veins on the, under local customs of Derbyshire, § 8.
term not found in Revised Statutes, § 317.
and "downward course" synonymous, § 317.
popular use of the term, § 317.
as judically defined, § 318.
bears a mathematical relation to strike, § 317.
location cannot be made on, § 364.
Judge Hallett's views as to location on, § 364.
See EXTRALATERAL RIGHT; UNION OF VEINS.
**Dips, Spurs, and Angles.**
granted by local mining customs prior to 1866, § 43.
basis of extralateral right, § 43.
location of, under local rules and customs, § 43.
terms used in act of 1866, p. 1142, § 2.
See EXTRALATERAL RIGHT.
**Discovery.**
foundation of miner's title under local customs, § 44.
subsequent to approval of survey will not defeat title of state to school lands, § 142.
prior to final listing, prevents selection by state as lieu lands, § 143.
prior to certification of railroad indemnity selection prevents approval of such selection, § 157.
prior to patent to railroad company defeats title, § 154.
subsequent to railroad patent, will not defeat title, §§ 161, 162.
townsite patent, §§ 170, 175.
final homestead receipt, § 208.
perfected location relates back to, § 373.
recorded certificate of location as *prima facie* evidence of, § 392.
new, not required to support relocation, § 403.
**Lode.**
source of miner's title, §§ 328, 329, 335.
no valid location without, § 335.
must precede location, § 335.
or be in advance of intervening right, § 335.
priority of, gives priority of right against location without, § 335.
what constitutes a valid, § 336.
liberal rules applied between mining claimants, § 336.
strict rules applied between mining and agricultural claimants, § 336.
rules followed by land department, § 336.
neither size nor richness of, material, § 336.
views of Judge Hawley, § 336.
where discovery must be made, § 337.
must be on public mineral lands, § 337.
within limits of claim, § 337.
any portion of the apex sufficient, § 337.

**Discovery**—*Continued.*
must be treated as an entirety and basis of but one location, § 337.
exceptions to the rule, § 337.
loss of, is loss of location, § 338.
extent of locator's rights after, and prior to completion of location, §§ 339, 219.
after, has a reasonable time to complete location, § 339.
relationship of, to discovery shaft, § 345.
See DISCOVERY SHAFT.
**Placers.**
as essential as in lode claims, § 437.
*dictum contra* by supreme court of California, § 438.
return by surveyor-general that land is mineral does not dispense with, § 438.
rules governing same as in cases of lodes, § 437.
on each twenty-acre tract required, § 438.
rule of land department in location by associations in excess of twenty acres, § 438.
rule announced by supreme court of Montana, § 438.
**In Tunnels.** See TUNNEL LOCATIONS.
**Discovery Shaft and Its Equivalent.**
state legislation requiring, § 343.
Arizona, discovery shaft, p. 1236, § 3.
equivalent, p. 1237, § 5.
time allowed for completion, p. 1237, § 6.
California (character of work not specified), p. 1246, § 4.
Colorado, p. 1264, par. 5.
equivalent, p. 1265, par. 7.
time allowed for completion, p. 1265, par. 8.
Idaho, p. 1278, § 3.
equivalent, p. 1278, § 3.
time allowed for completion, p. 1278, § 3.
Montana, p. 1286, par. 2.
equivalent, p. 1286, par. 2.
time allowed for completion, p. 1286, par. 2.
Nevada, p. 1292, § 2.
equivalent, p. 1292, § 2.
time allowed for completion, p. 1298, § 2.
New Mexico, p. 1307, par. 3.
equivalent, p. 1307, par. 3.
time allowed for completion, p. 1307, par. 3.
North Dakota, p. 1314, par. 5.
equivalent of, p. 1315, par. 7.
time allowed for completion, p. 1315, par. 8.
South Dakota, p. 1325, par. 5.
equivalent, p. 1326, par. 7.
time allowed for completion, p. 1326, par. 8.
Utah (character of work not specified), p. 1332, par. 5.
Wyoming, p. 1342, par. 4.
equivalent, p. 1343, par. 5.
time allowed for completion, p. 1343, par. 6.
validity of state laws, § 250 (15).

**Discovery Shaft and Its Equivalent**—*Continued.*
object of requirement as to, § 344.
relationship of the discovery to, § 345.
must be within limits of claim as located, § 345.
not necessary to sink at original point of discovery, § 345.
locator protected in his possession during time allowed for sinking, § 345.
extent of work necessary to comply with laws, § 346.
may cost of sinking be credited on annual work? § 632.
**Dissolution.**
of mining partnership, § 802.
death does not affect, §§ 796, 803.
surviving partner has no right to take control, § 803.
**Districts, Mining.**
state laws providing for method of organizing, § 259 (12).
how organized, § 269.
See LOCAL RULES AND CUSTOMS.
**Ditches.**
right of way for, over public lands, §§ 529, 530.
mining locations subject to pre-existing rights of way for, §§ 530, 531.
right of way for, cannot be acquired over mining claims except for public uses, § 531.
cost of constructing, when may be credited to annual labor, § 631.
See EMINENT DOMAIN.
**Dower.**
estate of galee in lead mines of Derbyshire, subject to, § 8.
no dower in unpatented mining claims, §§ 543, 544.
in patented mining claims, states recognizing, § 543.
in the territories, § 544.
**"Downward Course" (of Vein).**
term used in Revised Statutes, § 317.
text of federal law, Revised Statutes, § 2322, p. 1165.
equivalent of "dip," § 318.
"dip" judicially defined, § 318.
See EXTRALATERAL RIGHT.
**Drainage of Mines.**
federal law purporting to authorize state legislation on subject of, Revised Statutes, § 2338, p. 1179.
right of eminent domain exercised by states, not derived from federal laws, § 252.
state and territorial legislation concerning, §§ 252, 806.
law of natural flow, § 807.
rights and duties of higher and lower proprietor, § 807.
introduction of foreign water, § 808.
flooding, § 808.
negligence in cases of, to what extent an element, § 808.
property may be condemned for purposes of, in certain states, §§ 19, 806.
See EMINENT DOMAIN.

**Dump.**
land for purposes of, in connection with located lode, may be acquired as a millsite, § 523.
not allowed on lands of others, § 843.
See TAILINGS.
**Duplicate Receipt.** See CERTIFICATE OF PURCHASE.
**Easements.**
right of states to legislate upon subject of mining, § 252.
text of federal statute, Revised Statutes, § 2338, p. 1179.
rights of way for ditches and canals over public lands, § 529.
text of federal law, Revised Statutes, § 2340, p. 1180.
highways over government lands, § 530.
mining locations are subject to pre-existing, §§ 530, 531.
condemnation for, only authorized for uses specified in state constitution, § 252.
mining as a "public use," § 254.
rights of way for pipe lines for oil and natural gas, § 255.
for lateral and other railroad for transportation of mine products, § 256.
for mining purposes, states that have legislated on subject, § 252.
right of eminent domain within the states not derived from federal laws, § 252.
physical and industrial conditions as affecting rule of public utility, § 237.
condemnation for purpose of mining in Nevada, § 258.
Arizona, § 259.
Georgia, § 260.
Pennsylvania, § 261.
West Virginia, § 262.
California, § 263.
general conclusions on subject of "public use," § 264.
rights of way over mining claims cannot be acquired, except for public uses, § 531.
right of prior townsite occupant to subjacent support where lode patent is issued, § 175.
right of way for railroads by government an absolute grant, § 153.
when takes effect, § 153.
carries minerals, § 153.
rights of way through forest reserves for transmission of electricity, p. 245, note 1.
right of ingress and egress for mining purposes within forest reservations, p. 1232.
not proper subject of adverse claim in patent proceedings, § 729.
right of access to lower strata by owner of surface, § 827.
reciprocal, between owners of different strata, § 826.
of natural underground flow of water, § 807.
of subjacent support, §§ 826, 827.
of lateral support, §§ 831, 833.
**Ejectment.**
lies for unpatented mining claims, §§ 535, 538, 773.
may be maintained on certificate of purchase of mining claims, § 773.

**Eminent Domain.**
mining not considered a public utility by the government, §§ 80, 112.
mining as a "public use" within the states, § 254.
Arizona, § 259.
California, § 263.
Georgia, § 260.
Kentucky, § 19.
Massachusetts, § 19.
Nevada, § 258.
New York, § 19.
Pennsylvania, § 261.
Tennessee, § 19.
West Virginia, § 262.
states which have legislated upon subject of mining easements, § 252.
right of, exercised by states, not derived from federal laws, § 252.
right of United States to exercise, within states limited to public purposes, § 252.
provisions of Revised Statutes concerning state legislation on subject of easements, § 252.
constitutional provisions of the states, § 253.
rights of way for pipe lines for oil and gas, § 255.
lateral and other railroads for transportation of mine products, § 256.
physical and industrial conditions as affecting rule of "public utility," § 257.
power of state may be exercised for private uses if sanctioned by its constitution, §§ 252, 531.
but such power limited to the specified uses, § 252.

**End Lines.**
**Under Act of 1866.**
were implied, §§ 58, 365, 567.
the Eureka case, §§ 58, 576.
circular instructions as to, § 59.
fixed in patent diagram as controlling rights on located lode, § 573.
extralateral right where, converge in direction of dip, § 574.
when they diverge, § 575.
parallelism not essential, §§ 58, 365, 575, 576.
**Under Act of 1872 and the Revised Statutes.**
changes made by act of 1872, § 75.
functions of, § 365.
stop pursuit of vein on strike, § 365.
define the extralateral right, § 365.
parallelism of, essential to exercise of extralateral right, § 365.
nonparallelism of, does not render location void, § 365.
location with nonparallel, confers only limited right, § 365.
locator may give them any direction if parallelism preserved, § 365.
theory of law requiring parallelism, § 365.
should be parallel throughout, § 365.
broken end lines not sanctioned, § 365.

**End Lines**—*Continued.*
locator may abandon portion of claim for purpose of paralleling, § 365.
need not be of same length, § 365.
must be throughout their entire length on public domain, § 365.
must conform to boundary of prior locator, § 365.
cannot be extended into limits of prior location, § 365.
irregularly shaped locations resulting from the rule, § 365.
rights of owners of irregularly shaped locations, § 365.
side lines, when become, § 367.
not always those designated by locator as such, § 367.
parallelism, when essential to exercise of extralateral right, § 582.
the Elgin-Horseshoe case, § 582.
extralateral right, where converge in direction of dip, § 582.
right conferred by patent with parallel, cannot be defeated by showing nonparallelism of original, § 582.
substantial parallelism sufficient, § 582.
locator may amend his location by paralleling, §§ 365, 396, 582.
See EXTRALATERAL RIGHT.

**England.**
common law of, as part of American system, § 1.
force of English precedents, § 1.
common law of, modified by local customs, § 4. See CORNWALL; DEVONSHIRE.
has no general mining code, § 10.
English denotation of terms "mine" and "mineral," §§ 88-92.

**Entry.** See CERTIFICATE OF PURCHASE.

**Estate.**
nature of, in "tin bounds" in Cornwall, § 5.
Devonshire, § 6.
"gales" in Forest of Dean, § 7.
"meers" in Derbyshire, § 8.
mines under the civil law, § 11.
created by accepted homestead filing, § 205.
pre-emption filing, § 205.
homestead and pre-emption compared, § 205.
in perfected mining location, the early decisions, § 535.
has attributes of a fee, §§ 535, 536, 538, 548.
compared with copyholds, § 540.
*dominium utile*, §§ 541, 11.
homestead claims, § 542.
pre-emption claims, § 542.
dower not allowed in, § 543.
perpetuation of, by annual labor, §§ 623-638.
how lost, § 642.
how transferred, § 642.
held by alien locator, §§ 232, 233.
purchaser from citizen locator, §§ 232, 233.

**Estate**—*Continued.*
in perfected mining location, alien holds until "office found," § 233.
of locator of mining claims is by purchase, § 233.
nature of, in the vein, created by grant of the extralateral right, §§ 568, 585.
**Estoppel.**
acceptance by state of surveyor's mineral return, effect as to state school lands, § 144.
rule of "*res adjudicata*" as applied to decisions of land department as to character of land, § 208.
not an element of abandonment, § 644.
**Evidence.**
surveyor-general's return as, §§ 106, 207.
how overcome, §§ 106, 207.
possession as, of title, § 216.
of citizenship, § 227.
copies of district records as, § 272.
all written rules of a district constitute one instrument, § 272.
parol, of mining custom inadmissible to contradict written rule, § 272.
unless written rule has fallen into disuse, § 272.
district rules once adopted presumed to continue in force, § 272.
of abrogation and disuse of miners' rules and customs, § 272.
local rules and regulations, courts do not take judicial notice, § 272.
local rules and regulations, how proved, § 272.
mining district records do not prove themselves, §§ 272, 391.
how proved, §§ 272, 391.
presumption that apex exists within land covered by lode patent, § 313.
*situs* of apex a question of fact, § 313.
of record of mining claim inadmissible unless record required by state law or local rule, § 273.
recorded certificates of location, evidence of what facts, § 392.
parol evidence, when admissible in aid of description contained in location certificates, §§ 382, 383.
affidavits of annual labor under state laws as, § 636.
certificate of purchase as, § 773.
to establish or negative abandonment, § 644.
declarations of party in cases of alleged abandonment, § 644.
patent record as, to show date to which it relates, § 781.
burden of proof in cases of alleged forfeiture or abandonment, §§ 636, 643.
burden, when shifted, under Idaho law, § 636.
text of the law, p. 1280, § 6.
burden, when shifted, under New Mexico law, § 636.
text of law, p. 1309, par. 7.
in contests over character of land, §§ 106, 689.
to overcome surveyor-general's return, §§ 106, 207, 689.
when burden shifts, § 689.
in actions arising out of underground trespasses, § 866.
does burden shift during trial? § 866.

**Exceptions.**
in junior patents, of area in conflict with senior title, § 782.
See RESERVATIONS.
**Execution.**
unpatented mining claims subject to sale on, § 535.
purchaser at sale must adverse patent application of judgment debtor, § 719.
**Expenditures.** See ANNUAL WORK; WORK AND EXPENDITURES.
**Extralateral Right.**
**Foreign Analogies.**
pursuit of "rake veins" under customs of Derbyshire, § 8.
the "inclined locations" of the early German codes, § 43.
**Under Local Customs.**
following "dips, spurs, and angles," §§ 43, 566.
**Under Act of 1866.**
end lines, implied, §§ 58, 365, 567.
not required to be parallel, §§ 58, 365, 575, 576.
"dips, angles, and variations," §§ 61, 567.
right to a patent and its restriction to one lode, § 572.
functions of diagram and surface lines, § 573.
right of patentee under act of 1866, where end lines converge in direction of dip, § 574.
where end lines diverge, § 575.
conclusions of author, § 577.
on other lodes conferred by act of 1872, on claims located prior, § 598.
construction of patents applied for prior to repeal, but issued after act of 1872, § 604.
**Under Act of 1872 and Revised Statutes.**
governed by form of surface location, § 71.
difference between acts of 1866 and 1872, § 71.
state legislation defining, of no force, § 251 (1).
discussed with reference to nonmetallic deposits in place, § 323.
ideal location described, conferring greatest possible rights, § 360.
pertaining to lodes located within placers, §§ 414, 619.
apex, as a controlling factor, § 305.
defined, §§ 306-308.
the ideal lode and its, § 309.
necessarily a surface, § 309.
departure from the ideal lode, § 310.
illustration of apex questions, §§ 311, 313.
Leadville blanket deposits, §§ 311, 313.
origin and use of term "extralateral right," § 565.
nature of estate in vein created by grant of, § 568.
grant of extralateral right is severance of the vein from overlying surface, § 568.
estate in the vein is that of title in fee, §§ 568, 585.
parallelism of end lines essential, § 582.
the Elgin-Horseshoe case, § 582.
location must include entire width of apex, "broad lodes," § 583.
vein entering and departing through the same side line, § 584.
applied to the ideal lode, § 585.

**Extralateral Right**—*Continued.*
vein crossing two parallel side lines, § 586.
the Flagstaff case, § 586.
Argentine-Terrible case, § 587.
King-Amy case, § 588.
deductions from side-end line cases, § 589.
vein crossing two opposite nonparallel side lines, § 590.
vein crossing one end line and a side line, § 591.
vein with apex wholly within location crossing none of its boundaries, § 592.
vein entering at one end line not reaching any other boundary, § 592.
as to veins other than the one upon which the location is based, § 593.
conclusions, § 594.
on other lodes, conferred by act of 1872 on claims previously located, § 598.
where end lines of original location cross original lode and are parallel, § 599.
where the end lines are not parallel, § 600.
construction of patents applied for prior, but issued subsequent, to act of 1872, § 604.
legal obstacles interrupting, § 608.
prior appropriation by regular valid location of a segment of same vein without surface conflict, § 609.
priority of location, how affects, § 610.
junior apex locator may pursue vein underneath senior location, § 611.
the rule where vein penetrates underneath agricultural grants, § 612.
the rule where vein penetrates underneath other classes of grants, § 613.
union of veins on dip, § 614.
identity and continuity of veins involved in exercise of, § 615.
presumption as to, § 615.
extent of apex necessary to be shown where right is challenged, § 615.
does not follow a placer location, § 619.
upon lodes within placers depends upon lode appropriation, § 619.
burden of proof in cases of underground trespasses, § 866.

**Extralimital Rights.**
defined, § 549.
See EXTRALATERAL RIGHT.

**Fault.**
does not destroy continuity of vein, § 615.
occurrence of, in veins prevents equitable partition, § 792.

**Federal Courts.**
jurisdiction of, in actions to determine adverse claims, § 747.
to what such jurisdiction referable, §§ 748, 749.
transfer of causes from state to, § 750.

**Federal Question.**
proper interpretation of mining law not necessarily a, § 81.
involved in action to determine adverse claims, § 748.

**Fees.**
for publication of patent applications, § 678.
departmental regulations, p. 1209, par. 97.
of register in filing patent application, § 678.
of deputy mineral surveyor, to be paid by claimant, § 670.
statement of, to be filed in patent proceedings, § 693.
departmental regulations, p. 1211, par. 102.
form of, p. 1388.
**Fee Simple.**
estate of mining locator has attributes of, §§ 535, 536, 538, 548.
**Fire Clay.**
classified as mineral under English authorities, § 92.
by land department, § 97.
**Fixtures.**
mining, what are, § 409.
right of relocator to, left by original locator, § 409.
**Flint Stones.**
classified as mineral by English decisions, § 92.
**Flooding.**
of mines, responsibility for damage caused by, § 808.
**Florida.**
ceded to United States by Spain, p. 35, note 2.
is subject to mining laws of congress, p. 35, note 2.
federal coal land laws operative in, § 498.
dower right exists in, § 543.
but does not attach to unpatented mining claims, § 543.
**Flumes.**
cost of constructing, when may be credited to annual labor, § 631.
**Fluorspar.**
manner of locating lands containing depends upon mode of occurrence, § 323.
**Forcible Entry.**
mining claim may not be located by a, §§ 217, 330.
claimant dispossessed by, excused from performing annual labor, § 634.
**Foreign Law.**
influence of, on the American system, § 1.
comparative review of mining, § 1.
title of the United States to ceded lands not affected by laws of ceding nation, § 80.
**Forest of Dean.**
local customs in, § 4.
coal, iron, and other mines governed by local customs, § 7.
"gales," "galee," "galeage," defined, § 7.
"free miners," defined, § 7.
registration of gales with gaveler of the forest, § 7.
"gale," how acquired, § 7.
obligation of galee to work his gale, § 7.
estate of galee, § 7.
transfer of gale, § 7.
forfeiture of gale, § 7.

**Forest Reservations.**
manner of creating, § 197.
purposes of creating, § 197.
enumeration of, § 197.
how abolished, § 197.
status of mining claim in, prior to act of June 4, 1897, § 198.
same rule applied as in Indian and military reservations, § 198.
right of way for transmission of electricity, p. 245, note 1.
the act of June 4, 1897, p. 1232.
departmental regulations, pp. 1232, 1234.

**Forfeiture.**
for failure to comply with local rules not worked, unless rules so prescribe, §§ 273, 274.
to record notice of location, §§ 273, 290.
to sink discovery shaft, § 345.
by senior of area conflicting with junior locator will not inure to benefit of latter, § 363.
forfeited conflict area can only be appropriated by junior locator by amended location, § 363.
burden of proof rests upon one asserting, §§ 636, 644.
statutory exceptions in Idaho and New Mexico, § 636.
for failure to perform annual work, Revised Statutes, § 2324, p. 1168.
circumstances under which locator's estate is terminated, § 642.
distinction between abandonment and, § 643.
intention to abandon not an element of, § 643.
is not complete until someone else enters with intent to locate, §§ 643, 645.
only may ensue after lapse of statutory period upon failure to perform work, §§ 632, 643.
must be specially pleaded, § 643.
except in actions upon adverse claims, § 643.
penalty for failure to perform annual work, § 645.
penalty enforced reluctantly, § 645.
deemed in law odious, §§ 645, 646.
must be established by clear and convincing proof, §§ 274, 636, 645.
work must be done, or claim will be subject to, § 645.
foreign analogies — Cornwall, § 5.
Devonshire, § 6.
Forest of Dean, § 7.
Derbyshire, § 8.
France, § 12.
pendency of patent proceedings does not prevent, if labor unperformed, § 632.
relocation, when claim subject to, § 402.
new discovery not essential, § 403.
admits validity of original, § 404.
by original locator, § 405.
by one of several original locators in hostility to the others, § 406.
by agent or others occupying fiduciary relations, § 407.
by mortgagor, § 407.

**Forfeiture**—*Continued.*
relocation, manner of perfecting, § 408.
right of second locator to improvements made by first, § 409.
resumption of work prevents, § 651.
what constitutes valid, § 652.
when right must be exercised, §§ 408, 653.
general conclusions, § 654.
foreign analogies, §§ 5-8.
to co-owner, the federal law, § 646.
object of provisions, § 646.
suggestions of unconstitutionality, § 646.
statute must be strictly construed, §§ 646, 251 (5).
right of state to legislate upon, §§ 251 (5), 646.
state statutory provisions—Arizona, pp. 1240, 1241, §§ 1-5.
California, p. 1249, § 1.
Colorado, p. 1270, par. 2.
Nevada, p. 1297, § 11.
how treated by land department, § 646.
remedy of cotenant excluded from patent proceeding, § 646.
**Forms and Precedents.**
notices and certificates of location, pp. 1357-1372.
Alaska, p. 1372.
Arizona, p. 1357.
California, preliminary lode, p. 1359.
final lode, p. 1360.
placer, p. 1362.
Colorado, preliminary lode, p. 1363.
for recording, p. 1364.
Idaho, discovery notice, p. 1366.
for recording, p. 1366.
Montana, for posting, p. 1367.
declaratory statement, p. 1367.
New Mexico, p. 1368.
North Dakota, preliminary, p. 1369.
final, p. 1370.
Oregon, p. 1371.
South Dakota, p. 1371.
Utah, p. 1371.
Washington, p. 1372.
Wyoming, p. 1372.
proceedings to obtain lode patent, pp. 1373-1392.
application for survey, p. 1373.
application for patent, p. 1374.
certified copy notice of location, 1377.
proof of posting notice and diagram on claim, p. 1378.
notice of application for patent (exhibit A), p. 1379.
affidavit of citizenship, p. 1381.
agreement of publisher, p. 1382.
proof of labor (claimant), p. 1382.

**Forms and Precedents**—*Continued.*
proof of labor (witnesses), p. 1383.
proof of mineral character of land, p. 1384.
notice of application for patent, p. 1386.
proof that plat and notice remained posted, p. 1387.
statement of fees and charges, p. 1388.
affidavit of publication, p. 1389.
application to purchase, p. 1389.
placer—proof that no known lodes exist, p. 1391.

**Fossils.**
classified as mineral under French law, § 12.

**France.**
influence of mining laws of, on American system, § 1.
mining laws of, § 12.
ownership of mines, § 12.
division into *mines, minières, carrières*, § 12.
*mines, minières, carrières*, defined, § 12.
conditions under which mining concessions granted, § 12.
substances classified as mineral, § 12.
estate vested in *concessionaire*, § 12.
royalties exacted, § 12.
right of search in private property, § 12.
manner of obtaining concessions, § 12.
rights limited to vertical planes through surface boundaries, § 12.
territory acquired by United States by Louisiana purchase, § 33.
adjustment of claims to grants in territory ceded by, § 117.

**Fraud.**
location of placers by use of "dummies" is a, § 450.
power of land department to cancel entry for, § 772.
patents may be vacated on ground of, § 777.

**Freestone.**
classified as mineral under English authorities, § 92.
See BUILDING STONE.

**Gas, Natural.**
classified as mineral, § 423.
lands containing, subject to appropriation under placer laws, § 423.
right to condemn right of way for pipe lines to transport, § 256.

**Geological Surveys.**
not the basis for classifying lands, § 103.

**Georgia.**
not subject to federal mining laws, § 19.
no mining legislation in, § 19.
mining as a public use in, § 200.

**Gold.**
mines of, under common law belonged to the crown, § 3.
what constituted, § 3.
early discoveries in America, § 29.
ordinance of May 20, 1785, reserved one third to government, § 30.
discovery of, in California, § 40.
mines of, reserved from Mexican grants under act of 1891, §§ 118, 127.
townsite entries, §§ 166, 176.

**Granite.**
classified as mineral under English decisions, § 92.
American decisions, § 93.
See BUILDING STONE.
**Grant.**
royal mines at common law did not pass by, unless named, § 3.
reservations in crown, to colonies, § 31.
by the United States, carries minerals unless reserved, § 80.
a valid mining location has the effect of a, §§ 169, 539.
nature and extent of such, § 550.
right to pollute streams may be acquired by, § 840.
See CONVEYANCE.
**Grants.**
**Mexican.**
ownership of mines under Mexican law, § 114.
interest in mines did not pass by, under Mexican law, § 114.
title to mines conveyed only under mining ordinances, § 114.
nature of title conveyed to United States by treaty, § 115.
obligation of United States to protect rights, § 116.
adjustment of claims to, in California, § 117.
in other states and territories, § 118.
claims to mines asserted under mining ordinances, § 119.
status of, considered with reference to condition of title, § 120.
*sub judice*, § 121.
different classes of, § 122.
by specific boundaries, § 123.
of a place or *rancho* by name, § 123.
while *sub judice*, are not public lands, § 123.
"floats" ascertained surplus only, public land, § 124.
mining claims cannot be located within, §§ 123, 124, 128.
confirmed under California act, § 125.
carry minerals, § 125.
by action of Congress, § 126.
act of March 3, 1891, concerning, in Colorado, etc., § 127.
reserves minerals, §§ 118, 127.
change of governmental policy, § 127.
**Railroad.**
area of, in precious-metal-bearing states, § 149.
originally made to trustees for benefit of companies, § 149.
since 1862 made direct to railroad companies, § 149.
object of general analysis of land-grant legislation, § 149.
types of, selected for discussion, § 150.
Pacific railroad acts of 1862, 1864, § 150.
Northern Pacific act of 1864, § 150.
joint resolution of congress reserving mineral lands, §§ 150, 152.
character and extent of grants to Pacific railroads, § 151.
lateral limits of, § 151.
indemnity lands for those not "in place," § 151.
mineral lands reserved from operation of, § 152.
reservation of mineral lands not to include coal or iron, §§ 152, 158.
made in contemplation of future legislation, § 152.

**Grants**—*Continued.*
mining locations within, prior to lode law of 1866, § 152.
grants of sections "in place" acquire precision on survey, § 154.
until survey, grants of alternate sections are "floats," § 154.
grants of alternate sections are "*in præsenti*," § 154.
if surveyed, attach upon filing map of definite location, § 154.
doctrines of relation applied to, § 154.
time when character of land is to be determined, § 154.
discovery of mineral prior to patent prevents title from passing, §§ 154, 155.
construction of, by the courts, § 154.
land department, § 155.
distinction between grants of school lands and, § 156.
return of surveyor-general concludes no one, §§ 106, 157.
indemnity, acquire precision by approved selections, § 157.
mineral lands within indemnity limits not subject to selection, § 157.
of rights of way are present absolute grants, § 153.
title vests on approval of map of definite location, § 153.
subject to valid subsisting mining location, § 153.
for depot and side track purposes subject to supervision of land department, § 153.
grants of alternate sections are "in place," § 154.
limits of grants of alternate sections are "primary" or "place" limits, § 154.
indemnity limits defined, § 154.
indemnity lands, how selected, § 157.
departmental instructions relating to selection of lands by, p. 1224.
in selection of indemnity lands same rules govern as in state lieu selections, § 157.
title to indemnity lands vests only on final certification, § 157.
restriction upon definition of "mineral lands," § 158.
coal and iron will not pass unless specially named, § 158.
ruling of department as to phosphates, §§ 158, 425.
petroleum, § 158.
test of character of land applied to, §§ 158, 159.
state of law and facts at time patent applied for determines patentability, § 159.
or at time application to select is made, § 159.
term "mineral lands" to be construed in its broadest sense, §§ 158, 159.
classification of lands in Idaho and Montana, § 160.
effect of patents issued to railroads, § 161.
discovery of mineral subsequent to patent does not affect title, § 161.
collateral attack on patents, § 161.
patent conclusive evidence of nonmineral character, § 161.
void reservation in patents, § 161.
general principles governing administration, § 162.
**To States for Educational Purposes.**
mineral lands excepted from operation of, §§ 136, 143.
conflicts between mineral claimants and purchasers of, § 135.
restriction upon definition of "mineral" in administering, § 137.

**Grants**—*Continued.*
do petroleum lands pass under? § 138.
do lands valuable for building stone pass? § 139.
test as to mineral character, when and how determined, §§ 140, 141.
character of land at time grant takes effect controls, §§ 140, 145.
coal lands do not pass under, § 140.
subsequent discovery of mineral does not defeat, § 142.
subsequent exhaustion of mineral will not revest title in state, § 142.
sixteenth and thirty-sixth sections, § 132.
when take effect, §§ 142, 145.
until survey, state has no title, § 142.
effect of surveyor-general's return, § 142.
state may contradict, §§ 144, 145.
estopped from contradicting by selection of lieu lands, §§ 144, 145.
compared with railroad grants, §§ 144, 156.
indemnity or lieu-land grants, § 133.
in lieu of mineral lands lost to the state, § 142.
character of land, when to be determined, § 143.
circular instructions with reference to selection, p. 1226.

**Graphite.**
classified as mineral under French law, § 12.
when occurring "in place," how appropriated, § 323.

**Gravel.**
auriferous, in beds of water courses, when subject of appropriation, § 428.
subterranean are not "in place," § 301.
subject to location under placer laws, §§ 301, 427, 428.

**"Grub Stake" Contracts.**
nature of, and obligations of the parties, § 858.

**Gypsum.**
classified as mineral by land department, § 97.
when occurring "in place," how appropriated, § 323.
not "in place," § 420.

**Hearings.** See LAND DEPARTMENT.

**Highways.**
rights of way for, over public lands, § 530.
mining locations subject to pre-existing right of way for, §§ 530, 531.
mining location once perfected cannot be invaded for purpose of, without condemnation, § 531.

**Historical Review.**
original nucleus of national domain, § 28.
cession by the states, § 28.
mineral resources of territory ceded by the states, § 29.
early discoveries of gold in America, § 29.
copper, § 29.
first congressional action on subject of mineral lands, § 30.
reservation in crown grants to the colonies, § 31.
development of copper mines, § 32.
Louisiana purchase, § 33.
legislation concerning lead mines, § 33.
message of President Polk, § 34.

**Historical Review**—*Continued.*
sales of land containing lead and copper, § 35.
reservation in pre-emption laws, § 36.
discovery of gold in California, § 40.
the Mexican cession, § 40.
origin of local customs, § 41.
scope of local regulations, § 42.
"dips, spurs, and angles," § 43.
legislative and judicial recognition by the state, § 44.
federal recognition of local customs, §§ 45, 56.
act of congress creating department of interior, § 47.
supervision of mineral land transferred to the department, § 47.
act ordering mineral lands in Michigan to be sold, § 47.
federal legislation recognizing possessory rights in mineral lands, §§ 47, 56.
executive recommendations to congress, § 48.
passage of the coal land laws, § 49.
Sutro tunnel act, § 49.
passage of the act of July 26, 1866, the "lode and water law," § 53.
essential features of the lode law of 1866, § 54.
declaration of governmental policy, § 55.
recognition of local customs and possessory rights, § 56.
local rules and customs after the act of 1866, § 61.
passage of the placer law of July 9, 1870, § 62.
purchase of Alaska, § 64.
passage of the act of May 10, 1872, § 68.
changes made by the act of 1872, §§ 69, 70, 71.
legislation subsequent to the act of May 10, 1872, § 75.
local rules and customs since the act of 1872, § 76.

**Homestead (Federal).**
laws relating to, considered in connection with mining laws, § 203.
manner of acquiring, § 204.
only nonmineral lands may be acquired, § 204.
if land returned mineral, hearing may be had to contradict the return, § 204.
nature of inceptive right, § 205.
preliminary filing creates a limited estate, § 205.
right of claimant compared with that of pre-emptioner, § 205.
application for mining patent not allowed for lands embraced in, §§ 205, 679.
mining claim may be located within limits of inchoate, § 206.
proceedings to determine character of land, § 207.
regulations of land department concerning, p. 1211, pars. 108-118.
test as to character of land, § 207.
may be attacked, on allegation of mineral character at any time prior to final entry, § 208.
discovery of mineral subsequent to issuance of final receipt does not defeat title, § 208.
final receipt equivalent to a patent, § 208.
right of apex locator to pursue vein in depth underneath prior, § 612.

**Husband and Wife.**
wife partakes of husband's nationality, § 224.
married woman, if citizen, may locate mining claim, § 224.
dower rights in mining property in the states, § 543.
in the territories, § 544.
whether wife must join in conveyance of mining claim depends upon state law, § 544,

**Hydraulic Mining.**
does doctrine of lateral support apply to mine worked by? § 834.
not a nuisance *per se*, § 849.
principles established by California debris cases, § 849.
in California, subject to control of government commission, § 850.
text of act creating commission, p. 1251.
See CALIFORNIA DEBRIS COMMISSION.

**Idaho.**
acquired through Louisiana purchase, § 33.
subject to federal mining laws, § 81.
act of congress for classification of railroad lands in, § 160.
laws of, defining property rights of aliens, § 238.
legislation in, concerning rights of way and mining easements, § 252.
constitutional provisions on subject of eminent domain, § 253.
saline law of January 12, 1877, does not apply to, § 514.
no right of dower exists in, § 543.
legislation on subject of subjacent support, § 822.

**Mining Legislation in.**
*Lode Claims.*
width, § 250 (2).
text of law, p. 1277, § 1.
location, how made, p. 1277, § 1.
certificate of location, contents, § 380.
text of law, p. 1277, § 2.
must claim but one location, p. 1281, § 8.
to be posted at point of discovery, p. 1277, § 2.
form of, suggested, p. 1366.
verification of, §§ 251 (4), 385.
text of law, p. 1283, § 13.
record of, § 389.
text of law, p. 1279, § 4.
appointment of deputy district recorders, p. 1281, § 9.
amendment of, § 397.
text of law, p. 1279, § 5.
discovery shaft, §§ 343, 250 (15).
text of law, p. 1278, § 3.
its equivalent, p. 1278, § 3.
time allowed for completion, p. 1278, § 3.
posting preliminary notice, § 354.
text of law, p. 1277, § 2.
form of notice suggested, p. 1366.
marking boundaries, §§ 374, 250 (7).
text of law, p. 1277, § 2.
change of boundaries, p. 1279, § 5.
line of vein as marked not to be changed, p. 1277, § 1.

**Idaho**—*Continued.*
proof of annual labor, §§ 250 (11), 636.
text of law, p. 1280, § 6.
relocation of abandoned claims, §§ 408, 250 (9).
text of law, p. 1281, § 7.
*Placer Claims.*
location certificate, § 459.
text of law, p. 1282, § 12; amended, p. 1284, § 12.
must claim but one location, p. 1281, § 8.
verification of, p. 1283, § 13.
record of, p. 1283, § 14.
amendment of, p. 1279, § 5.
posting preliminary notice, § 442.
text of law, p. 1284, § 12.
marking boundaries, § 455.
text of law, p. 1284, § 12.
preliminary development work, p. 1284, § 12.
proof of annual labor, § 636.
text of law, p. 1280, § 6.
**Miscellaneous Mining Legislation.**
reference table, p. 1285.
**Illinois.**
lands in, containing baser metals sold under special laws, §§ 20, 35.
**Illustrations.**
Idaho-Maryland patent (act of 1866), figure 1, p. 67.
of patented lode claim, exhibiting construction of act of 1866 by land department, figure 2, p. 68.
Flagstaff case, figure 3, p. 70; figure 39, p. 712.
ideal lode and its apex (cross section), figure 4, p. 391.
ideal location (plan), figure 5, p. 392; figure 16, p. 473.
perspective of vein involved in Duggan *v.* Davey, figure 6, p. 395.
horizontal projection, figure 7, p. 397.
longitudinal section (on line of strike), figure 8, p. 398.
cross section (on line of dip), figure 9, p. 399.
cross section illustrating strike, dip, and apex on flat veins, figures 10, 11, p. 401.
cross sections (Iron S. M. Co. *v.* Cheesman), figures 12 A and B, 13 A and B, pp. 404, 405.
cross section, hypothetical illustrations based upon Leadville cases, figure 14, p. 410.
horizontal projection (North Star-Irish American), figure 15, p. 417.
parallelism of end lines, different angles, figures 17, 18, p. 473.
broken end lines, figure 19, p. 475.
conflicting areas, end lines how to be drawn, figure 20, p. 476.
side lines, figures 21, 22, p. 478.
tunnel claims (Rico-Aspen *v.* Enterprise), figure 23, p. 593.
hypothetical, figure 24, p. 667.
cross lodes (Hall *v.* Equator), figure 25, p. 669.
section from map of Cripple Creek, Colorado, figure 26, p. 664.
Grass Valley, California, figure 30, p. 669.

**Illustrations**—*Continued.*
cross lodes, Pardee *v.* Murray, p. 665.
Watervale *v.* Leach, figure 28, p. 666.
Wilhelm *v.* Sylvester, figure 29, p. 668.
extralateral right under act of 1866, converging end lines, figure 31, p. 684.
diverging, figure 32, p. 685.
Eureka case, figure 33, p. 688.
under act of 1872, Elgin-Horseshoe case, figure 34, p. 697.
broad lodes, plan, figure 35, p. 702.
cross section, figure 36, p. 704.
vein entering and departing through same side line, figure 37, p. 707.
Catron *v.* Old, figure 38, p. 708.
vein crossing two parallel side lines, Flagstaff case, figure 39, p. 712.
Argentine case, figure 40, p. 713.
King-Amy case, figure 41, p. 715.
deductions, figure 42, p. 718.
vein crossing two nonparallel side lines, figures 43, 44, p. 720.
vein crossing one end and one side line, Tyler-Last Chance case, figure 45, p. 722.
Del Monte-New York case, figure 46, p. 727.
Fitzgerald *v.* Clark, figure 47, p. 729.
on other veins, granted under act of 1872, Wyoming-Champion, figure 49, p. 734.
Providence-Champion, figure 50, p. 740.
interruption of extralateral right, figure 51, p. 748; figure 52, p. 751; figure 53, p. 754.
union of veins on dip, figures 54 and 55, p. 767.
patent covering excessive area, figure 56, p. 963.

**Improvements.**
made by original locator, right of relocator to, § 409.
cannot be credited to relocator for patent purposes, § 409.
under annual labor laws what may be estimated, § 629.
buildings, § 629.
roads, §§ 629, 631.
See ANNUAL LABOR.
contribution between cotenants for, §§ 406, 790.
for patent purposes. See WORK AND EXPENDITURES.

**Incorporeal Hereditament.**
owner of, cannot maintain partition, § 792.

**Indemnity Lands.**
**State Selections.**
circular instructions of the department concerning, p. 1226.
in lieu of sixteenth and thirty-sixth sections, §§ 133, 142.
selection by state, § 143.
mineral lands not subject to, § 143.

**Indemnity Lands**—*Continued.*
effect of surveyor-general's return, § 144.
state may controvert surveyor's return, § 144.
point of time to which inquiry as to character of land is directed, § 143.
until selection approved state has no title, § 143.
**Railroad Selections.**
circular instructions of the department concerning, p. 1224.
within what limits, § 157.
rules governing, § 157.
mineral lands cannot be selected, § 157.
test of mineral character, § 159.
point of time to which inquiry as to character of land is directed, §§ 157, 159.
until selection approved, railroad has no title, §§ 157, 159.
**Indian Hostilities.**
pendency of, as excusing performance of annual labor, § 634.
**Indian Reservations.**
nature of Indian title, §§ 181, 183.
manner of creating and abolishing, § 182.
lands within, not open to purchase or location under land laws, § 183.
mining claims cannot be located within, § 184.
status of attempted mining locations within, § 184.
acts of location within, may be adopted upon extinguishment of Indian title, § 184.
mining claims located prior to creation, are not affected, § 185.
mineral land laws extended over certain, p. 235, note 1.
general rules governing mining locations in, § 186.
**Indians.**
born in the United States not citizens, § 224.
naturalization of, § 224.
**Indian Territory.**
acquired through Louisiana purchase, § 33.
See OKLAHOMA.
**Injunction.**
courts will not interfere with land department by process of, § 438.
when lies at suit of one cotenant against another, § 790.
to prevent pollution of water, § 842.
deposit of tailings, § 842.
injuries from hydraulic mining, § 849.
as an auxiliary remedy in actions of trespass, § 872.
**"In Place."**
classification of mineral deposits, § 298.
use of term in mining laws, § 299.
blanket deposits of Leadville, § 300.
judicial interpretation of term, § 301.
**Inquest of Office.**
alien may hold title to unpatented mining claims until, §§ 233, 234.
proceedings to obtain patent involving citizenship are in the nature of, §§ 233, 234.

**Inspection and Survey.**
power of the court to grant, in actions concerning mining properties, § 873.
**Interpretation.** See STATUTORY CONSTRUCTION.
**Intralimital Rights.**
arising out of lode location defined, §§ 349, 550.
right to the surface and presumptions flowing therefrom, § 551.
not affected by form of surface location, § 552.
pursuit of vein on its course beyond boundaries not permitted, § 553.
cross lodes, (interpretation of § 2336, Revised Statutes), § 557.
See CROSS LODES.
**Iowa.**
acquired through Louisiana purchase, § 33.
lands containing the baser metals sold under special laws, §§ 20, 35.
police regulations concerning manner of working mines, § 20.
**Iron.**
passes under railroad grants only when named, §§ 152, 158.
not specifically named in federal mining laws, § 323.
lands containing, sold same as agricultural lands prior to 1872, § 323.
manner of appropriating land containing, depends upon mode of occurrence, § 323.
**Ironstone.**
classified as mineral under English decisions, p. 99, note 3.
**Judgment.**
in actions to determine adverse claims, form of, § 763.
when becomes available in land office, § 764.
effect of appeal from, § 764.
effect of judgment, 765.
**Jurisdiction.** See COURTS; LAND DEPARTMENT.
**Justice of the Peace.**
administering oath to patent proofs, official character to be attested by clerk of court, § 682.
**Kansas.**
acquired through Louisiana purchase, § 33.
police regulations concerning manner of working mines, § 20.
excepted from operation of federal mining laws, §§ 20, 75.
**Kaolin.**
classified as mineral by English authorities, § 92.
land department, § 97.
lands containing, subject to entry under placer laws, § 420.
**Kentucky.**
not subject to federal mining laws, § 19.
state laws regulating manner of working mines, § 19.
mining as a "public use" in, § 19.
federal government acquired no lands in, § 28.
**"Known Mines."**
reservation of, in pre-emption law, construed, § 209.
not legal equivalent of mineral lands, § 209.
**Labor.** See ANNUAL LABOR.

**Land Department.**
how constituted, §§ 658, 659.
supervision of public mineral lands transferred to, § 47.
jurisdiction of, § 664.
limit of authority found in acts of congress, § 664.
cannot grant land, § 664.
nor insert unauthorized reservations in patents, § 171.
ceases when patent issues, § 203.
but may patent known lode within prior placer patent, § 413.
courts cannot interfere with discretionary powers, § 664.
nor exercise appellate powers over, § 438.
to determine character of land, exclusive, §§ 207, 717.
suspended, pending suit upon adverse claim, § 741.
except where both parties fail to comply with law, §§ 632, 679, 759.
resumption of, after termination of adverse suits, § 765.
to suspend or cancel certificate of purchase, § 772.
officers of, § 659.
secretary of the interior, his powers and duties, § 663.
commissioner of the general land office, his powers and duties, §§ 208, 662.
registers and receivers, appointment, powers, and duties, § 660.
hearings to establish character of land, §§ 107, 679.
departmental regulations, p. 1211, pars. 108-118.
state lieu selection, §§ 143, 144.
railroad grants, §§ 156, 157.
homesteads, §§ 205, 207.
decisions of, upon questions of fact, effect of, §§ 665, 777.
of law, § 666.
mixed law and fact, § 666.
character of land, final, §§ 161, 207.
rule of *res adjudicata* as applied to, § 208.
functions of, in patent proceedings, § 664.
relationship between courts and, §§ 746, 750.
exclusive power to determine character of land, §§ 207, 717.
exclusive judge of what local rules are in force, § 275.
pending proceedings upon adverse claim, § 759.
resumption of jurisdiction after determination of adverse suit, § 765.
regulations, power to prescribe, § 472.
conferred by Revised Statutes, § 2478.
have the force of laws, § 472.
courts take judicial notice of, § 472.
do not oust jurisdiction of courts, § 646.
general mining, pp. 1182-1214.
coal lands, pp. 1217-1224.
selection of lands by railroads, pp. 1224-1226
states, pp. 1226-1227.
forest reservations, pp. 1232-1234.

**Land Department**—*Continued.*
construction of land laws by, how regarded by the courts, §§ 419, 482, 666.
lode and water law of 1866, § 59.
term "mineral lands," § 95.
in administering school grants, § 137.
railroad grants, §§ 155, 158.
townsite laws, § 171.
laws providing for entry of stone lands, § 421.
ruling of Secretary Bliss, note to Revised Statutes, § 2319, p. 1163.
of placer laws, §§ 419, 420.
**"Lead."**
derivation of "lode" from, § 290.
synonymous with lode, § 290.
applied to subterranean auriferous gravels, § 290.
**Lead.**
ordinance of May 20, 1785, reserved one third to government, § 30.
beginning of lead mining in the United States, § 33.
congressional act providing for leasing mines of, § 33.
practical operations of law providing for leasing mines, § 33.
message of President Polk relative to mines, § 34.
specially named in act of May 10, 1872, §§ 71, 323.
Revised Statutes, § 2320, p. 1164.
**Lease.**
of lead mines on public domain, act authorizing, § 33.
operation of the act, § 33.
message of President Polk, § 34.
distinction between tribute contracts and, § 244.
licenses and, § 860.
what constitutes a mining, § 861.
mining executed by one of several cotenants, § 791.
**Ledge.**
as defined by lexicographers, § 287.
elements to be considered in applying definition, § 289.
legal equivalent of "lode" and "vein," § 290.
a local term, § 290.
**Legislation.** See Acts of Congress; States and Territories.
**Licenses.**
difference between lease and, § 860.
distinguishing attributes of, § 860.
executed by one of several cotenants, effect of, § 791.
**Liens.**
holders of, when not required to adverse patent application, § 719.
**Lieu Lands.** See Indemnity Lands.
**Limestone.**
classified as mineral by English authorities, § 92.
American authorities, § 97.
lands containing, subject to entry under placer laws, § 421.
See Stone.
**Limitations.** See Statute of Limitations.

**Local Rules and Customs.**
**Prior to Act of 1866.**
to some extent traceable to English customs, § 4.
Mexican mining ordinances, § 42.
origin of, § 41.
scope of, in early period of mining in California, § 42.
"dips, spurs, and angles" of lode claims under, §§ 43, 566.
relationship of surface to located lode, § 43.
state legislative and judicial recognition of, § 44.
federal recognition of, § 45.
adopted in California, followed in other states, § 56.
sanctioned parol transfer of mining claims, § 270.
as to preliminary notice of location and its posting, § 350.
foreign analogies (English), § 4.
origin of English, § 4.
affected ownership of baser substances only, § 4.
recognition by act of parliament, § 4.
theory of such, § 4.
governing tin mines in Cornwall, § 5.
Devonshire, § 6.
coal and iron in Forest of Dean, § 7.
lead mines in Derbyshire, § 8.
**Under Act of 1866.**
act a crystallization of, §§ 56, 306.
details of locations regulated by, as before, § 61.
area of placers regulated by, prior to 1870, §§ 58, 61, 447.
extent of their operative force after passage of act of 1870, § 63.
**Under Existing Laws.**
to a limited degree, form part of present federal mining system, §§ 46, 76, 81, 249, 268.
supplanted by state and territorial legislation, § 21.
must not contravene state or federal law, § 268.
manner of organizing districts, § 269.
permissive scope of, § 270.
may restrict size of claims, §§ 270, 361.
regulate marking boundaries, § 270.
require more work than federal law requires, § 270.
provide for record of locations, § 270.
must be reasonable, § 270.
not be retroactive, § 270.
cannot divest rights held under general laws, § 270.
authorize a nuisance, § 270.
regulate manner of conveyance or record of transfers, § 270.
regulate subjects covered by state legislation, §§ 268, 270.
not necessary that any should be adopted, §§ 271, 328.
adopted and acquiesced in, if not in conflict with state or federal laws, have force of positive law, § 271.
substantial compliance with valid, essential to perfect mining title, §§ 271, 329.
courts do not inquire into regularity of adoption, § 271.
acquiescence and observance, not mere adoption, the test, § 271.

**Local Rules and Customs**—*Continued.*
acquire operative force from obedience of miners following enactment, § 271.
become void, when they fall into disuse, § 271.
custom to be binding must be well known and recognized, § 271.
judicial notice cannot be taken of, § 272.
how proved, § 272.
where written, record must be produced, § 272.
record of, will not prove itself, § 272.
certified copies admissible only where depositary authorized by rules to certify, § 272.
entire body of written rules constitute one instrument, § 272.
the entire body should be inspected in interpreting a part, § 272.
parol evidence of custom not permitted when written rules are in force on same subject, § 272.
if doubt exists as to written rules being in force, parol evidence of custom admissible, § 272.
parol evidence of custom as to matters not covered by written regulations, admissible, § 272.
once proven to have been adopted and acquiesced in, presumed to continue in force, § 272.
mere violation of, by few persons does not amount to abrogation, § 272.
abrogation and general disuse, how proved, § 272.
whether in force or not, a question for the jury, § 272.
construction of, a question for the court, § 272.
custom may be proved, regardless of date or duration of its establishment, § 272.
common law rules as to custom, do not apply to, § 272.
must be construed so as to harmonize with entire body of mining law, § 272.
no distinction in operative force of a custom and written regulation, § 272.
what is reasonable time allowed to perfect location may be proved by reference to customs in other districts, § 272.
custom as to record, in absence of state legislation, may be proved by recorder's books showing recording of considerable number of claims, § 273.
recorder's books may tend to prove disuse of regulation as to area of claims, § 273.
where record provided for, it must conform to requirements of federal law, § 273.
regulations concerning record of mining claims, § 273.
penalty for noncompliance with, § 274.
failure to comply with does not work forfeiture, unless rule so provides, § 274.
in patent proceedings, land department exclusive judge of what, are in force, § 275.
consideration given to, in congressional legislation, § 448.
general principles applied to permissive state legislation apply to, in absence of such, § 330.

**Location.**
defined, § 327
distinction between mining claim and, § 327.
under annual labor laws, "claim" means, § 628.
is the inception of the miner's title, § 327.
when perfected relates back to discovery, § 373.
patent relates back to date of, § 783.
certificate of purchase evidence of perfected, § 773.
perfected valid, segregates lands from public domain, §§ 322, 363.
cannot be made by forcible entry, upon actual possession, §§ 217, 219.
may be made by peaceable entry, upon possession of mere intruder, §§ 218, 219, 330.
however regular in form, void to the extent of conflict with prior valid, § 363.
state legislation concerning, permissive scope, §§ 248, 251.
subjects concerning which, states may unquestionably act, § 250.
of doubtful validity, § 251.
requirements to be considered in determining validity of location, § 329.
local rules and regulations, permissive scope, §§ 270-275.
substantial compliance with valid, essential, § 329.
proceedings to perfect, regarded with indulgence, § 381.
**What Lands are Subject to.**
only public mineral lands are subject to, §§ 112, 322.
public lands defined, §§ 80, 85, 112, 322.
mineral lands defined, §§ 85-98, 162.
rules for determining, § 98.
classification of mineral lands for purposes of, § 298.
classification of deposits according to mode of occurrence, § 323.
metallic or nonmetallic character of deposits "in place" as affecting mode of, § 323.
within Mexican grants inhibited, 128.
grants to states, § 145.
grants to railroads, § 162.
townsites, §§ 166-177.
Indian reservations, § 186.
military reservations §§ 191, 192.
national park, §§ 196-198.
forest reservations, §§ 197, 198.
rules and legislation of 1897, concerning, p. 1232.
homestead and other agricultural claims, §§ 202-212.
lands in occupancy of others, § 219.
cannot embrace any part of prior valid subsisting, § 363.
in case of overlapping, subsequent abandonment of prior location will not inure to subsequent location, § 363.
abandoned conflict area can only be appropriated by junior locator by amended location, § 363.
location to be valid, must be valid at time it is made, § 363.
**Who may Make.**
only citizens, or those who have declared their intention, § 223.

**Location**—*Continued.*
who are citizens, § 224.
minors, § 225.
married women, § 224.
domestic corporations, § 226.
by aliens, acquisition of title by, §§ 231-234.
may hold until "office found," §§ 233, 234.
citizen purchaser from alien, §§ 233, 234.
effect of subsequent naturalization, § 232.
by agents permitted, § 331.
principal presumed to assent, § 331.
one colocator may act for others, § 331.
**Nature of Estate Acquired**
as defined by the early decisions, § 535.
is legal estate of freehold, §§ 535, 539, 548.
origin of the doctrine, § 536.
federal recognition of doctrine, § 538.
as defined by the courts since passage of act of 1866, § 539.
is property in highest sense of term, § 539.
compared with copyholds at common law, § 540.
"*dominium utile*" of the civil law, § 541.
inchoate agricultural claims, § 542.
dower not allowed in, §§ 543, 544.
subject to sale on execution, § 535.
descends to heir, § 535.
subject to partition, § 535.
**Location—Lode.**
under act of 1866 how made, § 58.
quantity of surface regulated by local customs, §§ 58, 361.
could acquire but one lode, §§ 58, 361.
lode the principal thing, §§ 58, 361.
relationship of surface to lode, §§ 58, 361.
details of, regulated by local rules, §§ 58, 361.
changes made by act of 1872, §§ 71, 361.
relationship of surface to located lode, §§ 71, 361.
top, or apex, of lode as controlling factor, § 305.
top, or apex, defined, §§ 306-312.
"strike" defined, §§ 317, 318.
dip, or downward course, defined, § 318.
classification of deposits for purpose of, according to mode of occurrence, § 323.
metallic or nonmetallic character of deposits in place as affecting mode of location, § 323.
nature of deposits which are subject of, § 323.
no limitation as to number of, which may be made by an individual, § 361.
**How Made.**
acts necessary to be performed in absence of state legislation, § 328.
where state legislation exists, § 329.
order in which acts are performed immaterial, § 330.

**Location—Lode**—*Continued.*
time within which acts are to be performed, when nonessential, § 330.
requirements of state legislation to be considered in determining validity, § 329.
unless completed, of no avail against intervening rights, § 330.
in absence of state legislation locator has reasonable time to complete, § 339.
what constitutes reasonable time within which to perfect, § 339.
extent of locator's rights after discovery and prior to completion of location, § 339.
*Discovery.*
source of miner's title, §§ 328, 329, 335.
no valid location without, § 335.
must precede location, § 335.
or be in advance of intervening right, § 335.
priority of, gives priority of right against location without, § 335.
what constitutes a valid, § 336.
liberal rules applied between mining claimants, § 336.
strict rules applied between mining and agricultural claimants, § 336.
rules followed by land department, § 336.
neither size nor richness of, material, § 336.
views of Judge Hawley, § 336.
where discovery must be made, § 337.
must be on public mineral lands, § 337.
within limits of claim, § 337.
any portion of the apex sufficient, § 337.
must be treated as an entirety and basis of but one location, § 337.
exceptions to the rule, § 337.
loss of, is loss of location, § 338.
extent of locator's rights after, and prior to completion of, location, §§ 219, 339.
after, has a reasonable time to complete location, §§ 219, 339.
relationship of, to discovery shaft, § 345.
*Discovery Shaft and Its Equivalent.*
state legislation requiring, § 343. See under VARIOUS STATES AND TERRITORIES.
validity of state laws, § 250 (15).
object of requirement as to, § 344.
relationship of the discovery to, § 345.
must be within limits of claim as located, § 345.
not necessary to sink at original point of discovery, § 345.
locator protected in his possession during time allowed for sinking, § 345.
effect of failure to comply with the law within time allowed, § 345.
extent of work necessary to comply with laws, § 346.
may cost of sinking be credited on annual work? § 632.
*Posting Notice.*
custom prior to 1866, § 350.
not required in absence of state law or local regulation, § 350.
object of, § 350.

**Location — Lode** —*Continued.*
state legislation requiring, §§ 250 (3), 351. See VARIOUS STATES AND TERRITORIES.
liberal rules applied to construction of posted notices, § 355.
posted notice not to be tested by rules applicable to recorded, § 355.
if also required to be recorded, must contain requirement of federal law, § 355.
place and manner of posting, § 356.
instances of sufficient posting, § 356.
to what extent protects discoverer, § 339.
cannot be substituted for marking boundaries, § 373.
*The Surface — Its Form and Extent.*
ideal location a rectangular parallelogram, § 360.
length, maximum fixed by federal law, § 361.
right of states to limit within maximum, § 250 (1).
fifteen hundred feet the uniform rule, § 361.
limitation as to length by local rule in absence of state legislation, § 270.
width, maximum fixed by federal law, § 361.
right of states to limit within maximum, § 250 (2).
states limiting, §§ 250 (2), 361.
area, maximum superficial, § 361.
effect of exceeding maximum, § 362.
excessive, void only as to excess, §§ 362, 373.
excess, how cast off (length), § 362.
(width), § 366.
excessive, not necessarily fraudulent, § 362.
rights of junior conflicting locator, in case of excessive, §§ 362, 373.
size of claim not controlled by number of locators, § 362.
should be along the course, or strike, of the vein, § 364.
must include the apex, § 364.
any portion of apex sufficient to support location, § 364.
cannot be lawfully made on dip of vein, § 364.
Judge Hallett's views as to location on dip, § 364.
existence of apex presumed after issuance of patent, § 364.
prior to patent, existence of apex must be shown if locator's rights are challenged, § 364.
must not overlap prior subsisting locations, § 363.
in case of overlapping, subsequent abandonment of prior location will not inure to subsequent locator, § 363.
abandoned conflict area can only be appropriated by junior locator by amended location, § 363.
priority of appropriation important in case of surface conflicts, § 364.
rights of lode locator defined by form of location, §§ 373-552.
end lines, function of, § 365.
stop pursuit of vein on the strike, §§ 365, 553.
define the extralateral right, § 365.
implied under act of 1866, § 365.
not required to be parallel under act of 1866, § 365.
parallelism of, under existing law, essential to exercise of extralateral right, § 365.

**Location—Lode**—*Continued.*
end lines, nonparallelism of, does not render location void, § 365.
location with nonparallel, confers only limited rights, § 365.
need not be at right angles to located lode, § 365.
locator may give them any direction if parallelism preserved, § 365.
theory of the law requiring parallelism, § 365.
should be parallel throughout, § 365.
broken end lines not sanctioned, § 365.
locator may abandon portion of claim for purpose of paralleling, § 365.
need not be of the same length, § 365.
must be, throughout their entire length, on public domain, § 365.
must conform to boundary of prior locator, §§ 365, 373.
cannot be extended into limits of prior location, § 365.
irregularly shaped locations resulting from this rule, § 365.
rights of owners of irregularly shaped locations, § 365.
side lines, when become, § 367.
not always those designated by locator as such, § 367.
side lines, primary function of, § 366.
fixed with reference to middle of vein, § 366.
data for lateral measurement, how obtained, § 366.
should be equidistant from lode, unless prevented by prior locations, § 366.
more than statutory limit cannot be taken on one side, § 366.
need not be parallel, § 366.
if within statutory limit may take any direction, and have angles and elbows, § 366.
parallelism of original, important when they become end lines, § 366.
when become end lines in law, § 366.
side-end lines, what are, § 367.
functions of, § 367.
*Marking Boundaries.*
requirement of federal statute mandatory, § 371.
states have no power to dispense with federal requirement, § 371.
may particularize as to character of marking, § 371.
location incomplete until boundaries are marked, § 371.
what is sufficient marking in absence of state or local regulation, § 373.
what is sufficient, a question for the jury, § 373.
what is sufficient depends upon circumstances of each case, § 373.
examples of sufficient marking, § 373.
posting notices cannot be substituted for, § 373.
should be within statutory limit, § 373.
including excessive area, when will not vitiate location, §§ 362, 373.
failure to mark boundaries within required time renders ground subject to relocation, § 373.

**Location — Lode** — *Continued.*
boundaries once established cannot be changed to detriment of intervening locators, § 373.
object of, § 371.
time allowed for, § 372.
when time not fixed by state law or local rules, reasonable allowed, § 372.
what is a reasonable time, § 339.
time prescribed in the different states, § 374.
state legislation defining character of marking, § 374. See VARIOUS STATES AND TERRITORIES.
substantial compliance with, sufficient, § 374.
perpetuation of monuments not necessary, § 375.
exception to rule, § 375.
variation between monuments and descriptive calls of notices, § 379.
locator marks boundaries at his peril, § 396.
*Changing Boundaries.*
circumstances justifying change of, § 396.
for purpose of rectifying lines, § 396.
including abandoned overlapping surfaces, § 396.
paralleling end lines, §§ 396, 582.
not permitted to detriment of intervening rights, §§ 176, 397, 398.
right to amend location exists independent of state legislation, § 397.
state legislation concerning amendments to locations, § 397. See VARIOUS STATES.
object and functions of amended certificate, § 398.
*Certificate of Location.*
is instrument prepared for record after completion of location, § 379.
in Montana called the "declaratory statement," § 379.
differs from the posted notice, except in Arizona and New Mexico, § 379.
is a statutory writing affecting realty, §§ 379, 642.
is first muniment of locator's paper title, § 379.
purpose and function of, § 379.
not required by federal law, § 379.
provisions of federal law as to contents, where state law requires record, § 379.
where state law requires recording, certificate must contain elements provided for by Revised Statutes, § 379.
contents of, in the several states and territories, § 380. See VARIOUS STATES.
rules of construction applied to, § 381.
technical accuracy of expression not required, § 381.
should be construed on lines of obvious common sense, § 381.
erroneous calls in, when do not affect validity, § 381.
may be aided by monuments on the ground, § 381.
to be considered in connection with markings on the ground, § 381.
variation between calls in certificate and monuments, § 382.
courses and distances yield to monuments, but to invoke rule monuments must be perpetuated, §§ 375, 382.
"natural objects," what are, § 383.
"permanent monuments," what are, § 383.

**Location—Lode**—*Continued.*
illustrations of natural objects and permanent monuments, § 383.
effect of failure to comply with state laws as to contents, § 384.
verification of, states requiring, § 385.
validity of laws requiring verification discussed, §§ 251 (4), 385.
sufficiency of, as referring to natural objects a question of fact, § 383.
presumed in absence of evidence, § 383.
parol evidence, when admissible in aid of, § 383.
*Recording Certificate of.*
in absence of state legislation, local rules may provide for, § 270.
records of mining district do not prove themselves, §§ 272, 391.
how proved, §§ 272, 391.
popular understanding as to necessity for, §§ 273, 389.
custom as to, how shown, § 273.
failure to, does not work forfeiture, unless law or rule so provides, §§ 273, 274, 390.
record unnecessary, unless required by state law or local rule, §§ 273, 328, 389.
evidence of, unless authorized by state law or local rule, inadmissible, § 273.
if required by local rules, must contain requirements of federal law, § 273.
if required by state law, must contain requirements of federal law, §§ 355, 379.
proof of record, § 391.
record as evidence, § 392.
time allowed for, by laws of several states, § 389. See VARIOUS STATES.
place of, § 389.
effect of failure to record within time fixed by state law, § 390.
*Amended Certificates.*
circumstances justifying change of boundaries, § 396.
right to amend exists in absence of state legislation, § 397.
state regulations concerning, § 397.
object and functions of, § 398.
void certificates not subject of, as against intervening rights, § 397.
same formalities required as in case of originals, § 397.
right of amendment, when cut off by intervening location, § 398.
relates back to the right of location acquired by discovery, § 398.
except where new territory is added, § 398.
treated as original where it includes new ground, § 398.
not an abandonment of the original, § 398.
title of colocator cannot be divested by omitting name in, § 398.
effect of changing name of claim in, § 398.
purposes for which made need not be recited in certificate, § 398.
*Relocation.*
circumstances under which may be made, §§ 373, 345, 402.
new discovery not essential to, § 403.
admits validity of original, § 404.
by original locator, based upon his failure to perform assessment work, not permitted, § 405.

**Location—Lode**—*Continued.*
by one of several original locators in hostility to others, §§ 331, 405, 406.
by agent or others occupying fiduciary relation, § 407.
manner of perfecting, § 408.
state statutory regulations, § 408. See VARIOUS STATES.
in perfecting, same acts necessary as in original, § 408.
manner of performing preliminary development work, § 408.
when resumption of work by original locator cuts off right of, § 408.
right of second locator to improvements made by first, § 409.
mortgagor may not make, so as to defeat mortgage, § 719.
by citizen, of mining claim in possession of alien, §§ 233, 234.
by original locator after sale to, and forfeiture by, grantee, § 407.
may be made pending patent proceedings, if annual labor not performed, § 632.
right to perfect, when once initiated, cannot be cut off by resumption of work, § 653.

**Rights Flowing from Perfected Lode Location.**
classification of rights flowing from, §§ 548, 549.
extent of grant defined by § 2322, Revised Statutes, § 550.
intralimital rights defined, §§ 549, 561.
extralimital defined, § 549.
the right to the surface, and presumptions flowing therefrom, § 551.
ownership of veins apexing outside of boundaries, § 550.
subject to extralateral right of others, § 551.
intralimital rights not affected by form of, § 552.
pursuit of vein on its course beyond boundaries not permitted, § 553.
cross lodes, interpretation of § 2326, Revised Statutes, § 557.
Colorado doctrine, § 558.
Montana doctrine, § 559.
Arizona-California rule, § 560.
author's conclusions, § 560.
priority of, as affecting exercise of extralateral right, §§ 610-612. See EXTRALATERAL RIGHT.
when owner of, called upon to adverse placer application, § 720.
within townsite, when must adverse townsite application, § 722.
correlative rights between lode owner and townsite occupant, § 723.

**Location—Lodes Discovered in Tunnel.**
not required to be appropriated by surface location. Note to § 2323 Revised Statutes, p. 1167.
the rule discussed prior to recent decision of United States supreme court, § 482.
length of, awarded to tunnel discoverer, § 481.

**Location—Lodes within Placers.**
right to appropriate lodes within placers, § 413.
manner of perfecting, § 414.
length of, § 414.
width of, § 415.
lines of placer location not necessarily lines of lode location, § 414.
extralateral rights, how defined, § 414.

**Location—Millsite.**
act of 1872 first provided for obtaining title to, § 74.
prior to, regulated by local custom, § 519.
federal law governing acquisition of title to, § 519.
text of Revised Statutes, § 2337, p. 1179.
different classes of, § 520.
right to, how initiated, § 521.
limit as to area, § 520.
must be made substantially as a mining claim, § 521.
state legislation concerning, § 521.
California—Statement in § 521 erroneous.
owner of several lodes may locate for each, § 520.
actual occupation and use necessary to confer right to, § 521.
cannot be located on lands in possession of another, § 521.
may not be selected within limits of railroad grant, § 521.
nor within limits of subsisting agricultural holding, § 521.
right to land embraced in, depends on priority of possession, § 521.
in connection with lode, may adjoin side lines, § 521.
end lines, when, § 521.
nature of use required to hold, § 533.
lost by abandonment of lode, § 564.
right to, disconnected with lode ownership, depends upon existence thereon of mill or reduction works, § 524.
may not be appropriated for the water thereon, § 524.
not subject to annual labor laws, § 638.
not proper subject of adverse claim in mineral application, § 724.
**Location—Placer.**
regulated by local custom prior to act of 1870, §§ 62, 447.
limit as to area under act of 1870, §§ 62, 447.
essential features of act of 1870, § 62.
text of act, p. 1146.
to what extent controlled by local rules after 1870, § 63.
under act of 1870 required to conform to public surveys, §§ 62, 447.
**Character of Deposits Subject to.**
general rule § 419.
"placer" defined, § 419.
distinction between deposits "in place" and not "in place," § 323.
metalliferous character of deposits as affecting mode of appropriation, § 323.
commercial value, and not metallic character, controls, § 419.
disposition of land department to limit operation of placer laws, § 419.
specific substances classified as subject to, § 420.
lands containing natural gas as subject of, § 423.
brick clay, § 424.
building stone, § 421.
petroleum, § 422.
phosphates, § 425.
tailings, § 426.
subterranean gravel beds, §§ 301, 427.
auriferous gravels in navigable streams, § 428.
in nonnavigable streams, § 428.
state legislation specifying, void, § 251 (6).

**Location — Placer** — *Continued.*
mineral character of land not inferred from character of adjoining tracts, § 438.
rule for determining, § 98.
recent ruling of Secretary Bliss, note to Revised Statutes, § 2319, p. 1163.
**How Made.**
acts necessary to complete in absence of state or local regulation, § 432.
generally speaking, acts required are same as in case of lodes, §§ 432, 433, 463, 448.
*Discovery.*
as essential as in lode claims, § 437.
*dictum contra* by supreme court of California, § 438.
return by surveyor-general that land is mineral does not dispense with, § 437.
rules governing same as in cases of lodes, § 437.
on each twenty-acre tract required, § 438.
rule of land department in location by associations in excess of twenty acres, § 438.
rule announced by supreme court of Montana, § 438.
*Surface — Its Form and Extent.*
twenty acres, unit of, § 437.
individual location limited to twenty acres, § 448.
legal subdivisions of forty acres may be subdivided into ten-acre tracts, § 448.
illustration of manner of describing minor subdivisions, p. 1129, par. 57.
number of which may be made by an individual, unlimited, § 450.
in name of "dummies," fraudulent, § 450.
by associations, limited to one hundred and sixty acres, §§ 438, 448.
is a corporation an association? §§ 226, 449.
on surveyed lands, must conform to public surveys "as near as "practicable," § 447.
what is meant by "as near as practicable"? § 448.
rule applied to gulch and river claims, § 448.
deep placers, § 448.
on unsurveyed lands, §§ 448.
*Posting Notices.*
general rules governing lode claims applicable, § 442.
requirement of state statutes, § 442. See VARIOUS STATES AND TERRITORIES.
*Preliminary Development Work.*
state laws requiring, § 443. See VARIOUS STATES AND TERRITORIES.
*Marking Boundaries.*
rule in absence of state legislation, § 454.
state legislation concerning, § 455. See VARIOUS STATES AND TERRITORIES.
*Certificate of Location.*
same rules apply as in case of lodes, § 459.

**Location—Placer**—*Continued.*
state legislation concerning, § 459. See VARIOUS STATES AND TERRITORIES.
*Recording Certificate.*
same rules apply as in case of lodes, § 459.
state legislation concerning, § 459. See VARIOUS STATES AND TERRITORIES.
**Rights Flowing from Perfected Location.**
surface rights acquired by, compared with lode location, § 413.
does not carry known lodes, § 413.
known lodes within, subject of separate appropriation, § 413.
manner of appropriating, § 414.
width allowed, § 415.
nature and extent of property rights conferred by, § 619.
no extralateral right incident to, § 619.
extralateral right in lodes within, depends upon lode appropriation, § 619.
within townsite, not required to adverse application for townsite patent, § 723.
no correlative rights between locator and townsite occupant, §§ 171, 173, 723.
controversies between lode and placer claimants in patent proceedings, §§ 720, 721.
subject to privilege of apex lode proprietor to follow his vein underneath, §§ 611, 615, 619.
annual labor laws apply to, § 625.
amount of, where location by association, § 628.
where several *locations* constitute one *claim*, § 628.
**Location—Tunnel.** See TUNNEL LOCATIONS.
**Lode.**
relationship of surface to located, prior to 1866, § 43.
subsequent to 1866, § 58.
first patentable under act of 1866, §§ 54, 57.
right to in length under act of 1866, §§ 58, 59, 60, 339.
in depth, §§ 58, 59, 60.
limitation by local custom within maximum, § 61.
change in law made by act of 1872, § 71.
term "mine" sometimes used as equivalent of, §§ 89, 176, 286.
definitions—English and Scotch, § 286.
lexicographers, § 287.
geologists, § 288.
Dr. Raymond, § 289.
made by miners first, § 289.
elements to be considered in applying, § 289.
legal equivalent of "vein," ledge, § 290.
may include more than one vein, § 290.
classification of cases, in which term to be construed, § 291.
judicial definitions, § 292.
the Eureka case, § 292.
the Leadville cases—blanket deposits, § 293.

**Lode**—*Continued.*
other judicial definitions, § 294.
neither size nor richness of ore elements, § 294.
includes impregnations, § 294.
top, or apex, defined, §§ 306–312.
"strike" defined, §§ 317, 318.
dip, or downward course, § 318.
known, but not located, reserved from townsite entry, § 176.
reserved out of townsite patent, may be patented, § 177.
are nonmetallic substances classified as? § 323.
when there are two veins within a, each vein may be subject of location, § 583.
broad, difficulties arising where side lines bisect, § 583.
rights of discoverer after discovery, and prior to completion of location, § 339.
estate in the vein created by grant of the extralateral right, §§ 568, 585.
right to pursue in depth beyond vertical side boundaries. See EXTRALATERAL RIGHT.
patent for lode claim, what conveys, § 780.
how located. See LOCATION LODE.
within placer, when are "known to exist" within meaning of § 2333, Revised Statutes, § 781.
to whom such existence must be known, § 781.
claimant of, when must adverse placer applicant, § 720.
effect of failure to adverse placer application, § 720.
surface in connection with, where lode claimant fails to adverse placer applicant, § 720.
proof that none exists, in patent proceedings, § 703.
patents, how applied for, § 704.
no extralateral right, unless lodes are located as such, § 619.
junior patent does not presume that lode was known to exist prior to filing placer application, § 781.
mere location does not prove existence of, § 781.
how located. See LOCATION — LODES WITHIN PLACERS.

**Louisiana.**
acquired through Louisiana purchase, § 33.
federal coal land laws operative in, § 497.
saline laws of January 12, 1877, do not apply to, § 514.

**Louisiana Purchase.**
states and territories embraced within, § 33.

**Maine.**
not subject to federal mining laws, § 19.
no mining legislation in, § 19.
federal government acquired no lands in, § 28.
reservation in crown grants to Duke of York, § 31.

**Mandamus.**
action of land department cannot be controlled by, § 438.

**Marble.**
classified as mineral by English authorities, p. 99, note 3.
land department, § 97.
recent ruling of Secretary Bliss, note to § 2319, Revised Statutes, p. 1163.
occurring "in place," how appropriated, § 323.
not "in place," appropriated under placer laws, § 420.

**Marls.**
occurring "in place," how appropriated, § 323.

**Married Woman.**
citizenship of, § 224.
partakes of nationality of her husband, § 224.
marriage with an alien does not change her status, § 224.
may locate mining claims, § 224.
See HUSBAND AND WIFE; DOWER.

**Maryland.**
not subject to federal mining laws, § 19.
reservation of mines in crown grants to Lord Baltimore, § 31.

**Massachusetts.**
not subject to federal mining laws, § 19.
no mining legislation in, § 19.
mining as a "public use" in, § 19.
reservation of mines in crown grant to colony, § 31.

**Measure of Damages.**
for unlawfully depositing debris on lands of others, § 844.
in actions for trespass on mining claims, § 868.

**Metals.**
enumerated in lode law of 1866, § 323.
act of 1872, § 323.
metallic or nonmetallic quality of deposits as affecting method of appropriation, § 323.
enlargement of terms used in act of 1872, § 323.
See MINERALS.

**Mexican Grants.**
ownership of mines under Mexican law, § 114.
interest in mines did not pass by, under Mexican law, § 114.
title to mines conveyed only under mining ordinances, § 114.
nature of title conveyed to United States by treaty, § 115.
obligation of United States to protect rights, § 116.
adjustment of claims to, in California, § 117.
in other states and territories, § 118.
claims to mines asserted under mining ordinances, § 119.
status of, considered with reference to condition of title, § 120.
*sub judice*, § 121.
different classes of, § 122.
by specific boundaries, § 123.
of a place or *rancho* by name, § 123.
while *sub judice* are not public lands, § 123.
"floats" ascertained surplus only, public land, § 124.
mining claims cannot be located within, §§ 123, 124, 128.
confirmed under California act, § 125.
carry minerals, § 125.
by action of Congress, § 126.

**Mexican Grants**—*Continued.*
act of March 3, 1891, concerning, in Colorado, etc., § 127.
reserves minerals, §§ 118, 127.
change of governmental policy, § 127.
right of apex proprietor to pursue vein in depth underneath, § 613.
**Mexico.**
influence of mining laws of, on American system, § 1.
mining laws of, at time of treaty of cession, § 13.
nature and conditions of mining concessions, § 13.
rights of discoverer, § 13.
right to mine, how acquired, § 13.
denouncement of abandoned mines, § 13.
right to denounce mines on private property, § 13.
placers, § 13.
foreigners and religious orders, § 13.
extent of surface limits allowed, § 13.
rights in depth, § 13.
marking boundaries, § 13.
right to all veins found within boundaries, § 13.
forfeiture for failure to work, § 13.
royalties, § 13.
treaty of Guadalupe Hidalgo, and the Mexican cession, § 40.
states carved out of territory ceded, § 40.
ownership of mines in, § 114.
mines in, did not pass by ordinary grants, § 114.
title to mines conveyed only under mining ordinances, § 114.
nature of title to lands conveyed to United States by treaty, § 115.
obligation of United States to protect rights, § 116.
See MEXICAN GRANTS.
**Mica.**
classified as mineral by land department, § 97.
when occurring in veins, how appropriated, § 323.
when not "in place," appropriated under placer laws, § 420.
**Michigan.**
lands containing baser metals sold under special laws, §§ 20, 35, 37.
excepted from operation of federal mining laws, §§ 20, 75.
**Military Reservations.**
manner of creating and abolishing, § 190.
mining claims may not be located within, § 191.
status of mining claims located within, § 191.
subsisting valid mining locations not affected by creation of, § 192.
general rules governing Indian reservations apply to, § 192.
**Millsites.**
**Location.**
act of 1872 first provided for obtaining title to, § 74.
prior to, regulated by custom, § 519.
federal law governing acquisition of title to, § 519.
text of Revised Statutes, § 2337, p. 1179.
different classes of, § 520.
right to, how initiated, § 521.
land covered by, must be nonmineral, § 520.
limit as to area, § 520.

**Millsites**—*Continued.*
must be made substantially as a mining claim, § 521.
state legislation concerning, § 521.
California—statement in § 521 erroneous.
owner of several lodes may locate for each, § 520.
actual occupation and use necessary to confer right to, § 521.
cannot be located on lands in possession of another, § 521.
may not be selected within limits of railroad grants, § 521.
may not be selected within limits of subsisting agricultural holding, § 521.
right to land embraced in, depends on priority of possession, § 521.
in connection with lode may adjoin side lines, § 522.
may adjoin end lines, when, § 522.
nature of use required to hold, § 533.
lost by abandonment of lode, § 564.
right to, disconnected with lode ownership depends upon existence thereon of mill or reduction works, § 524.
may not be appropriated for the water thereon, § 524.
not subject to annual labor laws, § 638.
not proper subject of adverse claim in mineral application, § 724.
**Patent.**
how obtained, § 708.
text of federal law, Revised Statutes, § 2337, p. 1179.
departmental regulations, p. 1202, pars. 64–68.
what expenditures are necessary to obtain? p. 885, note.
notice of application for patent must be posted on, § 677.
**Mineral—Minerals.**
property in, under the common law, § 2.
"royal metals," § 3.
gold and silver belonged to the crown, § 3.
the baser substances belonged to land-owners, § 3.
alum and saltpeter, claim of crown to, § 3.
under navigable streams, § 3.
seashore, § 3.
severance of title to, from ownership of soil, § 2.
property in, under the civil law, § 11.
French law, § 12.
Mexican law, § 114.
not a definite term, § 87.
incapable of a definition universally applicable, § 88.
English evolution of denotation, 88.
in its primary sense, § 88.
early English definitions, § 88.
enlarged meaning of word mine, § 89.
as defined by English and Scotch authorities, § 90.
utility and profitableness, not metallic character, the test, §§ 90, 93.
English rules of interpreting term, § 91.
to be understood in its widest sense, unless contracted by context, §§ 91, 96, 137, 158.
substances classified as, under English decisions, § 92.
pass by patent from United States unless reserved, §§ 80, 114.

**Mineral—Minerals**—*Continued.*
reserved from Mexican grants confirmed under act of 1891, §§ 118, 127, 128.
restrictions upon definition in administering school grants, §§ 137-140.
railroad grants, § 158.
severance of title to, from that of surface, application of common law rules, § 812.
rights and duties of respective owners in case of, §§ 812-814.
right of subjacent support in case of, §§ 818-822.
to lodes effected by grant of extralateral right, § 568.
**Substances Classified as Mineral.**
*Alum*, under French law, § 12.
claim of crown of England to, § 3.
by land department, § 97.
*Arsenic*, under French law, § 12.
*Asphaltum*, by land department, § 97.
*Bismuth*, under French law, § 12.
*Bitumen*, under French law, § 12.
*Borax*, by land department, § 97.
*Brick Clay*, rulings of land department, §§ 97, 424.
*Building Stone*, under English authorities, § 92.
rulings of land department, §§ 97, 139, 210, 424.
under act of August 4, 1892, § 210.
*Carbonate of Soda*, by land department, § 97.
*Chalk*, under English decisions, p. 99, note 3.
*China Clay*, under English authorities, § 92.
by land department, § 97.
*Clay*, rulings of land department, § 97.
*Coal*, under English decisions, § 92.
American courts, §§ 93, 140.
land department, § 97.
*Coprolites*, under English decisions, § 92.
*Diamonds*, by land department, § 97.
*Fire Clay*, under English decisions, § 92.
by land department, § 97.
*Flint Stones*, under English decisions, § 92.
*Freestone*, under English authorities, § 92.
*Granite*, under English decisions, § 92.
American decisions, § 93.
*Gypsum*, by land department, § 97.
*Ironstone*, under English decisions, p. 99, note 3.
*Kaolin*, under English decisions, § 92.
by land department, § 97.
*Limestone*, under English decisions, § 92.
American decisions, § 97.
*Marble*, under English authorities, p. 99, note 3.
by land department, § 97.
recent ruling by Secretary Bliss, note to § 2319, Revised Statutes, p. 1163.
*Mica*, by land department, § 97.

**Mineral — Minerals** — *Continued.*
*Nitrate of Soda*, by land department, § 97.
*Natural Gas*, mineral properties discussed, § 423.
*Petroleum*, by American courts, §§ 93, 422.
land department, §§ 97, 138, 422.
when found within railroad grants, § 158.
*Phosphates* (coprolites), under English decisions, § 92.
Florida, by land department, §§ 97, 425.
do they pass by railroad grant? §§ 97 (note 7), 158.
ruling reversed by Secretary Bliss. See note to § 2319, Revised Statutes, p. 1163.
*Paint Stone*, under American authorities, § 93.
*Porcelain Clay*, same as china clay.
*Salt*, under French laws, § 12.
by American courts, § 93.
land department, § 97.
not subject to entry under mining laws, § 97.
*Sandstone* (freestone), under English decisions, § 92.
*Slate*, under English authorities, § 92.
by land department, § 97.
*Soda — Nitrate*, by land department, § 97.
*Carbonate*, by land department, § 97.
*Stone* (of different kinds), under English decisions, § 92.
rulings of land department, §§ 97, 210.
under act of August 4, 1892, § 210.
*Umber*, by land department, § 97.

**Mineral Lands.**
how acquired in states not subject to federal laws, § 19.
in certain states, containing baser metals sold under special laws, § 20.
first congressional legislation concerning, § 30.
ordinance of May 20, 1785, § 30.
reservation of one third of gold, silver, lead, and copper, § 30.
in crown grants to the colonies, § 31.
act of congress reserving lead mines from sale, § 33.
authorizing leasing of lead mines, § 33.
supervision of, originally confided to war department, § 33.
sale of lead and copper mines under special laws, § 35.
prior to passage of act of 1866, rights governed by local rules, §§ 41, 42.
state recognition of systems of miners' rules and customs, § 44.
federal recognition of miners' rules and customs, § 45.
supervision of, transferred to department of interior, § 47.
sale of, in Michigan ordered by special act, § 47.
possessory rights to, recognized by congress, § 47.
reservation of, in pre-emption laws, § 47.
grants to states, § 47.
railroads, § 47.
general policy of government as to reservation of, § 47.
report of Colonel Mason, announcing discovery of gold in California, § 48.
message of President Fillmore concerning, § 48.
proposed measure of General Fremont, § 48.

**Mineral Lands**—*Continued.*
passage of the coal land laws, § 49.
passage of the Sutro tunnel act, § 49.
act of July 26, 1866, § 54.
declared by congress to be open to exploration and occupation, § 54.
change of governmental policy concerning, § 55.
the act of July 9, 1870, text of the act, p. 1146.
essential features, § 62.
placers first patentable under act of 1870, § 62.
acquisition of title to, by adverse possession, § 62.
act of May 10, 1872, its passage, § 68.
declaration of governmental policy, § 69.
text of the act, p. 1149.
changes made by, §§ 71, 72, 73, 74.
local rules and customs as part of existing laws governing, § 76.
are not held by virtue of the federal sovereignty, § 80.
government owns same as any other proprietor, § 80.
federal law governing, based upon what theories, § 80.
outline of the federal system and its elements, § 81.
necessity for definition of the term, § 85.
terms of reservation employed in various acts, § 86.
no legislative interpretation of term, § 86.
legal equivalents of term, § 86.
"mine" and "mineral," indefinite terms, § 87.
English denotation, §§ 88, 89.
primary signification, § 88.
enlarged meaning of "mine," § 89.
"mineral," as defined by English and Scotch authorities, § 90.
English rules of interpretation of term "mineral," § 91.
substances classified as mineral under English decisions, § 92.
American cases defining "mine" and "mineral," § 93.
as defined by American tribunals, § 94.
interpretation of terms by land department, § 95.
American rules of statutory interpretation, § 96.
substances held to be mineral by land department, § 97.
rules for determining mineral character of land, §§ 98, 419.
character of, no general classification as to, § 102.
geological surveys not considered, § 103.
return of surveyor-general, what constitutes, § 105.
*prima facie* character of land established by returns, §§ 106, 144, 207, 156.
character of land a question of fact, § 107.
how established, § 107.
See CHARACTER OF LAND.
only public, subject to appropriation, § 112.
what are public, §§ 80, 85, 112, 322.
within Mexican grants pass by confirmation, in California, § 125.
confirmation under special laws, § 126.
do not pass by confirmation under act of 1891, § 127.
cannot be appropriated under mining laws, §§ 123, 128.

**Mineral Lands**—*Continued.*
within grants to states excepted from grant, § 136.
administration of state grants with reference to, §§ 136-145.
See GRANTS (TO STATES FOR EDUCATIONAL PURPOSES).
within railroad grants excepted from grant, § 152.
administration of grants with reference to, §§ 152-162.
See GRANTS—RAILROAD.
within townsites, reserved, § 166.
administration of townsite laws with reference to, §§ 166-177.
See TOWNSITES.
within homesteads, mineral lands cannot be selected under homestead laws, § 204.
administration of homestead laws with regard to, §§ 202-208.
See HOMESTEAD; AGRICULTURAL LANDS; CHARACTER OF LAND.
title to, can only be acquired under the mining laws, § 219.
classification of, for purpose of appropriation, §§ 298, 323, 419.
location, the inception of the miner's title, § 327.
See LOCATION.
naked occupancy of, confers no title, § 216.
rights to, cannot be initiated by forcible entry, § 217.
location of, may be made peaceably, of lands in naked occupancy of others, §§ 218, 219.
term "mineral lands" not equivalent of "known mines," § 208.
See MINERAL—MINERALS.
**Mineral Springs.**
lands containing, subject to entry under agricultural laws, § 515.
**Miners.**
state laws for the protection of, § 19.
**Miners' Rules and Customs.** See LOCAL RULES AND CUSTOMS.
**Mines.**
property in, under the common law, § 2.
"royal mines," defined, § 3.
of gold and silver, at common law belonged to crown, § 3.
what classed at common law as mines of gold and silver, § 3.
of alum and saltpeter, claim of crown to, § 3.
ownership of, at common law under navigable streams, § 3.
under the seashore, § 3.
ownership of, in the thirteen original states, § 19.
reservation of, in crown grants to colonies, § 31.
in ordinance of May 20, 1785, § 830.
state regulations concerning manner of working, § 19.
ownership of, under civil law, § 11.
Spanish and Mexican law, §§ 13, 114.
under Mexican law, did not pass by ordinary grants, § 114.
conveyed only under mining ordinances, § 114.
nature of title to, passing to United States by treaty, § 115.

**Mines**—*Continued.*
under Mexican law, obligation of United States to protect rights, § 116.
within Mexican grants not subject to location, §§ 123, 124, 128.
reserved from Mexican grants under act of 1891, §§ 127, 128.
title to, passes under confirmed Mexican grants in California, § 125.
confirmation by act of congress, § 126.
term, an indefinite one, § 87.
incapable of definition universally applicable, § 87.
evolution of denotation, early English definitions, § 88.
in its primary sense, § 88.
in its enlarged sense, § 89.
where used in connection with "mineral" does not limit its meaning, § 91.
American cases, defining, § 93.
exploitation of, in United States not a governmental function, § 80.
mining not a "public utility," § 80.
in United States are not held by the government of as an attribute of sovereignty, § 80.
theories of federal government concerning, § 80.
property in, once vested is subject to rules applicable to other property, § 22.
reservation of, in townsite laws, §§ 166, 170.
what constitutes, within meaning of townsite laws reserving, § 176.
reservation of known, in pre-emption laws, § 209.
not legal equivalent of "mineral lands," § 209.
See MINERAL; MINERAL LANDS.

**Mining.**
not considered as "a public use" by the federal government, § 80.
how considered by the states and territories, §§ 19, 20, 254-264.
See EMINENT DOMAIN.
different kinds of, defined and distinguished, § 851.
right to pollute streams in conduct of, §§ 840-842. See HYDRAULIC MINING.

**Mining Claim.**
defined, § 327.
not always synonymous with "location," § 327.
"claim," as used in § 2324, Revised Statutes, means location, § 628.
as used in townsite laws, § 176.
no limit to number one may own, § 327.
transfer of, in early days, by parol, § 270.
under existing laws must be in writing, § 270.
rules applicable to other real estate govern, § 270.
estate in valid, has attributes of fee, §§ 535, 536, 538, 548. See ESTATE.
may be partitioned, § 792.
may be mortgaged, §§ 538, 539.
subject to sale on execution, § 535.
consolidation of a number for purposes of patent, § 448.
See LOCATION.

**Lode.**
rights in, how governed prior to 1866, § 41.
dips, spurs, and angles, as an incident to, § 43.

**Mining Claim**—*Continued.*
relationship of surface to located lode prior to 1866, § 43.
subsequent to 1866, § 58.
first patentable under act of 1866, §§ 54, 57.
under act of 1866 limited to one lode, § 58.
details of location of, after 1866, controlled by local customs, § 61.
limit of linear feet under act of 1866, § 61.
"square claims" in certain localities, § 61.
changes in laws effected by act of May 10, 1872, § 71.
See LOCATION — LODE.
**Placer.**
rights to, governed by local rules until 1870, §§ 57, 62.
limit as to area under act of 1870, § 62.
essential features of act of 1870, § 62.
text of act of 1870, p. 1146.
to what extent controlled by local rules after passage of act of 1870, § 63.
under act of 1870, required to conform to public surveys, § 62.
changes effected by act of 1872, §§ 72, 73.
See LOCATION — PLACER.
**Mining Districts.** See LOCAL RULES AND CUSTOMS.
**Mining Law.**
**Federal.**
evolution and development, historical parallels, § 1.
influence of foreign laws on development of, § 1.
originated in local customs, §§ 41, 42, 43, 44.
historical review of. See HISTORICAL REVIEW.
governmental theories upon which existing federal system is based, § 80.
federal system, how composed, §§ 81, 248.
Judge Beatty's characterization of system, § 81.
in force only in certain states, §§ 18, 81.
See ACTS OF CONGRESS.
**Foreign.**
comparative mining jurisprudence, § 1.
England, § 10.
France, § 12.
Mexico, § 13.
**State.**
systems classified, § 18.
mining code of New York, § 19.
Texas, § 19.
See STATES AND TERRITORIES.
**Mining Partnership.**
nature of relationship, § 796.
distinctive features, § 796.
not dissolved by death or bankruptcy of member, §§ 798, 803.
sale of interest of member, §§ 796, 800.
state legislation on subject of, § 796.
how created, § 797.
express agreement not necessary, § 797.

**Mining Partnership** — *Continued.*
agreement to form, not within statute of frauds, § 797.
special instances, wherein held to be created, § 798.
held not to be created, § 799.
rights and obligations of mining partners *inter sese*, § 800.
authority of members, § 801.
liability of copartnership to third parties, 801.
partnership property, § 802.
dissolution, § 803.
**Minnesota.**
lands containing baser metals sold under special laws, § 20.
excepted from operation of federal mining laws, §§ 20, 75.
**Minors.**
born in the United States are citizens, § 224.
may locate mining claims, § 224.
**Mississippi.**
acquired by Louisiana purchase, § 33.
saline act of January 12, 1877, does not apply to, § 514.
**Missouri.**
acquired through Louisiana purchase, § 33.
lands containing baser metals sold under special laws, §§ 20, 35.
excepted from operation of federal mining laws, §§ 20, 75.
public regulations concerning manner of working mines, § 20.
**Montana.**
acquired through Louisiana purchase, § 33.
subject to federal mining laws, § 81.
act of congress for classification of lands in railroad grants, § 160.
laws of, defining property rights of aliens, § 238.
mining as a "public use" in, § 252.
legislation in, concerning rights of way and mining easements, § 252.
constitutional provisions on subject of eminent domain, § 253.
saline law of January 12, 1877, does not apply to, § 514.
dower exists in, § 543.
but not in unpatented mines, § 543.
*Lode Claims.*
location, how made, p. 1286, par. 1.
declaratory statement, certificate of location, its contents, § 389.
text of law, p. 1287, par. 3.
form of, suggested, p. 1367.
verification of, §§ 251 (4), 385.
text of law, p. 1287, par. 3.
record of, § 389.
text of law, p. 1287, par. 3.
discovery shaft, §§ 250 (15), 343.
text of law, p. 1286, par. 2.
time allowed for completion, p. 1286, par. 2.
posting preliminary notice, §§ 250 (3), 352.
text of law, p. 1286, par. 1.
form of, suggested, p. 1367.
marking boundaries, § 374.
text of law, p. 1286, par. 2.

**Montana** — *Continued.*
private survey of, by deputy mineral surveyor, p. 1290, par. 7.
proof of annual labor, §§ 250 (11), 636.
text of law, p. 1288, par. 5.
relocation of abandoned claims, §§ 250 (9), 408.
text of law, p. 1289, par. 6.
*Millsites.*
how located, p. 1286, par. 1.
preliminary development work not required, p. 1286, par. 1.
posting preliminary notice, p. 1286, par. 1.
boundaries, how marked, p. 1286, par. 2.
declaratory statement, its contents, p. 1287, par. 3.
verification of, p. 1287, par. 3.
record of, p. 1287, par. 3.
*Placer Claims.*
attempt to define what may be located as, § 251 (6).
text of law, p. 1286, § 1.
how located, p. 1286, par. 1.
declaratory statement, its contents, § 459.
text of law, p. 1287, par. 3.
verification of, p. 1287, par. 3.
record of, p. 1287, par. 3.
equivalent of discovery shaft required, p. 1286, par. 2.
posting preliminary notice, p. 1286, par. 1.
marking boundaries, § 455.
text of law, p. 1286, par. 2.
private survey by deputy mineral surveyor, p. 1290, par. 7.
proof of annual labor, §§ 250 (11), 636.
text of law, p. 1288, par. 5.
relocation of abandoned claims, p. 1289.
text of law, p. 1289, par. 6.
**Monuments.**
location, should be within statutory limit, § 373.
not be within lines of other locations, § 373.
character of, to comply with federal law as to marking boundaries, § 373.
required by various state laws, § 374. See VARIOUS STATES.
stakes as, §§ 373, 383.
boundary lines of adjoining claims are, § 383.
obliteration of, will not destroy right once vested, § 375.
may be resorted to, in aid of description contained in certificate of location, § 381.
courses and distances yield to, §§ 382, 778.
"natural objects" defined, § 383.
"permanent monuments" defined, § 383.
parol evidence to show that thing named in certificate is a permanent, § 383.
circumstance justifying change of, § 396.
shifting, for purpose of paralleling end lines, § 396.
casting off excess, §§ 362, 396.
See BOUNDARIES.

**Mortgage.**
mining claims are subjects of, §§ 538, 539.
mortgagor cannot relocate claim so as to defeat, § 407.
may not abandon claim so as to impair, § 719.
owner of, not required to adverse patent application by mortgagor, § 719.

**National Domain.**
original nucleus of, cession by the states, § 28.
mineral resources of territory ceded by states, § 29.
Louisiana purchase, § 33.
cession of Florida, § 29, note 2.
the Mexican cession, § 40.
the Gadsden purchase, § 40.
the purchase of Alaska, § 64.
See PUBLIC LANDS.

**National Park Reservations.**
manner of creating, and purposes of, § 196.
mining claims cannot be located within, § 196.

**Natural Gas.** See GAS.

**Naturalization.**
of Indians, § 224.
gives alien full status of citizen, § 224.
when complete, § 224.
declaration of intention to become citizen gives alien right to locate mining claims, § 224.
proof of, under mining laws, § 227.
retroacts in favor of alien locator, § 232.
in absence of intervening rights, §§ 232, 234.

**Natural Objects.**
reference to, required in recorded notices of location, § 379.
what are, § 383.
parol evidence admissible for purpose of showing that thing named in location certificate is a, § 383.
See BOUNDARIES; MONUMENTS.

**Navigable Streams.**
ownership of minerals under, at common law, § 3.
lands underlying, held by government in trust for states, § 80.
gravel deposits in beds of, not subject of appropriation, § 428.
injury to, by hydraulic mining, §§ 848, 853.
See STREAMS.

**Nebraska.**
acquired through Louisiana purchase, § 33.
subject to federal mining law, § 81.
laws of, defining property rights of aliens, § 238.
dower right exists in, § 543.

**Negligence.**
to what extent an element in fixing liability for flooding mine, §§ 807, 808.
not an element in actions for injuries caused by surface proprietor to miner's rights, § 826.

**Nevada.**
acquired through cession from Mexico, § 40.
subject to federal mining laws, § 81.
act of congress in relation to Mexican grants in, §§ 118, 127.
establishing federal courts for, § 47.
recognizing possessory rights to mining claims, §§ 47, 49.
laws of, defining property rights of aliens, § 238.
legislation in, concerning rights of way and mining easements, § 252.
constitutional provisions on subject of eminent domain, § 253.
mining as a public use in, § 258.
saline law of January 12, 1877, does not apply to, § 514.
no right of dower exists in, § 543.
**Mining Legislation in.**
forfeiture to co-owners, p. 1297, § 11.
validity of this class of laws questioned, §§ 251 (5), 646.
deeds from state to contain reservation of minerals, p. 1304, § 2.
location of mining claims within state lands, p. 1303, § 1.
validity of law questioned, p. 1251, note.
*Lode Claims.*
location, how made, p. 1292, § 1.
certificate of location, its contents, p. 1293, § 3.
void, unless conforms to law, p. 1293, § 3.
must claim but one location, p. 1299, § 12.
form of, suggested, p. 1368.
record of, p. 1293, § 3.
amendment of, p. 1295, § 6.
discovery shaft, p. 1292, § 2.
its equivalent, p. 1292, § 2.
time allowed for completion, p. 1292, § 2.
posting preliminary notice, p. 1292, § 1.
form of notice suggested, p. 1368.
marking boundaries, p. 1292, § 2.
change of boundaries, p. 1295, § 6.
private survey by deputy mineral surveyor, p. 1296, § 8.
rights conveyed by perfected location, p. 1294, §§ 4, 5.
validity of this class of laws questioned, § 251.
annual labor, value of day's work, p. 1296, § 9.
validity of this class of laws questioned, § 635.
proof of, § 636.
text of law, p. 1297, § 10.
relocation of abandoned claims, p. 1296, § 7.
**Millsites.**
may be located, p. 1300, § 15.
how located, p. 1301, § 16.
posting notice, p. 1301, § 16.
marking boundaries, p. 1301, § 16.
recording notice, p. 1301, § 17.
location notice void, when, p. 1301, § 18.
*Placer Claims.*
location, how made, p. 1299, § 13.

**Nevada** —*Continued.*
location certificate, p. 1300, § 14.
record of, p. 1300, § 14.
amendment of, p. 1295, § 6.
posting preliminary notice, p. 1299, § 13.
marking boundaries, p. 1299, § 13.
annual labor, value of day's labor, p. 1296, § 9.
validity of this class of laws questioned, § 635.
proof of, § 636.
text of law, p. 1297, § 10.
*Tunnel Claims.*
how located, p. 1301, § 19.
boundary lines, how established, p. 1302, § 20.
recording notice, p. 1302, § 21.
blind lodes discovered in, how located, p. 1302, § 22.
For rights of tunnel proprietor under federal laws, see TUNNEL LOCATIONS.
**New Hampshire.**
reservation of mines in crown grant to colony, § 31.
not subject to federal mining law, § 19.
**New Jersey.**
not subject to federal mining law, § 19.
no mining legislation in, § 19.
**New Mexico.**
acquired by treaty with Mexico, § 40.
subject to federal mining laws, § 81.
act of congress concerning Mexican grants in (1854), § 118.
(1891), § 127.
forest reservations in, § 197.
subject to alien laws of congress, § 243.
(alien laws amended by act of 1897, p. 1229.)
legislation in, concerning rights of way and mining easements, § 252.
saline law of January 12, 1877, does not apply to, § 514.
dower right not recognized in, § 544.
**Mining Legislation in.**
act empowering land owners to make local rules governing mining claims within their lands, p. 1311, par. 10.
*Lode Claims.*
location, how made, p. 1306, par. 1.
notice of location, its contents, § 389.
form of, suggested, p. 1368.
record of, § 389.
text of law, p. 1306, par. 1.
amendment of, § 397.
text of law, p. 1308, par. 5.
discovery shaft and its equivalent, §§ 250 (15), 343.
text of law, p. 1307, par. 3.
time allowed for completion, p. 1307, par. 3.
posting preliminary notice, § 353.
text of law, p. 1306, par. 1.
form suggested, p. 1368.

**New Mexico**—*Continued.*
marking boundaries, § 374.
text of law, p. 1307, par. 2.
change of boundaries, p. 1308, par. 5.
annual labor, value of day's labor, p. 1310, par. 8.
validity of law questioned, §§ 250 (10), 635.
proof of, § 636.
text of law, p. 1309, par. 7.
forfeiture for failure to perform, p. 1307, par. 4; p. 1310, par. 9.
relocation of abandoned claims, § 408.
text of law, p. 1309, par. 6.
original locator prohibited from, for certain period, p. 1307, par. 4.
*Placers.*
doubtful if laws generally apply to, § 455.
provisions common to lodes and, marking boundaries, p. 1307, par. 2.
amended certificates and change of boundaries, p. 1308, par. 8.
proof of annual labor, p. 1309, par. 7.
value of day's work, p. 1310, par. 8.
validity questioned, §§ 250 (10), 635.
forfeiture for failure to perform work, p. 1307, par. 4; p. 1310, par. 9.
relocation of abandoned, p. 1307, par. 4; p. 1310, par. 9.
**Miscellaneous Mining Legislation.**
reference table, p. 1311.
**Newspaper.** See PUBLICATION.
**New York.**
outline of mining code of, § 19.
mining system based upon regalian theory, § 19.
mining a *quasi* "public use," § 19.
condemnation of property for mining purposes authorized, § 19.
rights of discoverer of mines in state lands, § 19.
**Nitrate of Soda.**
classified as mineral by land department, § 97.
lands containing, subject to entry under placer laws, § 420.
**North Dakota.**
acquired through Louisiana purchase, § 33.
subject to federal mining laws, § 81.
laws of, defining property rights of aliens, § 238.
legislation in, concerning rights of way and mining easements, § 252.
constitutional provisions on subject of eminent domain, § 253.
saline law of January 12, 1877, does not apply to, § 514.
no dower exists in, § 543.
legislation on subject of subjacent support, § 822.
local customs and regulations, how far binding, p. 1318, par. 14.
**Mining Legislation in.**
*Lode Claims.*
length, § 361.
text of law, p. 1313, par. 1.

**North Dakota**—*Continued.*
width, § 361.
text of law, p. 1313, par. 2.
location, how made, p. 1314, par. 5.
certificate of location, contents, § 380.
text of law, p. 1313, par. 3.
void, unless conforms to law, p. 1314, par. 4.
must claim but one location, p. 1317, par. 13.
form of, suggested, p. 1370.
record of, § 389.
text of law, p. 1313, par. 3.
amendment of, § 397.
text of law, p. 1316, par. 11.
discovery shaft, §§ 343, 250 (15).
text of law, p. 1314, par. 5.
its equivalent, p. 1315, par. 7.
time allowed for completion, p. 1315, par. 8.
posting preliminary notice, § 352.
text of law, p. 1314, par. 5.
form of notice suggested, p. 1369.
marking boundaries, § 374.
text of law, p. 1315, par. 6.
change of boundaries, p. 1316, par. 11.
rights conveyed by perfected location, p. 1316, pars. 9, 10.
validity of law questioned, § 251 (3).
relocation of abandoned claims, § 408.
text of law, p. 1317, par. 12.
*Placer Claims.*
no legislation specially applicable to, §§ 442, 455, 459.
**Miscellaneous Mining Legislation.**
reference table, p. 1318.
**Notice.**
of hearing to establish character of land, state entitled to, § 144.
railroad company, § 156.
constructive, imparted by record of certificate of location, § 392.
of application for patent, contents, § 677.
its posting on the claim, § 677.
proof of, §§ 683, 692.
is process, § 713.
its posting in register's office, § 691.
proof of, § 691.
is process, § 713.
publication, § 685.
designation of newspaper, § 685.
agreement of publisher, § 685.
period of, § 690.
is process, § 713.
**Of Location**
preliminary, for posting not required in absence of state laws or local regulations, § 350.
object of, § 350.

**Notice**—*Continued.*
preliminary, for posting, state legislation requiring, §§ 350-354.
liberal rules of construction applied to, § 355.
place and manner of posting, § 356.
rules apply to placers, § 442.
final for recording, not required by federal law, § 379.
purpose and function of, § 379.
contents of, § 380.
state legislation concerning, § 380. See VARIOUS STATES.
rules of construction applied to, § 381.
verification of, § 385.
amendment of, §§ 397, 398.
recording, §§ 389-392.
See CERTIFICATE OF LOCATION.

**Nuisance.**
local rules cannot authorize acts amounting to, § 270.
See HYDRAULIC MINING; POLLUTION OF STREAMS; TAILINGS.

**Oath.**
to certificate of location required in certain states, § 385.
validity of laws discussed, §§ 251 (4), 385.
to adverse claim, by and before whom taken, § 736.
to proofs in patent proceedings, where must be taken, § 682.
See VERIFICATION.

**Occupancy.**
of mineral lands for purpose of trade, to what extent prevents location under mining laws, §§ 168, 170.
right of surface occupant as against lode claimant within townsite, under act of 1891, § 173.
naked, of public mineral lands confers no title, § 216.
rights of naked occupant, §§ 216, 218.
possession of occupant of mineral lands cannot be forcibly invaded, §§ 217, 219.
mining claim may be located on mineral lands in naked occupancy of others, if made peaceably, §§ 218, 219.
See POSSESSION.

**"Office Found."**
alien may hold title to unpatented mining claim until, §§ 233, 234.
proceedings to obtain patent involving citizenship are in nature of, § 233.

**Oil.** See PETROLEUM.

**Oklahoma.**
all lands within, declared agricultural, p. 84, note 1.
federal coal land laws not operative in, § 497.

**Onyx.**
occurring "in place," how appropriated, § 323.
See MARBLE.

**Oregon.**
acquired through Louisiana purchase, § 33.
subject to federal mining law, § 81.
laws of, as they existed in 1884, apply to Alaska, 172.

**Oregon**—*Continued.*
forest reservations in, § 197.
property rights of aliens under laws of, §§ 233, 238.
saline law of January 12, 1877, applies to, § 514.
dower right exists in, § 543.
but does not attach to unpatented mining claims, § 543.
**Mining Legislation in.**
length and width of lode claims, § 250 (1), (2).
text of law, p. 1319, par. 1.
posting notice of location, §§ 250 (3), 352.
text of law, p. 1319, par. 2.
recording notice of location, §§ 250 (5), 389.
text of law, p. 1319, par. 2.
annual labor, § 250 (10).
text of law, p. 1319, par. 2; p. 1320, par. 4.
law invalid, §§ 626, 250 (10).
number of claims that may be located by one person, p. 1320, par. 3.
when mining claim subject to taxation, § 1320.
recording mining claims, p. 1321, par. 5.
**Miscellaneous Mining Legislation.**
reference table, p. 1322.
**Paint Stone.**
classified as mineral under American authorities, § 93.
**Partition.**
mines and mining claims are subjects of, § 792.
usually requires sale, § 792.
parol accompanied by possession, valid, § 792.
right of, may be waived and permanent tenancy created, § 792.
owner of incorporeal hereditament cannot maintain, § 792.
**Partnership.**
distinction between mining partnership and general, § 796.
See MINING PARTNERSHIP.
**Patent.**
other than mining, passes title to all minerals unless reserved, § 80.
general rules as to conclusiveness of, § 777.
collateral attack upon, not permitted, § 777.
character of land established by, §§ 779, 208.
conclusive as to form and extent of surface boundaries, § 778.
principles determining operative force of, §§ 175, 777.
mining, conclusive evidence of regularity of antecedent steps, §§ 175, 777.
conclusive evidence of citizenship, §§ 226, 233.
cannot be broader than the law, § 575.
reservations in, void unless authorized by law, § 171.
prior patentee not required to adverse junior applicant, § 718.
equity will control, in favor of holder of equitable title, § 719.
presumption as to ownership of everything beneath surface, § 364.
burden of proof to overcome, § 866.
certificate of purchase equivalent to, §§ 208, 771.
right to, equivalent to patent issued, § 637.
exceptions in junior of conflicting area held under senior title, § 782.
title conveyed by, relates to inception of right, § 783.

**Patent**—*Continued.*
when conclusive evidence of priority, § 783.
for what purpose patent record may be introduced in evidence, § 783.
after issuance, property rights governed by laws of the states, §§ 22, 237.
upon issuance of, government loses dominion over lands, §§ 22, 777.
how vacated, circumstances justifying action to vacate, § 784.
suit to vacate, when must be brought, § 784.
**Agricultural.**
passes minerals unless reserved, § 80.
reservation of known mines in, §§ 209, 779.
**Lode.**
*Under Act of 1866.*
its restriction to one lode, §§ 58, 572.
effect of, on rights in located lodes, §§ 59, 60, 567.
functions of diagram, § 573.
different classes of, § 573.
extralateral right conferred, §§ 574-577.
construction of, applied for under, but issued after repeal of act, § 604.
*Under Act of 1872 and Revised Statutes.*
may not include land noncontiguous to discovery and workings, § 338.
what is conveyed by, § 780.
evidence of perfected location, § 582.
describing parallel end lines cannot be defeated by showing non-parallelism of original, § 582.
call for length of lode in, useless, § 780.
may issue for lode reserved out of prior placer patent, §§ 413, 704.
junior for lode within placer not evidence that lode was known to exist when placer application was filed, § 781.
construction of, applied for prior, but issued subsequent to act of 1872, § 604.
presumption that apex exists within land described, §§ 313, 364.
extralateral right conferred by. See EXTRALATERAL RIGHT.
**Mexican Grant.**
in California passes minerals, §§ 125, 126.
in other states does not convey minerals, § 127.
**Placer.**
first obtainable under act of 1870, § 62.
what is conveyed by, § 781.
reservation of lodes "known to exist," § 781.
reserved known lodes may be subsequently patented, §§ 413, 704.
will not carry known lodes, § 413.
unless specifically claimed, § 720.
consolidation for purposes of, area unlimited, § 447.
**Railroad.**
conclusive evidence of nonmineral character of land, § 161.
discovery of mineral subsequent to, will not defeat, § 161.
collateral attack upon, § 161.

**Patent**—*Continued.*
**Townsite.**
collateral attack upon, § 170.
effect of, § 175.
how assailed, § 177.
correlative reservations in townsite and mineral, §§ 171, 173, 175.
to incorporated cities under act of 1891, § 175.
reservation of mines and mining claims, §§ 166, 170, 176, 177, 779.
for lodes reserved out of, § 177.
**Patent Proceedings.**
**Lode Claims.**
provisions of federal law, Revised Statutes, § 2325, p. 1170.
regulations of land department, p. 1191, par. 27.
certificate of location, the basis of, § 739.
amendment of, prior to, § 396.
patent proceedings are *in rem*, §§ 604, 713.
survey, application for, § 670.
order for, § 670.
by whom made, § 670.
of lode claims, how made, § 671.
must conform to location, § 671.
excessive area may be cast off, § 362.
latitude allowed deputy, § 671.
group surveys, §§ 671, 477.
application for, contents of, § 680.
suggested form, p. 1374.
to be filed with register of land office, § 678.
may not be filed if land not clear on tract books, § 679.
filing of, withdraws the land, § 679.
applicant need not adverse subsequent applications, § 718.
pending, annual work must be done, § 679.
by one of several co-owners, § 681.
by corporations, § 681.
verification of, § 682.
when may be dismissed, § 679.
schedule of instruments to accompany, § 678.
suggested forms of, pp. 1374-1392.
notice of, for posting its contents, § 677.
form, p. 1379, exhibit "A."
object of posting, §§ 677, 713.
proof of posting, § 683.
form, p. 1378.
posting in register's office, § 691.
publication of, § 685.
designation of newspaper, § 685.
agreement of publisher, § 685.
form, p. 1382.
is process, § 713.
period of, how computed, § 738.
proof of, § 690.
proof of annual labor, § 686.
form, p. 1382.

**Patent Proceedings**—*Continued.*
proof of citizenship, § 684.
proof of mineral character of land, § 689.
abstract of title, § 687.
certified copies of notice of location, § 687.
proof of title by possession without location, § 688.
proof that plat and notice remained posted on claim, § 692.
form, p. 1387.
statement of fees and charges, § 693.
form, p. 1388.
certificate that no suit is pending, § 750.
application to purchase, § 694.
form, p. 1389.
résumé of proceedings, § 695.
**Millsites.**
how applied for, § 708.
federal statute, Revised Statutes, § 2337, p. 1179.
regulations of department, p. 1202, pars. 64-68.
**Placer Claims.**
survey, § 672.
descriptive report, § 672.
proceedings same as in lodes, § 699.
provisions of federal law, Revised Statutes, § 2329, p. 1174.
regulations of department, p. 1198, par. 52.
description of placers on surveyed lands, § 700.
proof of five hundred dollars' expenditures, § 701.
proof of mineral character of land, § 702.
proof that no known lodes exist within, § 703.
lodes within placers, how applied for, § 704.
See ADVERSE CLAIMS.
**Pennsylvania.**
not subject to federal mining law, § 19.
state laws regulating manner of working mines, § 19.
reservation of mines in crown grant to William Penn, § 31.
mining as a public use in, § 261.
**Permanent Monuments.** See MONUMENTS.
**Petroleum.**
classified as a mineral by American courts, § 93.
by land department, § 97.
ruling of department in reference to school lands, § 138.
a mineral, § 422.
subject to entry under placer laws, § 422.
act of congress, February 11, 1897, on subject of, § 422.
circular instructions under, p. 1228.
**Phosphates.**
legislation in South Carolina concerning, § 19.
phosphatic nodules (coprolites) classified as mineral, § 92.
in Florida treated as mineral by land department, § 97.
but held by Secretary Smith to pass to railroads, § 97, note 7; § 425.
ruling reversed by Secretary Bliss, note to § 2319, Revised Statutes, p. 1163.

**Phosphates**—*Continued.*
when occurring in place, how appropriated, § 323.
lands containing, subject to entry under placer laws, § 425.
**Pillars.**
owner of mines required to leave, to prevent subsidence, § 819.
custom cannot be invoked to justify removal of, § 819.
**Pipe Lines.**
right to condemn land for purpose of, for transporting oil and natural gas, § 255.
**Placers.**
manner of locating claims prior to 1870, § 61.
act of July 9, 1870, text of the act, p. 1146.
essential features, § 62.
limit as to area, §§ 62, 447.
local rules subsequent to, § 63.
required to conform to public surveys, §§ 62, 447.
changes made by act of 1872 with reference to, §§ 72, 73.
**Character of Deposits Classified as.**
general rule, § 419.
"placer" defined, § 419.
distinction between deposits "in place" and "not in place," § 323.
metalliferous or nonmetalliferous character of deposits as affecting mode of appropriation, § 323.
commercial value, and not metallic character controls, § 419.
specific substances classified as, § 420.
natural gas, § 423.
brick clay, § 424.
building stone, § 421.
petroleum, § 422.
phosphates, § 425.
tailings, § 426.
subterranean gravel beds, §§ 301, 427.
auriferous gravel beds in navigable rivers, § 428.
in nonnavigable rivers, § 428.
state legislation specifying, void, § 251 (6).
rule for determining, § 98.
recent ruling of Secretary Bliss. Note to Revised Statutes, § 2319, p. 1163.
**Location of, How Made.** See LOCATION — PLACER.
**Patent.**
proceedings to obtain same as lodes, § 609.
description of, in placer application, § 700.
in proceedings, no survey required if on surveyed lands, § 700.
proof of five hundred dollars' expenditure, § 701.
mineral character of land, § 702.
that no known lodes exist, § 703.
form of, p. 1391.
for lodes within placers, how applied for, § 704.
what is conveyed by, § 781.
reservations in, § 781.
lode reserved when "known to exist," § 781.

**Plat.**
of patent survey, copy to be posted on claim, § 677.
copy to accompany patent application, § 678.
proof that it remained posted during publication, § 692.
See SURVEY.

**Pleadings.**
allegation of citizenship in actions concerning mining claims, § 233.
forfeiture must be specially pleaded, § 643.
abandonment need not be specially pleaded, § 643.
in ordinary actions concerning mining claims, § 754.
actions to determine adverse claims, §§ 754, 755.

**Police Regulations.**
concerning working of mines. Reference to state laws, § 19.

**Pollution of Streams.**
use of water in conduct of mining, § 838.
the common law doctrine of riparian ownership, § 838.
accepted in some of the states, § 838.
modified in the mining states, § 838.
the English rule, § 839.
tin streaming in Cornwall, § 839.
American rule in states accepting common law doctrine, § 840.
in states not accepting common law doctrine, § 841.
reasonable use for mining purposes, §§ 840, 841.
remedy by injunction to prevent, § 842.
hydraulic mining in California, §§ 848-853.
causes inducing passage of California debris act, § 848.
hydraulic mining not a nuisance *per se*, § 849.
principles established by the California debris cases, § 849.
essential features of the California debris act, § 850.
hydraulic mining defined, § 852.
judicial interpretation of California debris act, § 853.

**Porcelain Clay.**
classified as mineral by English authorities, § 92.
land department, § 97.

**Possession.**
possessory rights in public mineral lands recognized by congress, §§ 47, 49, 56.
of public mineral lands for purpose of trade, to what extent prevents location under mining laws, §§ 168, 170, 173.
right of surface possessor as against lode locator within townsite, under act of 1891, § 173.
of public mineral lands without location confers no title, §§ 216, 218, 219, 329.
mining right cannot be initiated by a forcible entry upon, §§ 217, 219.
mining claims may be located peaceably over naked possession of another, §§ 218, 219.
naked, good as against mere intruders, §§ 218, 219.
naked, of public mineral lands, must yield to a mineral locator who enters without force, §§ 218, 219.
right of, to mineral lands only flows from valid location, § 218.

**Possession**—*Continued.*
principles of law governing mining locations in the possession of others not holding under color of title, § 219.
of public lands as against intruder, *prima facie* evidence of title, § 216.
of discoverer protected for a reasonable time to enable him to perfect location, §§ 219, 339, 345.
actual, not necessary for protection of perfected valid location, §§ 328, 539.
is necessary to perfect right to millsite, § 521.
owner of lode location is entitled to exclusive right of, §§ 539, 550.
of mining claim, actual and constructive under miners' rules, § 537.
miner's title originally founded on law of, §§ 536, 539.
constructive, flowing from marking boundaries, § 537.
without location may ripen into title, §§ 62, 688.
proof of title by, without location in patent proceedings, § 688.

**Posting.**
**Notice of Location.**
lode, custom prior to 1866, § 350.
not required in absence of state laws or local regulations, §§ 329, 350.
object of, § 350.
liberal rules applied to construction of posted notices, § 355.
posted notice not to be tested by rules applicable to recorded, § 355.
place and manner of posting, § 356.
instances of sufficient posting, § 356.
effect of, as protecting discoverer in possession, § 339.
if also required to be recorded, must follow requirements of federal law, § 355.
state legislation requiring, §§ 351-354. See VARIOUS STATES.
cannot be substituted for marking boundaries, § 373.
millsite must be located substantially as a mining claim, § 521.
state legislation concerning, § 521. See VARIOUS STATES.
placer, general observation on subject of lodes apply to, § 442.
state legislation concerning, § 442.
**Notice of Application for Patent.**
on claim, § 677.
is process, § 713.
when to be posted, § 677.
object of posting, § 677.
posting and publication jurisdictional, § 677.
in case of group applications, § 677.
proof of, § 683.
form, p. 1378.
proof that it remained posted, § 692.
form of, p. 1387.
in register's office, § 691.
proof of, § 691.

**Posts.**
when considered as permanent monuments, § 383.
state legislation prescribing character of, for marking boundaries, §§ 374, 250 (7).

**Pre-emption Claims.**
act of 1841—reservation of "known salines or mines," § 36.
March 3, 1883, excepting mineral lands, § 47.
mineral lands reserved from operation of laws, §§ 47, 86.
repeal of laws governing, § 203.
nature of estate created by accepted filing, § 205.
inchoate pre-emption and homestead claims compared, § 205.
reservation of "known mines" in act construed, § 208.
"known mines" not legal equivalent of mineral lands, § 208.
estate in unpatented mining claim, compared with inchoate, § 542.
right of apex locator to pursue vein in depth underneath prior, § 612.
existence of inchoate, will not prevent filing application for mining patent, § 679.
**Prescription.**
right to pollute stream may be acquired by, § 840.
See ADVERSE POSSESSION.
**Presumptions.**
of ownership of minerals from that of soil at common law, §§ 2, 3.
such presumption, how rebutted, § 2.
that district rules once adopted and acquiesced in remain in force, § 272.
flowing from surveyor-general's return, §§ 106, 144.
flowing from surface ownership, §§ 364, 551, 866.
after patent of ownership of everything beneath the surface, § 364.
in favor of surface owner in case of underground trespass, § 866.
in favor of apex proprietor in case of underground trespass, § 866.
flowing from surface ownership to be overcome by owner of extra-lateral right, § 615.
as to sufficiency of reference to natural objects in location certificates, § 383.
of citizenship of stockholder of domestic corporations, § 226.
of citizenship flowing from residence, § 227.
principal presumed to consent to location made by agent, § 331.
patent will be conclusively presumed to show true position of surface boundaries, § 582.
that apex exists within land described in lode patent, § 313.
as to continuity of vein within lines of location, § 615.
general, flowing from patents, §§ 175, 777.
**Principal and Agent.** See AGENT.
**Private Land Claims.** See MEXICAN GRANTS.
**Proofs (in Patent Proceedings).**
verification of, § 682.
of posting notice and plat on claim, § 683; form, p. 1378.
of citizenship, § 684; form, p. 1381.
of annual labor, § 686; form, pp. 1382, 1383.
that plat and notice remained posted, § 692; form, p. 1387.
of mineral character of land, § 689; form, p. 1384.
of publication of notice of application, § 690.
of posting notice in register's office, § 691.
general forms, pp. 1373-1392.
**Proofs (of Annual Labor).**
under state laws, § 636.
See ANNUAL LABOR.

**Protest.**
distinction between adverse claim and, § 712.
hearing to determine character of land initiated by, §§ 689, 717.
See CHARACTER OF LAND.
**Publication.**
of notice of patent application is *process*, §§ 713, 144, 156.
designation of newspaper, § 685.
agreement of publisher, § 685.
fees for, § 685.
maximum allowed, p. 1209, par. 97.
period of, §§ 690, 738.
proof of, § 690.
statutory provisions, § 2325, Revised Statutes, p. 1170.
departmental regulations, p. 1193, pars. 34-38.
**Public Lands.**
defined, §§ 80, 85, 112, 322.
states wherein federal government acquired no, §§ 19, 28.
original nucleus of national domain, § 28.
ordinance of 1785 regulating disposal of, § 30.
accession to, by Louisiana purchase, § 33.
by treaty with Mexico, § 40.
by Gadsden purchase, § 40.
purchase of Alaska, § 64.
title of United States to ceded lands not affected by laws of ceding nation, § 80.
government holds by purchase and cession, not by virtue of sovereignty, § 89.
laws governing disposal of, classified, §§ 202, 203.
character of, no general classification, § 102.
*prima facie*, as determined by surveyor's return, § 106.
how determined, § 107.
See CHARACTER OF LAND.
lands included within Indian reservation are not, § 181.
military reservation, § 191.
national parks, § 197.
forest reservations, § 198.
see recent legislation, p. 1232.
homesteads, § 205.
inchoate Mexican grants, §§ 123, 124, 127.
valid subsisting mining location, § 169.
naked occupancy of, confers no title, §§ 216, 219.
rights to mineral can only be acquired under the mining laws, § 216.
rights to, cannot be initiated by trespass, § 217.
See MINERAL LANDS.
**Public Land States.**
what are subject to federal mining laws, §§ 18, 20.
See STATES AND TERRITORIES.
**Public Surveys.** See SURVEYS—PUBLIC.
**Public Use.**
mining not considered a, by the federal government, §§ 80, 112.
as to what constitutes, depends upon state constitution and its construction by state courts, § 252.

**Public Use** — *Continued.*
federal laws cannot determine what is, within the states, § 252.
mining as a, within the states, § 254.
determination as to by legislation not binding on courts, § 254.
what constitutes, is a judicial question, § 254.
rights of way for pipe lines for oil and gas, § 255.
lateral and other railroads for transportation of mine products, § 256.
physical and industrial conditions as affecting the rule, § 257.
the rule in Arizona, § 259.
California, § 263.
Colorado, § 252.
Georgia, § 260.
Kentucky, § 19.
Massachusetts, § 19.
Nevada, § 258.
New York, § 20.
Pennsylvania, § 261.
Tennessee, § 19.
West Virginia, § 262.
general conclusions on subject of, § 264.

**Purchase.**
title of mining locator, is title by, §§ 233, 234.
alien may hold unpatented mining claim by, § 233.
See CERTIFICATE OF PURCHASE.

**Quarries.**
distinction under French laws between mines and, § 12.

**Railroad Grants.**
area of, in precious-metal-bearing states, § 149.
originally made to trustees for benefit of companies, § 149.
since 1862 made direct to railroad companies, § 149.
object of general analysis of land-grant legislation, § 149.
types of, selected for discussion, § 150.
Pacific railroad acts of 1862, 1864, § 150.
Northern Pacific act of 1864, § 150.
joint resolution of congress reserving mineral lands, §§ 150, 152.
character and extent of grants to Pacific railroads, § 151.
lateral limits of, § 151.
indemnity lands for those not "in place," § 151.
mineral lands reserved from operation of, § 152.
lands containing salt reserved from operation of, § 97.
reservation of mineral lands not to include coal or iron, §§ 152, 158.
made in contemplation of future legislation, § 152.
mining locations within, prior to lode law of 1866, § 152.
grants of sections "in place" acquire precision on survey, § 154.
until survey, grants of alternate sections are "floats," § 154.
grants of alternate sections are "*in præsenti*," § 154.
if surveyed, attach upon filing map of definite location, § 154.
doctrine of relation applied to, § 154.
time when character of land is to be determined, § 154.
discovery of mineral prior to patent prevents title from passing, §§ 154, 155.

**Railroad Grants**—*Continued.*
construction of, by the courts, § 154.
land department, § 155.
distinction between grants of school lands and, § 156.
return of surveyor-general concludes no one, §§ 106, 157.
indemnity, acquire precision by approved selections, § 157.
mineral lands within indemnity limits not subject to selection, § 157.
of rights of way are present absolute grants, § 153.
title vests on approval of map of definite location, § 153.
subject to valid subsisting mining location, § 153.
for depot and side track purposes subject to supervision of land department, § 153.
grants of alternate sections are "in place," § 154.
limits of grants of alternate sections are "primary" or "place" limits, § 154.
indemnity limits defined, § 154.
indemnity lands, how selected, § 157.
departmental instructions relating to selection of lands by, 1224.
in selection of indemnity lands same rules govern as in st ieu selections, § 157.
title to indemnity lands vests only on final certification, § 157.
restriction upon definition of "mineral lands," § 158.
coal and iron will not pass unless specially named, § 158.
ruling of department as to phosphates, §§ 158, 425.
petroleum, §§ 158, 422.
test of character of land applied to, §§ 158, 159.
state of law and facts at time patent applied for determines patentability, § 159.
or at time application to select is made, § 159.
term "mineral lands" to be construed in its broadest sense, §§ 158, 159.
classification of lands in Idaho and Montana, § 160.
effect of patents issued to railroads, § 161.
discovery of mineral subsequent to patent does not affect title, § 161.
collateral attack on patents, § 161.
patent conclusive evidence of nonmineral character, § 161.
void reservation in patents, § 161.
general principles governing administration, § 162.
millsite may not be located within, § 521.
right of apex proprietor to pursue vein in depth underneath, § 613.

**Record.**
**Certificates of Lode Locations.**
in absence of state legislation local rules may provide for, § 270.
records of mining districts do not prove themselves, §§ 272, 891.
how proved, §§ 272, 391.
popular understanding as to necessity for, §§ 273, 389.
custom as to, how shown, § 273.
to be binding, should be well known, § 273.
failure to, does not work forfeiture unless law or rule so prescribes, §§ 273, 274, 390.

**Record**—*Continued.*
unnecessary, unless required by state law or local rule, §§ 273, 328, 389.
constructive notice imparted by, a creature of the statute, §§ 392, 646.
evidence of, unless authorized by state law or local rule, inadmissible, §§ 273, 392.
if required by local rules, must contain requirements of federal law, § 273.
if required by state law, must conform to requirements of federal law, §§ 355, 379.
proof of record, § 391.
record as evidence, § 392.
time allowed, in absence of state law, § 389.
place of, § 389.
state legislation as to time and place of, § 389.
Alaska, regulated by local rules, p. 1372.
governed by laws of Oregon, p. 1352.
Arizona (Revised Statutes, 1887, § 2349), § 389.
California, p. 1245, § 3.
as evidence, p. 1247, § 5.
in districts, prohibited, p. 1248, § 7.
Colorado, p. 1263, par. 3.
Montana, p. 1279, § 4.
Nevada, p. 1293, § 3.
New Mexico, p. 1306, par. 1.
North Dakota, p. 1313, par. 3.
Oregon, p. 1319, par. 2.
South Dakota, p. 1324, par. 3.
Utah, p. 1332, § 4.
Washington, p. 1339, par. 6.
Wyoming, p. 1343, par. 7.
effect of failure to record within time fixed by state law, § 390.
**Millsite Locations.**
same rule applies as in mining locations, § 521.
**Placer Locations.**
governed by same rules as lode locations, § 459.
state legislation, § 459.
**Tunnels.**
governed by regulations of land department, § 472.
text of departmental regulations, p. 1190, pars. 23, 24.
state legislation concerning, § 250 (14).
Colorado, p. 1273.
Montana, Comp. Stats. Mont. 1887, §§ 1487-1491.
Nevada, p. 1301, § 19; p. 1302, § 21.
**Regalian Right.**
to mines, origin of the doctrine, § 3.
to mines of gold and silver under the common law, § 3.
civil law, § 3.
Spanish and Mexican law, § 13.
French law, § 12.
doctrine of, not recognized in the United States, § 80.

**Registers and Receivers.**
appointment, powers and duties of, § 660.
functions of, in patent proceedings. See PATENT PROCEEDINGS.
**Regulations of Land Department.**
power to prescribe, § 472.
conferred by Revised Statutes, § 2478.
have the force of laws, § 472.
courts take judicial notice of, § 472.
do not oust jurisdiction of courts, § 646.
general mining, pp. 1182-1214.
coal lands, pp. 1217-1224.
selection of lands by railroads, pp. 1224-1226.
states, pp. 1226-1227.
forest reservations, pp. 1232-1234.
See LAND DEPARTMENT.
**Regulations of Miners.** See LOCAL RULES AND CUSTOMS.
**Relocation.**
circumstances under which may be made, §§ 373, 345, 402.
new discovery not essential to, § 403.
admits validity of original, § 404.
by original locator, based upon his failure to perform assessment work, not permitted, § 405.
by one of several original locators in hostility to others, §§ 331, 405, 406.
by agent or others occupying fiduciary relation, § 407.
manner of perfecting, § 408.
state statutory regulations, § 408. See VARIOUS STATES.
in perfecting, same acts necessary as in original, § 408.
manner of performing preliminary development work, § 408.
when resumption of work by original locator cuts off right of, § 408.
right of second locator to improvements made by first, § 409.
mortgagor may not make so as to defeat mortgage, § 719.
by citizen, of mining claim in possession of alien, §§ 233, 234.
by original locator after sale to and forfeiture by grantee, § 407.
may be made pending patent proceedings if annual labor not performed, § 632.
right to perfect, when once initiated cannot be cut off by resumption of work, § 653.
**Removal of Causes.**
actions upon adverse claims from state to federal courts, § 750.
**Representation.** See ANNUAL LABOR.
**Reservation.**
of mines in crown grants to the colonies, § 31.
of one third of gold, silver, copper, and lead under ordinance of 1785, § 30.
of mines, policy of federal government adopted from crown grants, § 30.
act of March 3, 1807, reserving lead mines, § 33.
of mineral lands, general policy of government, § 47.
terms of, used in various acts, § 86.
in pre-emption laws of "known salines or mines," §§ 36, 47.
how construed, §§ 209, 777.

**Reservation**—*Continued.*
of mineral lands in grants to states, §§ 47, 136.
"mineral," how interpreted, §§ 137-140, 145.
of mineral lands in grants to railroads, §§ 47, 152.
how construed by courts, § 154.
land department, §§ 155, 158.
of mineral lands in Mexican grants under act of 1891, § 127.
of mines and mining claims in townsite laws, §§ 166, 170, 177.
what constitutes "mine," §§ 176, 779.
"mining claim," §§ 176, 779.
in patents void unless authorized, § 171.
construction of "known mines" in agricultural, § 779.
mines and mining claims in townsites, 779.
correlative in townsite and mineral, §§ 171, 173, 175.
**Reservations—Forest.** See FOREST RESERVATIONS.
**Indian.** See INDIAN RESERVATIONS.
**Military.** See MILITARY RESERVATIONS.
**National Park.** See NATIONAL PARK RESERVATIONS.
**Reservoirs.**
cost of constructing, when may be estimated in computing value of annual labor, § 631.
liability for injuries caused by breaking of, § 808.
**Resumption of Work.**
prevents forfeiture, § 651.
what constitues valid, § 652.
when right must be exercised, §§ 405, 408, 653.
general rules regulating, § 654.
foreign analogies, §§ 5-8.
**Return (of Surveyor-general).** See SURVEYOR-GENERAL.
**Revised Statutes (United States).**
embodied previous mining legislation, § 68.
relating to acquisition of title to mineral lands, pp. 1163-1182.
relating to coal lands, pp. 1214-1217.
**Rhode Island.**
not subject to federal mining laws, § 19.
no mining legislation in, § 19.
reservation of mines in crown grants to, § 31.
**Right of Way.**
for mining purposes, states which have legislated upon the subject, § 252.
provisions of Revised Statutes concerning state legislation on subject, § 252.
power of state to provide for, is limited by its constitution, § 252.
condemnation for, only authorized for uses specified in state constitution, § 252.
provisions of state constitution on subject of eminent domain, § 253.
mining as a public use, § 254.
for pipe lines for conveyance of oil and natural gas, § 255.
lateral and other railroads for transporting mine products, § 256.
physical and industrial conditions as affecting rule of "public utility," § 257.

**Right of Way**—*Continued.*
mining as a public use in the various states and territories, §§ 19, 258-264.
for ditches and canals over public lands, § 530.
mining locations subject to pre-existing, §§ 530, 531.
grant of, to railroads, present and absolute, § 153.
when takes effect, § 153.
carries minerals, § 153.
through forest reservations, § 198, note 1, p. 245.
act of 1897, and regulations, p. 1232.
of necessity, in cases of severance of title of minerals from surface, §§ 813, 827.
See EMINENT DOMAIN.

**Riparian Rights.**
common law doctrine, § 838.
English rule as to stream pollution, § 839.
accepted in some of the states, § 838.
modified in the mining states, § 838.
right of appropriation of water recognized in the mining states, § 838.
applied to mining operations in states accepting common law doctrine, § 840.
in the mining states, § 841.
remedy by injunction to prevent stream pollution, § 842.
hydraulic mining in California, §§ 848-853.
deposit of tailings on lands of others, § 843.

**River Claims.** See PLACERS.

**Roads.**
condemnation of land for, for mining uses, authorized in Nevada, § 258. See RIGHT OF WAY.
cost of constructing, when may be estimated under annual labor laws, §§ 629, 631.

**"Rock in Place."**
classification of mineral deposits, § 298.
use of term in the mining laws, § 299.
blanket deposits of Leadville, § 300.
judicial interpretation of term, § 301.

**Roman Law.**
ownership of mines under, § 3.

**Royal Mines.**
theory upon which crown based its right to, § 3.
doctrine of common law as to, same as civil law, § 3.
would not pass by grant unless expressly named, § 3.
under Spanish and Mexican law, § 13.

**Royalties.**
required of tin bounders in Cornwall, § 5.
Devonshire, § 6.
coal and iron miners in Forest of Dean, § 7.
lead miners of Derbyshire, § 8.
under French laws, § 12.
Spanish and Mexican laws, § 13.
exacted by South Carolina (phosphate deposits), § 19.
none reserved by federal laws, §§ 22, 81.

**Rules and Regulations of Miners.** See LOCAL RULES AND CUSTOMS.

**Salines.**
reservation of, in pre-emption act of 1841, § 36.
policy of government with reference to, §§ 513, 36.
salt classified as mineral, § 97.
not subject to entry under mining laws, § 97.
grants to states, § 513.
act of January 12, 1877, § 514.
what embraced within term "salines," § 515.

**Salt.**
classified as mineral under French laws, § 12.
by American courts, § 93.
by land department, § 97.
lands not subject to entry under mining laws, § 97.
lands reserved out of railroad grants, § 97.
is a mineral, but lands containing lakes and springs not subject to entry under mining laws, § 513.
governmental policy with reference to lands containing deposits, § 513.
Act of January 12, 1877, concerning salines, § 514.
what embraced within term "salines," § 515.

**Saltpeter.**
claim of crown of England to mines of, § 3.

**Salt Springs.** See SALINES.

**Sandstone.**
classified as mineral under English authorities, § 92.
See BUILDING STONE.

**School Land Grants (to States).**
reservation of lands for school purposes under ordinance of 1785, §§ 30, 132.
general grants for educational purposes, § 134.
mineral lands excepted from operation of, §§ 136, 143.
conflicts between mineral claimants and purchasers of, § 135.
restriction upon definition of "mineral" in administering, § 137.
do petroleum lands pass under? § 138.
do lands valuable for building stone pass? § 139.
test as to mineral character, when and how determined, §§ 140, 141.
character of land at time grant takes effect controls, §§ 140, 145.
coal lands do not pass under, § 140.
subsequent discovery of mineral does not defeat, § 142.
subsequent exhaustion of mineral will not revest title in state, § 142.
sixteenth and thirty-sixth sections, § 132.
when take effect, §§ 142, 145.
until survey, state has no title, § 142.
effect of surveyor-general's return, §§ 142, 144, 145.
state may contradict, §§ 144, 145.
estopped from contradicting by selection of lieu lands, §§ 144, 145.
compared with railroad grants, §§ 144, 156.
indemnity or lieu-land grants, § 133.
in lieu of mineral lands lost to the state, § 142.

**School Land Grants (to States)**—*Continued.*
mineral lands cannot be selected, § 143.
character of land, when to be determined, § 143.
circular instructions with reference to selection, p. 1226.
general rules relating to administration of, § 147.
right of apex proprietor to pursue vein in depth underneath, § 613.
**Scrip.**
mineral lands cannot be covered with, § 211.
**Seashore.**
ownership of minerals under, at common law, § 3.
**Servitude.**
in gross, owner of cannot maintain partition, § 792.
mine on lower level owes to mine on higher level, for natural drainage, § 807.
reciprocal, between owners of different strata, § 827.
See EASEMENTS; SUPPORT.
**Severance.**
of ownership of minerals from that of the soil at common law, §§ 2, 9.
nature of several estates after, § 9.
different ownership of different strata, § 9.
different ownership of different minerals, § 9.
under Mexican laws, § 114.
under federal mining laws, application of common law doctrine of, § 812.
reciprocal rights and duties of owners, § 812.
to what extent owner of minerals may use surface, § 813.
manner of conducting mining operations in cases of, § 814.
under townsite act of 1891, §§ 173, 175.
effected by grant of extralateral or dip right, §§ 568, 585.
considered with reference to vein entering underneath surface of prior agricultural grants, § 612.
manner of conducting mining operations in case of, § 814.
responsibility of surface owner for injuries to miner's rights, § 826.
right of access to lower strata, § 827.
reciprocal servitudes between owners of different strata, § 827.
See SUPPORT.
**Side-end Lines.**
what are, § 367.
their functions, § 367.
**Side Lines.**
primary function of, § 366.
fixed with reference to middle of vein, § 366.
data for lateral measurement, how obtained, § 366.
should be equidistant from lode unless prevented by prior locations, § 366.
more than statutory limit cannot be taken on one side, § 366.
need not be parallel, § 366.
if within statutory limit may take any direction, and have angles and elbows, § 366.
parallelism of original, important when they become end lines, § 366.

**Side Lines**—*Continued.*
when become end lines in law, §§ 366, 367.
effect of including excessive area, § 362.
excessive width, how cast off, § 366.
extralateral right where vein enters and departs from same side line, § 584.
where vein crosses two parallel, § 586.
the Flagstaff case, § 586.
Argentine-Terrible case, § 587.
King-Amy case, § 588.
deductions from side-end line cases, § 589.
where vein crosses two nonparallel, § 590.
where vein crosses one end line and a side line, § 591.
See BOUNDARIES.

**Silver.**
mines of, at common law belonged to crown, § 3.
what constituted, § 3.
See ROYAL MINES.
ordinance of May 20, 1785, reserved one third to government, § 30.
specially named in act of 1866, §§ 71, 323.
act of 1872, §§ 71, 323.
Revised Statutes, § 2320, p. 1164.
mines of, reserved out of Mexican grants under act of 1891, §§ 118, 127.
from townsite entries, §§ 166, 176.

**Slate.**
classified as mineral by English authorities, § 92.
land department, § 97.
for roofing purposes, lands containing, subject to entry under placer laws, § 420.

**Sluice Mining.**
defined, § 851.
distinguished from hydraulic mining, § 851.

**Soda.**
nitrate and carbonate of, classified as mineral, § 97.
lands containing, subject to entry under placer laws, § 420.

**South Carolina.**
not subject to federal mining law, § 19.
legislation concerning phosphates, § 19.

**South Dakota.**
acquired through Louisiana purchase, § 33.
subject to federal mining laws, § 81.
laws of, defining property rights of aliens, § 238.
legislation in, concerning rights of way and mining easements, § 252.
constitutional provisions on subject of eminent domain, § 253.
saline law of January 12, 1877, does not apply to, § 514.
no dower exists in, § 543.
legislation on subject of subjacent support, § 822.

**South Dakota**—*Continued.*
**Mining Legislation in.**
*Lode Claims.*
length, § 361.
text of law, p. 1324, par. 1.
width, § 361.
text of law, p. 1324, par. 2.
location, how made, p. 1325, par. 5.
certificate of location, contents, § 380.
text of law, p. 1324, par. 3.
void, unless conforms to law, p. 1325, par. 4.
must claim but one location, p. 1328, par. 14.
form of, suggested, p. 1371.
record of, § 389.
text of law, p. 1324, par. 3.
amendment of, § 397.
text of law, p. 1327, par. 11.
discovery shaft, §§ 343, 250 (15).
text of law, p. 1325, par. 5.
its equivalent, p. 1326, par. 7.
time allowed for completion, p. 1326, par. 8.
posting preliminary notice, § 352.
text of law, p. 1325, par. 5.
form of notice suggested, p. 1371.
marking boundaries, § 374.
text of law, p. 1326, par. 6.
change of boundaries, p. 1327, par. 11.
rights conveyed by perfected location, p. 1326, par. 9; p. 1327, par. 10.
validity of law questioned, § 251 (3).
annual labor, § 636.
text of law, p. 1328, par. 13.
relocation of abandoned claims, § 408.
text of law, p. 1328, par. 12.
*Placer Claims.*
no legislation specially applicable to, §§ 442, 455, 459.
**Miscellaneous Mining Legislation.**
reference table, p. 1329.
**Spain.**
mining laws of, § 13.
Florida acquired by cession from, p. 35, note 2.
adjustment of claims to grants in territory ceded by, § 117.
**Specific Performance.**
of contracts for sale of mining property, § 859.
**Springs.**
lands containing mineral, subject to entry under agricultural laws, § 515.
salt, land containing, not subject to entry under mining laws, § 513.
salt, fall within purview of laws specially applicable to salines, § 515.
**Spurs.**
right of locator to, under local rules prior to 1866, § 43.

**Stakes.**
when considered as permanent boundary monuments, §§ 373, 383.
usual method of marking location, § 373.
number and size required by several states to mark location, § 374.
See VARIOUS STATES.
**Stannary Courts.**
nature of tribunal and its jurisdiction in Cornwall and Devonshire, § 5.
**State Courts.** See COURTS.
**Statement of Fees and Charges.**
to be filed in patent proceedings, § 693.
form of, p. 1388.
object of, § 693.
departmental regulations, p. 1211, par. 102.
**States and Territories.**
classification of, with reference to public land system, § 18.
local mining systems, § 18.
character of state legislation, § 19.
federal mining law inoperative in certain, §§ 19, 20, 81.
power of, over mining industry, § 20.
may not impair rights granted by federal patent, § 22.
may regulate manner of working mines, § 22.
recognition by, of possessory rights under local customs, § 44.
precious-metal-bearing, enumerated, § 81.
property held by government in trust for future, § 80.
tide lands, § 80.
beds of navigable streams, § 80.
reservation by government of salines for use of, § 513.
diversity of decisions in, upon mining subjects, § 231.
after patent, state laws control subject of alien's rights, §§ 237, 238.
power of congress over territories, § 242.
Alaska not a territory, § 243.
concerning drainage, easements, and rights of way, § 252.
authorizing condemnation proceedings for mining easements, § 252.
provisions of state constitutions on subject of eminent domain, § 253.
provisions of § 2338, Revised Statutes, concerning state legislation on subject of mining easements, p. 1179.
exercise of right of eminent domain controlled by state constitutions, § 252.
mining considered as a "public use" in, §§ 254-264.
relationship of tribunals of, to land department in suits upon adverse claims. See ADVERSE CLAIMS — ACTIONS.
**Land Grants to, for Educational Purposes.**
reservation of lands for school purposes under ordinance of 1785, §§ 30, 132.
general grants for educational purposes, § 134.
mineral lands excepted from operation of, §§ 136, 143.
conflicts between mineral claimants and purchasers of, § 135.
restriction upon definition of "mineral" in administering, § 137.
do petroleum lands pass under? § 138.
do lands valuable for building stone pass? § 139.

**States and Territories**—*Continued.*
test as to mineral character, when and how determined, §§ 140, 141.
character of land at time grant takes effect controls, §§ 140, 145.
coal lands do not pass under, § 140.
subsequent discovery of mineral does not defeat, § 142.
subsequent exhaustion of mineral will not revest title in state, § 142.
sixteenth and thirty-sixth sections, § 132.
when take effect, §§ 142, 145.
until survey, state has no title, § 142.
effect of surveyor-general's return, §§ 144, 145, 142.
state may contradict, §§ 144, 145.
estopped from contradicting by selection of lieu lands, §§ 144, 145.
compared with railroad grants, §§ 144, 156.
indemnity or lieu-land grants, § 133.
in lieu of mineral lands lost to the state, § 142.
mineral lands cannot be selected, § 143.
character of land, when to be determined, § 143.
circular instructions with reference to selection, p. 1226.
general rules relating to administration of, § 147.
right of apex proprietor to pursue vein in depth underneath, § 613.
**Legislation Supplementing Federal Mining Laws.**
a part of the existing system of mining law, § 76.
limit and extent of power to supplement federal mining laws, §§ 248, 249.
limits within which states may legislate, § 249.
scope of existing state and territorial legislation, § 250.
subjects concerning which, may unquestionably legislate, § 250.
of questionable validity, § 251.
legislation on subject of mining easements not supplementary to federal legislation, § 252.
when enacted prevents districts from adopting regulations on same subjects, § 270.
to be considered in determining requisites of valid location, § 329.
failure to comply with valid legislation renders ground subject to relocation, § 345.
See VARIOUS STATES AND TERRITORIES.
**Statute of Frauds.**
transfers of mining claims are within, § 642.
mining partnerships are not within, § 797.
"grub stake" and prospecting contracts are not within, § 858.
license when not within, § 860.
**Statute of Limitations.**
title to mining claims may be acquired by, § 62.
provisions of the Revised Statutes, § 2332, p. 1176.
proof of title by, without location in patent proceedings, § 688.
departmental regulations, p. 1204, pars. 69-75.
when commences to run against underground trespasses, § 807.
within what time suit to vacate patent must be brought, § 784.
**Statutory Construction.**
by land department entitled to great respect, §§ 482, 606.
how regarded by courts, § 419.

**Statutory Construction**—*Continued.*
of American mining law, not aided by foreign precedents, § 1.
lack of uniformity in, § 81.
of act of July 26, 1866, by land department, § 59.
by courts, § 60.
interpretation of term "mineral," English rule, § 91.
American rule, §§ 93, 96.
land department rule, § 95.
in administering state grants, §§ 137, 138, 139.
in administration of railroad grants, §§ 158, 162.
"mines and mining claim" in townsite laws, § 176.
"known mines" in pre-emption laws, § 208.
rules of interpretation applied to townsite laws, §§ 167, 173.
no legislative definition of term "mineral lands," § 86.
legal equivalents of term "mineral lands," § 86.

**Stone.**
classified as mineral when obtained by mining or quarrying (English), § 92.
when used for road making and paving (English), § 92.
sandstone or freestone (English), § 92.
limestone (English), § 92.
flintstones (English), § 92.
other classes of stone (English), § 92.
under American law, § 210.
lands chiefly valuable for mineral may be entered under mining laws (act of 1892), § 210.
how entered under existing laws, § 421.
rulings of land department as to method of acquiring title to, § 421.
rulings of land department as to mineral character, § 97.
decision of supreme court of Washington as to manner of acquiring title to, § 421.
Montana, § 421.
lands containing lime may be entered under placer laws, § 421.
act of June 3, 1878. See STONE AND TIMBER ACT.
when considered as permanent boundary monuments, § 383.

**Stone and Timber Act.**
of June 3, 1878, and amendments thereto, § 210.
title to stone lands, how acquired under, § 210.
principles of law applicable to entries under, § 210.
lands embraced within applications under the act only cease to be public upon final entry, § 210.
application to purchase under, does not withdraw land, § 679.
See STONE.

**Strata.**
several ownership of different, §§ 9, 827.
right of access to lower strata by owner of surface, § 827.
reciprocal servitudes between owners of different, § 827.
See SEVERANCE.
**Streams.**
right of appropriation for useful purposes not within the scope of this treatise, §§ 530, 838.
not recognized at common law, § 838.
in some states, § 838.
recognized in mining states, § 838.
right to foul, in conduct of mining operations, §§ 839-842.
the English rule, § 839.
tin streaming in Cornwall, § 839.
rule in states accepting common law doctrine, § 840.
accepting Pacific coast doctrine, § 840.
deposit of mine tailings and waste, § 841.
California debris cases, § 848.
hydraulic mining in California, §§ 848, 853.
congressional act creating California debris commission, § 850.
text of act, p. 1251.
appropriation of auriferous gravels in beds of, § 428.
**Strike (of Vein).**
term not found in Revised Statutes, § 317.
popular use of the term, § 317.
as judicially defined, § 318.
**Subjacent Support.** See SUPPORT.
**Sulphur.**
classified as mineral under French law, § 12.
by land department, § 97.
manner of appropriating lands containing, depends upon mode of occurrence, § 323.
**Support.**
**Vertical or Subjacent.**
right reserved by implication in grant of minerals, § 818.
nature of the right, § 818.
negligence not an element, § 819.
right an absolute one, § 819.
right limited to support of soil in natural state, § 820.
waiver, or release of right, § 821.
statutory regulations on subject, § 822.
right of townsite occupant to, where lode patent is issued, § 175.
responsibility of surface owner for injuries to miner's rights, § 826.
right of access to lower strata, § 827.
reciprocal servitudes between owners of different strata, § 827.
**Lateral or Adjacent.**
general principles governing, §§ 831, 832.
negligence as an element where right is invaded, § 832.
right limited to support of soil in its natural state, § 833.
exceptions to the rule, § 833.
right of, as applied to mines worked by hydraulic process, § 834.

**Surface.**
*prima facie* ownership of minerals from ownership of, § 2.
presumptions in favor of surface proprietor in cases of underground trespasses, § 866.
to be overcome by owner of extralateral right, § 615.
patent conclusive as to form and extent of, § 778.
adverse claims in patent proceedings based on surface conflicts only, § 730.
severance of, from underlying minerals. See SEVERANCE; SUPPORT.
**Of Lode Locations.**
ideal location a rectangular parallelogram, § 360.
length, maximum fixed by federal law, § 361.
right of states to limit within maximum, § 250 (1).
fifteen hundred feet the uniform rule, § 361.
limitation as to length by local rule in absence of state legislation, § 270.
width, maximum fixed by federal law, § 361.
right of states to limit within maximum, § 250 (2).
states limiting, §§ 250 (2), 361.
area, maximum superficial, § 361.
effect of exceeding maximum, § 362.
excessive, void only as to excess, §§ 362, 373.
excess, how cast off (length) § 362.
(width), § 366.
excessive, not necessarily fraudulent, § 362.
rights of junior conflicting locator, in case of excessive, §§ 362, 373.
size of claim not controlled by number of locators, § 362.
rights defined by form of, §§ 373, 552.
rights of owners of irregularly shaped locations, § 365.
relationship of, to located lode under act of 1866, §§ 58, 567.
functions of diagram defining, § 573.
changes made by act of 1872, with reference to, § 71.
relationship of, to located lode under existing laws, § 365.
of prior, cannot be invaded by junior locator for any purpose, § 363.
perfected location confers exclusive dominion over, §§ 549, 550.
rights acquired by lode and placer locations distinguished, § 413.
See LOCATION — LODE; END LINES; SIDE LINES.
**Of Placer Locations.**
twenty acres, unit of, § 437.
individual location limited to twenty acres, § 448.
legal subdivisions of forty acres may be subdivided into ten-acre tracts, § 448.
illustration of manner of describing minor subdivisions, p. 1129, par. 57.
number of which may be made by an individual, unlimited, § 450.
by associations, limited to one hundred and sixty acres, §§ 438, 448.
is a corporation an association? §§ 226, 449.

**Surface**—*Continued.*
on surveyed lands must conform to public surveys "as near as "practicable," § 447.
what is meant by "as near as practicable"? § 448.
rule applied to gulch and river claims, § 448.
deep placers, § 448.
on unsurveyed lands, § 448.
dominion of placer locator over his, § 619.
rights of lode and placer locator distinguished, § 413.

**Surveyor-general.**
appointment and duties, § 661.
public surveys under immediate supervision of, § 104.
return of, what constitutes, § 105.
establishes *prima facie* character of land, §§ 106, 207.
presumptions flowing from, §§ 106, 689.
ranks as a deposition, § 106.
may be controverted, § 106.
unreliability of, § 106.
burden of proof on attack, § 106.
in case of school land grants, §§ 142, 144.
may be controverted by state, § 144.
state, when estopped from contradicting, § 144.
effect in administering railroad grants, §§ 156, 157.
accepted by land office as basis, § 204.
mineral, does not obviate necessity for discovery, § 437.
application to, for survey of mining claim, § 670.
certificate of, as to expenditures for patent purposes, § 673.

**Surveys.**
**Public.**
system of, established by ordinance of May 20, 1785, § 30.
manner in which they are conducted, § 104.
under supervision of United States surveyor-general, §§ 104, 661.
duties of deputies to note mineral character of the land, § 104.
what constitutes surveyor-general's return, § 105.
surveyor's return, as *prima facie* evidence of character of land §§ 106, 207.
ranks as a deposition, §§ 106, 207.
open to attack, § 106.
unreliability of, § 106.
See SURVEYOR-GENERAL.
lands deemed unsurveyed until plat is finally approved, § 448.
**Mineral, for Patent.**
application for, § 670.
order for, § 670.
by whom made, § 670.
of lode claims, § 671.
how made, § 671.
must conform to location, § 671.
latitude allowed deputy, § 671.
may cast off excessive area, §§ 302, 396.
group surveys, § 671.
of placer claims, § 672.
descriptive report, § 672.

**Surveys**—*Continued.*
**Of Adverse Claim.**
when required, § 735.
by whom made, § 735.
when excused, § 735.
**Private.**
state laws authorizing record of, of mining claims as act of location, § 250 (13).
**Suspension.**
of certificate of purchase by land department, §§ 208, 637, 772.
effect of such suspension, §§ 208, 772.
**Sutro Tunnel Act.**
its passage by congress, § 49.
**Tailings.**
lands containing deposits of abandoned, subject to entry under placer laws, § 426.
depositing in running streams, §§ 838-842.
the English rule, § 839.
American rule in states accepting common law doctrine, § 840.
rule in mining states of the west, § 841.
injunction to prevent, § 842.
hydraulic mining in California, § 848.
California debris cases, § 848.
on lands of others not permitted, § 843.
injunction to prevent, § 842.
measure of damages for, § 844.
**Taxation.**
mining claim subject to, § 535.
law of Oregon concerning, p. 1320, par. 4.
**Tax Title.**
holder of, must adverse patent applications made by former owner, § 719.
**Tenants in Common.**
location by several, creates tenancy in common, § 788.
one locating for benefit of several cannot divest rights by relocation, §§ 331, 398.
one cannot relocate in his own name after, neglect of all to perform annual work, § 406.
amended location by one will inure to benefit of all, § 398.
one cannot protect his individual estate by performance of annual labor, § 406.
annual representation a unit, § 616.
failure of one to contribute to assessment work not evidence of abandonment, § 644.
remedy where one contributes more than his share, § 646.
application for patent by one of several, § 681.
remedy of those excluded from, § 646.
as adverse claimants in patent proceedings, § 728.
contribution between, for assessment work, §§ 406, 770, 779.
cotenancy in mining claim, how created, § 788.
general rules of cotenancy applicable to, § 788.

**Tenants in Common**—*Continued.*
right of each to occupy and use common property, § 789.
working by one in ordinary way not waste, § 789.
remedy of excluded, § 790.
accounting between, § 790.
when injunction lies against one in possession, § 790.
one cannot compel others to join in working, § 790.
leases and licenses executed by one of several, § 791.
conveyance by one of his interest, § 791.
forfeiture to, for failure to contribute to assessment work, § 646.
text of the federal law, Revised Statutes, § 2324, p. 1168.
object of the statute, § 646.
suggestion of unconstitutionality, § 646.
to be strictly construed, §§ 646, 251 (5).
how treated by land department, § 646.
proceedings culminating in, how established, § 646.
state statutes supplementing federal law, § 251 (5).
Arizona, p. 1240, §§ 1-5.
California, p. 1249, § 1.
Colorado, p. 1270, par. 2.
Nevada, p. 1297, § 11.
validity of laws questioned, §§ 251 (5), 646.
See CO-OWNERS.
**Tennessee.**
not subject to federal mining laws, § 19.
state laws regulating manner of working mines, § 19.
mining as a "public use" in, § 19.
**Tenure.**
of tin bounders in Cornwall, § 5.
Devonshire, § 6.
of galees in Forest of Dean, § 7.
of miners in lead mines of Derbyshire, § 8.
mining, in states not subject to federal system, § 19.
mining, under the civil law, § 11.
analogy between estate in mines under the civil law and unpatented mines in United States, §§ 11, 541.
character of, by which mining location held, § 535.
has attributes of fee, §§ 535, 536, 538, 548.
compared with copyholds, § 540.
*dominium utile*, § 541.
homesteads, § 542.
pre-emptions, § 542.
dower not allowed, § 543.
See ESTATE.
**Territories.**
powers of congress over, §§ 242, 252.
Alaska not a territory, § 243.
See STATES AND TERRITORIES.
**Texas.**
not subject to federal mining laws, § 19.
outline of mining code of, § 19.
mining laws of, similar to federal laws, § 19.
no extralateral right granted, § 19.

**Tide Lands.**
held by government in trust for future states, § 80.
See SEASHORE.
**Timber.**
within forest reserves may be cut under special acts for mining purposes, § 198.
act of June 4, 1897, and departmental regulations, p. 1232.
timber culture act repealed, § 203.
right to cut, under act of June 3, 1878, § 564.
See STONE AND TIMBER ACT.
**Time.**
for completion of location, states which have legislation on this subject, §§ 250 (8), 343.
within which acts of location are to be performed, when nonessential, § 330.
reasonable, allowed discoverer to complete location, §§ 339, 372.
what constitutes such reasonable, § 339.
allowed to record location notices, § 389.
of the essence of contracts for sale of mines, § 859.
within which adverse claim must be filed, § 738.
suit upon adverse claim must be brought, § 756.
suit to vacate patent must be commenced, § 784.
action for underground trespass must be commenced, § 867.
**Tin.**
mines of Cornwall regulated by local customs, § 5.
Devonshire, § 6.
specially named in act of 1872, §§ 71, 323.
**Tin Streaming.**
in Cornwall, process similar to hydraulic mining, § 839.
use of water course for purpose of, created by custom, § 839.
**Title.**
to mines at common law, §§ 2, 3.
passing by federal patent, § 22.
of United States to mines that of a private proprietor, § 80.
nature of, acquired by treaty, § 115.
to minerals, passes by confirmation of Mexican grant, §§ 125, 126.
except those within the act of 1891, § 127.
by possession of mineral lands under local customs recognized by congress, § 47.
paramount in United States, no defense to possessory action, §§ 47, 773.
act of 1866 a muniment of existing titles, §§ 53, 59.
to lode claims first obtainable under act of 1866, § 53.
to placers first obtainable under act of 1870, § 57.
to mining claims may be acquired by adverse possession, §§ 62, 688.
evidenced by receiver's certificate of purchase equivalent to patent, § 208.
to mineral lands, cannot be acquired by forcible entry upon actual possession of another, §§ 217, 218, 219.
naked occupancy of public mineral lands confers no, §§ 216, 218, 219.
as against mere intruder, possession evidence of, § 216.
nature of Indian, to reservations, §§ 181, 183.

**Title**—*Continued.*
Indian in reservation, how extinguished, § 182.
of state when attaches to sixteenth and thirty-sixth sections, § 142.
lieu lands, § 143.
of railroad company to right of way, when attaches, § 153.
alternate sections, § 154.
indemnity selections, § 157.
to mineral lands, cannot be acquired under townsite laws, § 170.
exception in case of incorporated towns, §§ 173, 175.
certificate of location a muniment of miner's, § 379.
acquisition of, to unpatented mining claim by alien, § 231.
effect of subsequent naturalization of alien, § 232.
alien locator holds until office found, § 233.
purchaser, §§ 233, 234.
to located mining claim is title by purchase, § 233.
of citizen purchaser from alien locator, §§ 233, 234.
location the inception of the miner's, § 327.
substantial compliance with valid local rules essential to perfect mining, § 271.
nature of, in unpatented mining claim, §§ 535-544, 548, 642.
See ESTATE.
what are muniments of miner's, § 539.
proof of, by possession without location in patent proceedings, § 688.
conveyed by United States receiver's certificate of purchase, § 771.
**Top.** See APEX.
**Townsites.**
laws regulating entry of, § 166.
different classes of, § 166.
reservation of mines and minerals in, § 166.
incorporated cities and towns may be upon mineral lands, §§ 166, 172.
rules of interpretation of law relating to, §§ 167, 173.
occupancy of mineral lands for purposes of, § 168.
rights of mining locator on unoccupied lands in, § 169, p. 58, note 2.
prior occupancy for purposes of, as affecting right to locate under mining laws, § 170.
correlative rights of mining and townsite claimants, § 171.
act of March 3, 1891, limited to incorporated cities, § 172.
object and intent of, § 173.
not retroactive, § 174.
effect of patents issued for lands within, §§ 175, 177.
what constitutes a "mine" within meaning of laws, § 176.
"valid mining claim," § 176.
acts providing for sale of town lots on public domain, p. 58, note 2.
duty of department to determine character of land, §§ 173, 175.
when mineral claimant required to adverse patent application by, § 722.
when townsite claimant required to adverse mineral applicant, § 733.
patent, how assailed by mineral claimant, § 177.
right of surface occupant to subjacent support when lode patent is issued, § 175.

**Tract Books.**
status of lands as shown by, accepted by land officers as basis of action, § 204.
**Tramways.**
condemnation of lands for right of way for (Colorado), § 252.
See EASEMENTS; EMINENT DOMAIN.
**Transfer.** See CONVEYANCE.
**Trespass.**
mining location cannot be initiated by forcible, § 217.
action of, scope of in mining states, § 865.
burden of proof in cases of underground, § 866.
presumptions in favor of surface proprietor, § 866.
in favor of apex proprietor, § 866.
when statute of limitations commences to run against underground, § 867.
on mines, measure of damage, § 868.
**Tunnel Locations.**
prior to enactment of federal laws, § 467.
right to, first recognized by act of 1872, § 74.
provisions of the federal law, § 468.
text of Revised Statutes, § 2323, p. 1166.
acts to be performed in acquiring tunnel rights, § 472.
posting notice, § 472.
recording notice, § 472.
marking boundary lines, §§ 472, 475.
"line" of tunnel defined, § 473.
"face" of tunnel defined, § 474.
manner of locating regulated by land department rules, § 472.
general mining circular, pars. 20-26, pp. 1189-1191.
length upon discovered lode awarded to tunnel discoverer, § 481; see note to § 2323, Revised Statutes, p. 1167.
important questions suggested by tunnel laws, § 479.
rule of interpretation applied to laws, § 480.
discovered lode need not be appropriated, after discovery, by surface location, note to § 2323, Revised Statutes, p. 1167.
views of author printed before decision by supreme court of United States, §§ 482, 491.
recent decisions by supreme court of United States, § 725, and note to § 2323, Revised Statutes, p. 1167.
effect of tunnel location as inhibiting exploration on surface, § 483.
Colorado rule, § 484.
Montana rule, § 485.
Idaho rule, § 486.
Judge Hallett's views, § 487.
land department views, § 490.
rule, circuit court of appeals, eighth circuit, § 488.
recent rule established by supreme court of the United States, note to § 2323, Revised Statutes, p. 1167.
owner of, when need not adverse application for mineral patent, § 725.
right of way for mining not a public use, §§ 261, 262, 263.

**Tunnel Locations**—*Continued.*
**State Legislation Concerning.**
*Colorado*, § 250 (14).
text of act of 1897, pp. 1272-1273, §§ 1-4.
owner of tunnel may continue it through claim of another, p. 1272, § 1.
right of owner of intersected vein or claim to enter tunnel for purpose of inspection, p. 1272, § 2.
forfeiture of right to continue tunnel, p. 1272, § 2.
ownership of ore of intersected claim at point of intersection, p. 1273, § 3.
burden of proof of ownership of vein in tunnel, p. 1273, § 4.
recording location, p. 1273.
length of tunnel location, § 481, p. 1274.
*Nevada.*
manner of locating tunnel right, p. 1301, § 19.
posting notice, p. 1301, § 19.
establishing boundary lines of tunnel, p. 1302, § 20.
record of location, p. 1302, § 21.
blind lode discovered in tunnel to be located on surface, p. 1302, § 22.
**Umber.**
classified as mineral by land department, § 97.
lands containing, subject to entry under placer laws, § 420.
**Union of Veins.**
rules governing rights when veins unite in depth, § 614.
possibility of, not subject of adverse claims, § 730.
**United States.**
title of, to ceded lands not affected by laws of ceding nation, § 80.
holds its lands as a private proprietor, not by virtue of sovereignty, §§ 80, 249.
mining not considered a public use, § 80.
obligations under treaty with Mexico, § 116.
holds certain lands in trust for future states, § 80.
estopped from disputing surveyor's mineral return where state accepts it, § 144.
cannot control exercise of right of eminent domain within states, § 252.
may condemn property for certain public uses, § 252.
**Usage.** See Local Rules and Customs.
**Utah.**
acquired by cession from Mexico, § 40.
subject to federal mining law, § 81.
act of congress relating to Mexican grants in, §§ 118, 127.
laws defining property rights of aliens, § 238.
constitutional provisions on subject of eminent domain, § 253.
saline law of January 12, 1877, does not apply to, § 514.
dower right exists in, § 543.
but does not attach to unpatented mining claims, § 543.
**Mining Legislation in.**
*Lode Claims.*
length and width, p. 1330, § 1.
location, how made, p. 1330, § 2.

**Utah** — *Continued.*
posting notice, p. 1330, § 2.
form suggested, p. 1371.
marking boundaries, p. 1331, § 3.
location certificate, p. 1332, § 4.
form suggested, p. 1371.
recording certificate, p. 1332, § 4.
who perform duties of mining recorders, p. 1333.
records as evidence, p. 1334, §§ 9, 10, 11.
district records, when to be delivered to county recorders, p. 1334, § 12.
development work as an act of location, p. 1332, § 5.
proof of annual labor, p. 1332, § 6.
*Millsites.*
notice of location to be posted, p. 1330, § 2.
boundaries, how marked, p. 1331, § 3.
recording notice of location, p. 1332, § 4.
*Placers.*
notice of location to be posted, p. 1330, § 2.
boundaries, how marked, p. 1331, § 3.
recording notice of location, p. 1332, § 4.
development work, p. 1332, § 5.
proof of annual work, p. 1332, § 6.
records as evidence, p. 1334, §§ 9, 10.
**Miscellaneous Mining Legislation in.**
reference table, p. 1335.
**"Valuable Deposits."**
term first used in act of 1872, § 71.
equivalent of "mineral lands," § 86.
meaning of term as occurring in mining laws, § 323.
metallic or nonmetallic quality of, as affecting manner of appropriation, § 323.
certain terms used in mining laws as legal equivalents, §§ 86, 323.
**Vein.**
term "mine" sometimes used as equivalent of, §§ 89, 176, 286.
English and Scotch definition, § 286.
as defined by the lexicographers, § 287.
geologists, § 288.
miners made the definition first, § 289.
definition of Dr. Raymond, § 289.
elements to be considered in applying definition, § 289.
legal equivalent of "lode" and "ledge," § 290.
classification of cases in which term is used, § 291.
judicial definitions and their application, § 292.
the Eureka case, § 292.
Leadville cases, blanket deposits, § 293.
other judicial definitions, § 294.
neither size nor richness of ore elements, § 294.
includes impregnations, § 294.
metallic or nonmetallic character of contents as affecting their appropriation, § 323.

**Vein**—*Continued.*
nature of estate in, created by grant of extralateral or dip right, §§ 568, 585.
identity and continuity of, involved in exercise of extralateral right, § 615.
apex and identity to be established in actions of trespass, § 866.
how located. See LOCATION — LODE.
**Ventilation.**
of mines, regulated by state laws, § 19.
**Verification.**
of certificate of location required in certain states, § 385.
validity of laws requiring, discussed, §§ 251 (4), 385.
of application for patent, § 682.
of proofs in patent proceedings, § 682.
before justice of the peace, § 682.
of adverse claim, by and before whom made, § 736.
**Vermont.**
not subject to federal mining laws, § 19.
no mining legislation in, § 19.
federal government acquired no lands in, § 28.
**Virginia.**
reservation of mines in crown grants to, § 31.
**Waiver.**
of adverse claim, how evidenced, § 766.
of right of surface support in case of severance of title, § 821.
**War Department.**
originally supervised mineral lands, § 33.
supervision of mineral lands transferred to department of interior, § 47.
**Washington State.**
acquired through Louisiana purchase, § 33.
subject to federal mining laws, § 81.
forest reservations in, § 197.
laws of, defining property rights of aliens, § 238.
saline law of January 12, 1877, does not apply to, § 514.
no right of dower exists in, § 543.
**Mining Legislation in.**
reiterating provisions of federal law of no force, § 251 (1).
length of lode claims, § 250 (1).
text of law, p. 1337, pars. 1-2.
width of lode claims, § 250 (2).
text of law, p. 1337, par. 2.
recording locations, §§ 389, 250 (5).
text of law, p. 1339, par. 6.
annual work, § 250 (10).
text of law, p. 1338, par. 4.
end lines must be parallel, p. 1337, par. 2.
rights conveyed by perfected location, p. 1338, par. 3.
validity of law questioned, § 251.
district records and district recorders, p. 1339, par. 6.
**Miscellaneous Mining Legislation.**
reference table, p. 1340.

**Waste.**
working of mine in ordinary way by one cotenant does not constitute, § 790.
from mine, deposit of, on lands of others inhibited, § 843.
injunction to prevent deposit of, § 842.
**Watchman.**
wages paid to, when may be credited to annual labor, § 629.
**Water—Water Courses.**
right of appropriation for useful purposes not within the scope of this treatise, §§ 530, 838.
mining locations subject to pre-existing easements for conduct of, §§ 530, 531.
right of way to conduct over mining claim cannot be acquired except for public uses, § 531.
care of underground, in mining operations, §§ 806, 807.
law of natural flow applied to mine drainage, § 807.
introduction of foreign, into mines, § 808.
flooding lower proprietor, § 808.
use of, in conduct of mining operations, § 838.
right of appropriation not recognized at common law, § 838.
not recognized in some of the states, § 838.
recognized in mining states, § 838.
right to foul, in conduct of mining operations, §§ 839-842.
the English rule, § 839.
tin streaming in Cornwall, § 839.
rule in states accepting common law doctrine, § 840.
Pacific coast doctrine, § 841.
deposit of mine tailings and refuse of, § 841.
California debris cases, § 848.
hydraulic mining in California, §§ 848-853.
congressional act creating California debris commission, § 850.
text of act, p. 1251.
appropriation of auriferous gravels in beds of streams, § 428.
**West Virginia.**
not subject to federal mining laws, § 19.
state laws regulating manner of working mines, § 19.
federal government acquired no lands in, § 28.
mining as a public use in, § 262.
**Wife.** See HUSBAND AND WIFE.
**Wisconsin.**
lands containing baser metals sold under special laws, §§ 20, 35.
excepted from operation of federal mining laws, §§ 20, 75.
**Work and Expenditures (Preliminary Development).**
states may prescribe nature and extent of, §§ 250 (15), 443.
can it be credited to annual work required by federal law? §§ 632, 443.
**Lodes.**
object of requirement, § 344.
state legislation on subject, § 343.
California, character of, not specified, p. 1245, § 3.
Utah, character of, not specified, p. 1332, § 5.
See DISCOVERY SHAFT AND ITS EQUIVALENT.